Neutral Citation Number: [2022] EWHC 1907 (Comm)

Case No: CL-2020-000358

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2022

Before:

MR JUSTICE JACOBS

- -

Between:

Alexander Gorbachev

Claimant

- and -

Andrey Grigoryevich Guriev

Defendant

- and -

(1) Forsters LLP
(2) T.U. Reflections Limited
(3) First Link Management Services Limited

Respondents

- -
- -

Paul Stanley QC and Mark Belshaw (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Richard Dew (instructed by **Forsters LLP**) for the **1st Respondent**
Sam O'Leary (instructed by **Enyo Law LLP**) for the **2nd and 3rd Respondents**

Hearing date: Wednesday 6 July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: Introduction

1. The Claimant in these proceedings wishes to obtain, pursuant to CPR 31.17, third party disclosure of certain documents which are held by the First Respondent, Forsters LLP ("Forsters"), a firm of English solicitors. Forsters allege that the documents are held on behalf of the Second and Third Respondents ("the Trustees"), that the Trustees were the only proper parties to the application under CPR 31.17, and that it would therefore be inappropriate to require Forsters to give disclosure.

2. By an order made on 11 April 2022 ("the Order"), HHJ Pelling QC granted permission to the Claimant, pursuant to CPR Practice Direction 6B, to serve the application for third party disclosure out of the jurisdiction. The basis of the Claimant's application was "gateway" (20) in Practice Direction 6B paragraph 3.1 (20). This provides:

> "(20) A claim is made –
>
> (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."

3. HHJ Pelling QC also granted permission for the application to be served by alternative means pursuant to CPR 6.15, namely by delivery to Forsters' offices within the jurisdiction and by email to two addresses specified in the Order. Service was duly effected by those means on 12 April 2022.

4. The Trustees now apply to set aside the Order. The application gives rise to a number of issues.

5. Firstly, does an application under s.34 of the Senior Courts Act 1981 (the "SCA") and CPR 31.17 fall within Practice Direction 6B, Gateway (20) or does the court have no ability to permit service of such an application outside the jurisdiction? Section 34 of the SCA is the statutory provision which enables a party to apply for disclosure from third parties within the context of existing proceedings, and CPR 31.17 contains the rules of court made in order to give effect to that provision.

6. Secondly, if the court does have jurisdiction, is this case one in which it is appropriate for the court to exercise its discretion to serve out?

7. Thirdly, was it appropriate to order service by alternative means?

8. The first question was recently considered by Cockerill J in *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm) ("*Nix*"). She concluded that the court had no jurisdiction. The Claimant contends that I should not follow the decision of Cockerill J in that regard and that the decision proceeded in the absence of relevant argument and citation of relevant authority.

9. The second question also arose in *Nix*, and Cockerill J's firm view was that, even if the court did have jurisdiction, applications for third party disclosure against overseas non-parties should follow the route of a letter of request to the relevant overseas court, rather than by way of a direct application served on the overseas party pursuant to CPR Part

6. The Claimant accepts that in many cases the letter of request route would be the appropriate route to follow. However, he contends that this is not an exclusive route, and that a direct application is appropriate in the present case bearing in mind, in particular, that the relevant documents are physically within the jurisdiction of the court in the hands of English solicitors, Forsters.

B: The factual background

10. The application arises out of a dispute between the Claimant and the Defendant ("Mr Guriev"), in respect of their interests in a valuable fertiliser business based in Russia and called PJSC PhosAgro ("PhosAgro"). That dispute is listed for a six-week trial commencing in January 2023.

11. Among the issues in the trial will be how and why Mr Gorbachev was financially supported (between 2004 and 2012) through two Cyprus Trusts which were created for his benefit and which are alleged to have been operated by Mr Guriev's close associates. Those trusts are the Gamini Trust (of which the Second Respondent is the trustee) and the Goaliva Trust (of which the Third Respondent is the trustee).

12. From 2006 onwards, the Trustees were advised by Forsters, a firm of English solicitors. As a result, Forsters have possession in this jurisdiction of documents which, on the Claimant's case, are likely to be relevant to those issues.

13. In 2021, the Claimant's solicitors ("CMS") wrote to Forsters seeking disclosure of relevant documents. Negotiations continued between CMS and Forsters, while Forsters reviewed the documents in its files within the jurisdiction in order to determine whether it would be possible to provide the requested disclosure "with the agreement of our client", said to be Ms Areti Charidemou as trustee of the Cyprus Trusts. Ms Charidemou has apparently instructed Forsters in relation to this issue at all relevant times. That agreement was not forthcoming and in August 2021 Mr Gorbachev issued an application seeking non-party disclosure from Forsters under CPR 31.17 and s.34 of the SCA (the "Original Application").

14. The Original Application was listed for a hearing before HHJ Pelling QC on 11 April 2022 (the "11 April Hearing"). One point taken by Forsters was that no order could be made against them, because they held the documents on behalf of their clients, the Trustees. At the start of the hearing, the Judge invited the Claimant to consider joining the Trustees to the Original Application. The Claimant's primary position was that joinder of the Trustees was unnecessary and that Forsters remained the correct respondent. The joinder of the Trustees would, however, make argument on that point redundant. In response to the Judge's invitation, the Claimant applied orally and without notice for an order joining the Trustees to the Original Application (the "Amended Application") and for permission to serve the Original Application and the Amended Application (together, the "Claimant's Applications") on the Trustees out of the jurisdiction and by alternative means. That oral application was granted on the terms of the order and Mr Gorbachev issued an application notice on the same day.

15. On 12 April 2022, Mr Gorbachev served a copy of the Claimant's Applications and the Order on the Trustees: (i) by delivering them to Forsters' offices within the jurisdiction in accordance with paragraph 3(1) of the Order; and (ii) by email at the email addresses specified in paragraph 3(2) of the Order.

16. There have thereafter been various procedural debates. The upshot of them is that I am presently concerned only with the Trustees' jurisdictional objections, which have been advanced in writing and through the oral submissions of Mr O'Leary. The Claimant's principal argument, namely that the application can be made against Forsters in any event, has yet to be determined. Whatever the outcome of the present application, directions will need to be given for the future conduct of the substance of the CPR 31.17 application, whether against Forsters alone or against all respondents.

C: The legal framework

17. Section 34 SCA provides for applications by a party to proceedings (such as the Claimant in the present case) against a non-party. It provides:

> "On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim–
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order..."

18. An earlier section of the SCA, section 33, provides for applications for pre-action disclosure against a prospective party to litigation, in circumstances where substantive proceedings have not yet been issued. Section 33, and its interplay with "gateway" (20) under Practice Direction 6B, was considered by Catherine Newman QC, sitting as a deputy judge, in *ED&F Man Capital Markets LLP v Obex Securities LLC* [2017] EWHC 2965 (Ch) ("*Obex*"). That decision was referred to in the parties' arguments. It was also referred to, briefly, in Cockerill J's decision in *Nix*. *Obex* and *Nix* are the only authorities which have directly considered sections 33 and 34 and their interplay with gateway (20).

19. The rules of court which were contemplated by Section 34 SCA are contained in CPR 31.17. These provide:

> "(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –

> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (4) An order under this rule must –
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require the respondent, when making disclosure, to specify any of those documents –
>
> (i) which are no longer in his control; or
>
> (ii) in respect of which he claims a right or duty to withhold inspection.
>
> (5) Such an order may –
>
> (a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
>
> (b) specify the time and place for disclosure and inspection."

20. It is common ground that, if a party wishes to apply under CPR 31.17, the application is made by an application notice: see *White Book* paragraph 31.17.2.

21. It is also common ground that it would then be necessary to serve the application notice on the non-party against whom the application is made. CPR Part 6 makes provision for the service of application notices. CPR 6.38 (1) provides:

> "(1) Unless paragraph (2) or (3) applies, where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction."

22. However, as Mr Stanley accepted, this provision has no application in the present case. This is for one or both of two reasons. First, there is authority that it is only applicable to service upon existing parties to the proceedings. It facilitates the service of documents, other than the claim form, on those parties. Secondly, this is not a case where permission was required to serve the original claim form out of the jurisdiction. Service was in fact effected upon Mr Guriev by personal service within the jurisdiction.

23. CPR 6.39 is, however, potentially applicable in the present case. This is headed: "Service of application notice on a non-party to the proceedings". It provides:

> "(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.

> (2) Where an application is served out of the jurisdiction on a person who is not a party to the proceedings, that person may make an application to the court under Part 11 as if that person were a defendant, but rule 11(2) does not apply.
>
> (Part 11 contains provisions about disputing the court's jurisdiction.)"

24. This rule therefore references and excludes earlier parts of CPR Part 6 which concern service of the claim forms out of the jurisdiction. I shall return to the detail of CPR Part 6, including CPR 6.39, in Section E below. For present purposes, it is sufficient to say that CPR 6.39 implicitly applies the ordinary rules for service out of the jurisdiction to cases where an application notice is to be served out of the jurisdiction on a non-party. Accordingly, as the Claimant accepts, an application for permission must satisfy the same three requirements as an application for permission to serve a claim form out of the jurisdiction, namely:

    a. there is a good arguable case that the application against the foreign respondent falls within one or more of the heads of jurisdiction for which leave to serve out of the jurisdiction may be given, as set out in Practice Direction 6B para. 3.1;

    b. in relation to the foreign respondent to be served with the application, there is a serious issue to be tried; and

    c. in all the circumstances: (i) England is clearly or distinctly the appropriate forum; and (ii) the Court ought to exercise its discretion to permit service out of the jurisdiction.

25. There have been a number of decisions that have considered the application of gateway (20). An important recent Court of Appeal decision is *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, where the leading judgment was given by Lewison LJ. The court held (at paragraphs [33] – [35]) that the gateway should be given a "neutral" construction,

> "bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as "exorbitant". But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date…".

The Court is therefore "less cautious than before in contemplating service out of England and Wales": paragraph [47].

26. Applying that principle of neutral construction, Lewison LJ held that the only limitation on the scope of gateway (20) is that the enactment in question must allow proceedings to be brought against persons not within England and Wales. That is a matter for the true construction of the relevant enactment and it is not necessary for the enactment to expressly authorise the bringing of such proceedings: paragraph [48]. If, as a matter of construction, the enactment satisfies that requirement, the court has power to allow the proceedings to be served out of the jurisdiction. It must then go on to decide whether

it should exercise its power to do so. That second, discretionary, stage of the analysis is a "strong pointer against implying any restrictions into the ordinary meaning" of gateway (20): paragraph [48].

27. Accordingly, to fall within gateway (20), the relevant enactment must: (i) allow proceedings to be brought; (ii) allow those proceedings to be brought against persons outside of England and Wales; and (iii) those proceedings must not be covered by any of the other jurisdictional gateways.

28. There is, however, no previous authority which suggests that a combination of gateway (20) and s.34 SCA can be employed to enable proceedings to be brought directly against an overseas party for the purposes of an order under CPR 31.17. The usual route for obtaining third party disclosure from overseas parties is, as described by Cockerill J in *Nix*, for the English court to make a letter of request to the relevant overseas court. This would involve making an application against the Trustees under the Evidence (Proceedings in Other Jurisdictions) Act 1975, accompanied by a letter of request addressed to the courts of Cyprus. The rules relating to such applications are contained in CPR 34.13 and Practice Direction 34A, in particular CPR 34APD.5.

D: Service out – the parties' arguments

The Trustees' argument

29. In support of the Trustees' application to set aside, Mr O'Leary's primary submission was that there was no jurisdiction to allow a CPR 31.17 application to be served out of the jurisdiction under gateway (20). In summary, they advanced three arguments, although the first two were to some extent related.

30. First, the Trustees submitted that an application under CPR 31.17 is not a "claim".

31. Secondly, the Trustees submitted that a CPR 31.17 application under s.34 SCA did not fall within the words "which allows proceedings to be brought". This was because a CPR 31.17 application could not properly be described as the bringing of "proceedings". Such an application was dependent on the existence of proceedings in relation to some other cause of action. It was also dependent upon what precisely was in dispute in the parent action, in order to determine whether disclosure should be ordered and what its scope should be. It can only be made when existing proceedings are on foot. For the purposes of gateway (20), the "proceedings" had to be of a freestanding nature.

32. Thirdly, applying *Orexim*, the Trustees submitted that an application under s.34 SCA and CPR 31.17 could not be brought against persons other than those within England and Wales. They submitted that Cockerill J had so held in *Nix*. There was also a very close analogy between the present case and the decision in *Masri v Consolidated Contractors International Company SAL* [2009] UKHL 43 ("*Masri*"), where the House of Lords rejected the argument that CPR Part 71 had extra-territorial effect on company officers outside the jurisdiction.

33. Overall, the Trustees submit that the decision of Cockerill J in *Nix* establishes that there is no jurisdiction to make the order, and that this should be followed. In so far as the decision in *Obex* might suggest a wider approach, that decision is incorrect and is in

any event distinguishable because it was dealing with an application under s.33, not s.34.

34. Alternatively, the Trustees submitted that even if gateway (20) was satisfied, the court should not exercise its discretion to permit service out. They again referred to the decision and analysis in *Nix*, where Cockerill J would have refused permission (if potentially available) on the discretionary ground that the grant of permission would trespass on the letter of request regime under the Hague Service Convention. She held that this was the proper, courteous and respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. Although the Claimant had identified reasons why the use of the Hague Service Convention was not appropriate, these reasons were not persuasive. In particular, the use of that Convention remained appropriate notwithstanding that (i) the Cyprus court would only order the production of particular specific documents, and (ii) there might be significant delay in carrying out the process.

The Claimant's argument

35. On behalf of the Claimant, Mr Stanley submitted, in summary, that an application under s.34 SCA and CPR 31.17 was a "claim". It also did involve the bringing of proceedings. Section 34 SCA allows these proceedings to be brought against a party outside the jurisdiction.

36. The decision in *Orexim* requires gateway (20) to be given a neutral and non-restrictive interpretation. The question of whether s.34 SCA allows proceedings to be brought is to be answered by construing the terms of s.34 SCA, including its purpose and effect. There is no reason to read into gateway (20) a restriction to the effect that proceedings fall within it only if they are free-standing and independent of other proceedings, such that they amount to substantive proceedings in their own right. Such restrictions would cut across CPR 6.39, which contemplates applications brought against a non-party to the proceedings. It was in any event necessary to consider the position of each party separately. As far as a non-party respondent to a CPR 31.17 application is concerned, the application does originate proceedings.

37. On a proper construction of s.34 SCA, and taking account of its purpose and effect, that enactment does allow *"*proceedings*"* to be brought. The purpose of s.34 SCA is to provide a direct statutory jurisdiction by which a party to existing proceedings may obtain disclosure of documents from non-parties by appropriate application. The effect of s.34 SCA is to provide a cost-effective and procedurally efficient mechanism to resolve the substantive dispute between the applicant and the non-party which, as with an application for pre-action disclosure (see *Obex* at paragraph [20]), may obviate the need for further substantive proceedings to be commenced against the non-party.

38. The Claimant also submitted that s.34 SCA allows proceedings to be brought against persons outside England and Wales. Whilst there is a presumption against extra-territoriality, the question is ultimately a question of construction of the particular legislation. It is not necessary for the enactment to expressly authorise the bringing of such proceedings. On its true construction, s.34 SCA does allow proceedings to be brought against persons outside England and Wales. There is nothing in the text of the section which limits its application to persons within the jurisdiction. It is drafted in broad terms to allow an application to be brought against "a person who is not a party

to the proceedings". If Parliament had intended a limitation, then the section would have so provided.

39. The Claimant relied on *Obex* as establishing that an application under s.33 SCA (concerning pre-action disclosure) comes within gateway (20). It would be anomalous if s.33 SCA had no territorial limitation but s.34 SCA were to be construed as including such a limitation.

40. A construction which recognised that proceedings could be brought against persons outside England and Wales was supported by the fact that an application could only be made in the context of existing proceedings over which the English court has jurisdiction. There was a close connection between the English court's jurisdiction over the subject matter of those underlying proceedings (and the parties to those proceedings) and the subject matter of the s.34 SCA proceedings. This is a relevant factor in construing s.34 SCA.

41. The Claimant also submitted that the implication of a territorial limitation into s.34 SCA would undermine its purpose and efficacy, particularly in view of the international nature of the disputes before the English courts and the very real possibility that non-parties may be located outside the jurisdiction.

42. The Claimant accepted that Cockerill J did decide in *Nix* that the court did not have jurisdiction to make an order permitting service of a non-party disclosure order out of the jurisdiction. However, the case was argued on a very different and indeed incorrect basis, with a highly relevant authority *(Orexim*) not being cited. Accordingly, the court should not follow that decision.

43. Once it was established that the court had jurisdiction, the only remaining question was whether the court should exercise its residual discretion in favour of doing so. Mr Stanley recognised that in many cases the availability of the letter of request regime would be a powerful argument. But that was not so in the present case, where the purpose of the application was to obtain disclosure of documents held by English solicitors within the jurisdiction. The Trustees were not being required to do anything, and their joinder was simply intended to enable the court to decide whether documents held within the jurisdiction were to be produced.

44. Furthermore, the letter of request procedure was not appropriate in the present case. The Claimant was seeking an order requiring disclosure of categories of documents, rather than particular documents individually specified. This was primarily for reasons of proportionality and cost, as well as to save time and ensure that documents were produced well before trial in January 2023. But this would not be possible under the letter of request procedure, which would require particular documents to be specified. A further reason is that the letter of request procedure is slow and would take, at best, 12 months. That would in practice mean that the trial had already taken place prior to any documents being produced.

45. In the circumstances, the court should exercise its discretion to permit service out, and HHJ Pelling QC was correct to do so. He was also, contrary to the Trustees' submissions, correct to make an order for alternative service.

E: Discussion

The procedural context of the present application

46. Mr Gorbachev's application is made pursuant to s.34 SCA. This empowers the making of rules of court concerning disclosure applications against a non-party. The relevant rule is now contained in CPR 31.17 which applies where an "application" is made under any Act for disclosure by a person who is not a party to proceedings. CPR 31.17 (2) provides that the application must be supported by evidence. The notes in the White Book to CPR 31.17 state at paragraph 31.17.2, and it was common ground, that the application is made under CPR Part 23. This meant that a CPR Part 23 application notice was required.

47. An application notice is, of course, very commonly used where existing proceedings are underway; for example where the existing proceedings have originated with the issue of a claim form under CPR Part 7. However, as stated in the White Book paragraph 23.0.2, under the heading "When does Part 23 apply", there are circumstances in which "proceedings in court may be originated by an application". In both cases, Part 23 applies.

48. One example of a case in which proceedings in court may be originated by an application is where a party applies under CPR 31.16 for pre-action disclosure. Thus, the White Book paragraph 23.0.2 discusses such applications shortly after the passage which I have described. CPR 31.16 applies where an "application is made to the court under any Act for disclosure before proceedings have started." CPR 31.16 in the White Book contains a footnote reference to s.33 SCA. CPR 31.16 (3) sets out the circumstances in which such an application can be made, including that the respondent is likely to be a party "to subsequent proceedings". I conclude, for reasons explained below, that an application under CPR 31.16 is indeed an application which originates proceedings. I also agree with the deputy judge in *Obex* that such applications are both a "claim" and the bringing of "proceedings" within gateway (20). An important question, however, is whether the same applies to the present application, under s.34 SCA and CPR 31.17.

49. Neither the statute (the SCA), nor the rules to which I have referred, identify the manner in which an application is to be served. Those rules are contained in CPR Part 6. CPR 6.1 indicates that Part 6 is a comprehensive regime concerning service. CPR 6.2 contains various definitions, including a definition of claim:

> ""claim" includes petition and any application made before action or to commence proceedings and "claim form", claimant" and "defendant" are to be construed accordingly."

50. Claim is therefore widely defined. It includes, for example, an application made before action, such as an application for pre-action disclosure pursuant to s.33 SCA and CPR 31.16. It also clearly includes proceedings which are started other than by a "classic" claim form issued pursuant to Part 7.

51. The present case is concerned with service out of the jurisdiction, which is addressed in Section IV of CPR Part 6 beginning with CPR 6.30. That rule provides that Section

IV contains rules about "service of the claim form and other documents out of the jurisdiction". In the light of the definition in CPR 6.2, "claim form" in this context has an extended definition. It therefore does not simply refer to a classic claim form issued under CPR Part 7. CPR 6.30 also states that it contains rules about when the permission of the court is required and how to obtain that permission.

52. In certain cases, permission to serve out of the jurisdiction is not required: see CPR 6.33 – 6.35. However, these provisions have no application to the present case, where permission was clearly required. CPR 6.36 provides, as is well-known, for permission to serve out of the jurisdiction if "any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply". Paragraph 3.1 provides in excess of 20 grounds for permission. Most of these grounds, including sub-paragraph (20), begin with the words: "a claim is made". CPR 6.37 provides for the manner in which an application for permission to serve out is to be made, including the requirement that the court must be "satisfied that England and Wales is the proper place in which to bring the claim".

53. CPR 6.38 makes provision for service of documents other than the claim form. However, as I have said, this rule does not apply to the present case: in particular because it concerns service of other documents on an existing party, and does not provide a basis for service on a non-party. The only point which Mr Stanley made, by reference to CPR 6.38, was that it showed the importance of looking at each relevant party separately. I agree with that point.

54. CPR 6.39 (set out above) is, however, of more importance. The rule is directly concerned with applications, by an application notice, against a person who is not a party to the proceedings. It is implicit in the rule that permission to serve such an application notice, applying CPR 6.36 and 6.37, may be granted in appropriate cases. This is obvious from (i) the placement of CPR 6.39 in the section of Part 6 dealing with service out of the jurisdiction, and (ii) the disapplication of certain rules – including relating to acknowledgment of service – set out in CPR 6.37(5)(a)(i), (ii) and (iii).

55. In *Nix* paragraph [14][1], Cockerill J identified a number of types of application against a non-party which might be covered by CPR 6.39.[2] These included an application which engaged a third party such as an anti-suit injunction on notice, or a letter of request outwards to enable a potential respondent abroad to appear if it so wished. Cockerill J was not intending to give an exhaustive list.

56. In my view, CPR 6.39 is potentially applicable to the present application under CPR 31.17. That rule is directly concerned with service of an application notice against a person who is not a party to the proceedings, and a CPR 31.17 application is one type of such application. There is no reason to distinguish the present non-party, in the context of CPR 6.39, from the examples of non-parties given by Cockerill J. Indeed, one of Cockerill J's non-party examples was a person from whom documents were sought using the letter of request procedure. Where a party seeks documents using the letter of request procedure, an application notice would be required: see CPR 34APD.5,

[1] In the official version of the transcript, there is an error in the numbering: paragraph [14] follows immediately after paragraph [9]. I shall use the (mis) numbering in the official version, although this misnumbering may have been corrected in electronically available versions of judgment (e.g. on Westlaw).

[2] Paragraph [14] in fact refers to CPR 6.38; but it is apparent, from the context of the argument that the judge was addressing (as set out in paragraph [9]) that she was considering CPR 6.39.

and the discussion in *Hollander: Documentary Evidence* 14th edition, para 29-01. If that application notice were to be served on the prospective party, the relevant rule allowing and governing service would be CPR 6.39, as Cockerill J said.

57. The question of whether a non-party can be served out of the jurisdiction depends, in relation to any particular application, initially on whether or not there is an applicable gateway in paragraph 3.1 of Practice Direction 6B. In the present case, the gateway relied upon is (20). (As briefly discussed below, reliance was not placed on the "necessary or proper party" gateway (3)). If gateway (20) is available, then a further question arises as to whether discretion should be exercised in the applicant's favour.

58. Although I consider that CPR 6.39 is potentially available for service of the present application, it does not follow that service out for a CPR 31.17 application must be available under gateway (20) because of the presence of CPR 6.39. This appears to be the effect of the argument which was presented to Cockerill J in *Nix*: see paragraph [9] of her judgment. The applicant there appears to have alleged that CPR 6.39 would have no function at all if it did not apply to an application for third-party disclosure under CPR 31.17. This argument was rejected in paragraph [14] of her judgment. Cockerill J was in my view clearly right to do so.

59. I now turn to the three aspects of Mr O'Leary's argument, as to the application of gateway (20), summarised above.

Is Mr Gorbachev's application a claim?

60. I have no doubt that an application for disclosure against a non-party is a "claim", and is made by a "claim form" in the context of CPR Part 6. "Claim" (and hence "claim form") are broadly defined in CPR 6.2. The definition is itself not exhaustive: it "includes" certain matters, in particular "any application made before action" and any application "to commence proceedings". There is no reason to give the broad definition of "claim" a narrow meaning, so as to exclude an application under CPR 31.17. Such an application involves the applicant seeking to invoke the court's jurisdiction, against another person, for an order that another person should provide disclosure. Given the breadth of the definition in CPR 6.2, I consider that such an application can properly be described as a "claim". That conclusion is supported by the following matters.

61. First, the definition of claim includes any application made before action. It accordingly includes an application notice issued for pre-action disclosure, pursuant to s.33 SCA and CPR 31.16, against a person who is not yet a party to proceedings. Catherine Newman QC, sitting as a deputy High Court judge, so held in *Obex* at [13], and I consider that she was clearly right to do so.

62. The present application is made under s.34 SCA and CPR 31.17, rather than s.33 SCA and CPR 31.16 which were being considered in *Obex.* However, it is difficult to see why a s.33 SCA/CPR 31.16 would be a "claim", but that s.34 SCA/CPR 31.17 would not be. The nature of both applications is similar: the applicant is seeking disclosure. In both cases, the respondent to the application is a non-party to the proceedings. I do not think that there is any rational reason for treating the former application as a claim, but the latter as not.

63. Secondly, it is clear from CPR 6.39 that where an application notice is issued against a non-party to the proceedings, permission can be obtained to serve the application notice out of the jurisdiction. That provision applies generally to application notices against non-parties. Generally speaking, the party who issues an application notice against a non-party will, almost by definition, not be seeking to advance a substantive cause of action against the non-party, as the examples given by Cockerill J in paragraph [14] of *Nix* indicates. If there is an intention to pursue a substantive cause of action, ordinarily the claimant will issue proceedings by claim form using the Part 7 or Part 8 procedure.

64. Accordingly, CPR 6.39 applies to applications which can be described as being of a procedural rather than substantive character, including (as the definition in CPR 6.2 contemplates) an application made before action. The examples given by Cockerill J in paragraph [14] of *Nix* are all applications of a procedural character. Nevertheless, CPR 6.39 provides (implicitly) that the prior rules for service out of the jurisdiction apply to the application against the non-party. Those rules include the list of gateways in PD 6B, nearly all of which begin with the words a "claim is made". It follows that CPR Part 6, and in particular CPR 6.39, contemplates that "claims" which are of a procedural character are nevertheless within its scope. Accordingly, there is no reason to confine "claim" in the manner proposed by Mr O'Leary on behalf of the Trustees.

Does SCA 1981 section 34 "allow proceedings to be brought"?

65. Gateway (20) requires that the relevant enactment must "allow proceedings to be brought". Mr O'Leary argues that s.34 SCA does not do that. In substance, this is because s.34 SCA provides for an interlocutory application within the context of existing proceedings: it does not therefore allow proceedings to be brought.

66. Mr Stanley submits that the concept of a "claim" and "proceedings" are closely interlinked. He said (accepting that this was somewhat circular) that a claim is resolved in proceedings. If there were proceedings, the thing which begins those proceedings is the claim. Accordingly, proceedings are what is consequent on a claim, and a claim is what leads to the commencement of proceedings. At the heart of his submission was also a focus on the position as between the applicant and the third party from whom disclosure is sought. As between those parties, the application notice is the originating process which commences proceedings. Once served, the respondent will need to respond to those proceedings.

67. I consider that Mr Stanley's approach is sound, and I accept it.

68. In approaching this question, in accordance with the decision of the Court of Appeal in *Orexim* paragraph [34], it is necessary to give a "neutral" construction to gateway (20). It is therefore not appropriate to approach gateway (20), or indeed other gateways, on the basis of a presumption against service out because the jurisdiction is "exorbitant". With this in mind, I consider the following matters to be of significance.

69. First, the word "proceedings" should be seen in the context of the width of the word "claim" as previously discussed. Gateway (20) thus applies where a claim is made under an enactment which allows proceedings to be brought. "Claim" is not confined, under CPR Part 6, to claims commenced under a classic "claim form" issued under a Part 7 or Part 8 claim. It can include a claim made by an application notice, and (as discussed

above) CPR 6.39 permits service out of claims which have a procedural character. The words "allows proceedings to be brought" should be seen in that context.

70. Secondly, it is clear that, in certain circumstances, proceedings in court can be originated (i.e. "brought") by the issue of an application notice. Paragraph 23.0.2 of the White Book says so in terms (" … in certain circumstances, proceedings in court may be originated by an application"). Proceedings which are originated by an application notice will usually have a more "procedural" character than proceedings which originate with a Part 7 or Part 8 claim form. Nevertheless, it is appropriate to describe what has happened as the bringing of proceedings, as that paragraph of the White Book indicates.

71. This is illustrated by the decision of Catherine Newman QC in *Obex.* She was there considering an application made for pre-action disclosure under CPR 31.16. Such applications are made before the substantive claim against the party is made. Nevertheless, she considered that an application for pre-action disclosure came within gateway (20): see paragraphs [16] – [25]. In so doing, she rejected the argument of Obex that an application for disclosure in advance of action was not itself a form of proceedings.

72. As a matter of judicial comity, I should follow the decision of another judge of first instance, unless I am convinced that the judgment is wrong: *Police Authority for Huddersfield v Watson* [1947] 1 KB 842, 848. More recently, in *Willers v Joyce* [2016] UKSC 44, Lord Neuberger said at [9]:

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co- ordinate jurisdiction unless there is a powerful reason for not doing so."

73. Catherine Newman QC's decision was a reserved judgment reached after full argument from both sides. I have not been convinced that her judgment is wrong, or that there is a powerful reason for not following it. On the contrary, in holding that an application for pre-action disclosure constitutes "proceedings" for the purposes of gateway (20), I think that she was right. I consider that where an application notice is issued pursuant to that rule, proceedings in court are indeed being originated by the application. They are proceedings of a preliminary character: they are preliminary to the possible commencement of further (i.e. "subsequent") proceedings in which a substantive remedy will be claimed. But they are nevertheless proceedings in court.

74. This does not necessarily answer the question of whether the same approach should be taken to s.34 SCA and CPR 31.17. However, as I have already indicated in the context of "claim", applications under CPR 31.16 and CPR 31.17 have considerable similarities. In both situations, an application is being made for disclosure. In both situations, the application is against a non-party. In my view, in both cases, proceedings are being originated or brought against the non-party by the issue of the application notice. Whilst it is true that in the context of CPR 31.17 there is already litigation underway between other parties, this does not detract from the fact that the application notice is required to originate proceedings against the non-party and that that is what it does.

75. The decision in *Obex* has been criticised, and described as "clearly wrong", in paragraphs 1-10 of *Hollander: Documentary Evidence* 14th edition. *Hollander* essentially gives two principal reasons for his conclusion. The first reason is that:

> "the whole point of s.33 is to enable pre-action disclosure to be ordered without the need for proceedings to be commenced. Proceedings are commenced under CPR r 7.2 when the court issues a claim form."

Mr. O'Leary relied, to some extent, on this analysis. However, as Mr Stanley submitted, *Hollander* is clearly wrong on this point. CPR 6.2 defines "claim" more broadly than a claim commenced under CPR Part 7. The commencement of proceedings is not confined in the manner proposed by *Hollander*.

76. Secondly, *Hollander* refers to what he regards as a "fortuitous consequence of the 2008 rule change". That relevant rule change brought into effect the very general wording in gateway (20) which refers to "an enactment which allows proceedings to be brought". The previous equivalent rule had specified a number of statutes, and the SCA was not amongst them. However, this was a quite deliberate change from the specific to the general. The change is discussed in the decision of the Court of Appeal in *Orexim*. Its effect was plainly to bring within the purview of gateway (20) a large range of enactments which could not previously be relied upon. *Hollander's* second reason is therefore not a valid ground of criticism of the decision in *Obex*. Indeed, Mr O'Leary in his oral submissions distanced himself from this part of the analysis of *Hollander*.

77. In the light of these matters, my conclusion is that an application under CPR 31.17, pursuant to s.34 SCA, can properly be regarded as the commencement of proceedings against the non-party. Prior to the application, the third party is not concerned with any court proceedings. As far as the third party is concerned, the application notice is the first step in the process of commencing proceedings against him, even though those proceedings are of a limited nature.

78. This conclusion is not impacted by the three decisions on which Mr O'Leary placed particular reliance.

79. In *GFN SA v Bancredit Cayman Ltd* [2009] UKPC 39, the Privy Council considered the circumstances in which security for costs could be ordered in the context of the words "other legal proceeding" and "action or other proceedings" in the relevant Cayman legislation and rules of court. The court referred to the settled practice not to order security for costs in what was in substance an interlocutory application. However, an order for security was upheld in that case, because the substance of the particular application was a freestanding originating application. That case was concerned with the word "proceeding" in a very different context to the Civil Procedure Rules that I am considering. I do not consider that it provides any real assistance to the interpretation of CPR Part 6. There was also some force in Mr Stanley's submission that, as a matter of substance, CPR 31.17 proceedings are "freestanding" as between the applicant and the non-party.

80. In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, the Court of Appeal considered (obiter) the question of whether s.37 SCA is an enactment falling within gateway (20). Section 37 confers

power to grant injunctions. Stanley Burnton LJ (with whom Wilson LJ agreed) expressed, more positively than Rix LJ, the view that s.37 was not a relevant enactment:

> "In the absence of another basis for jurisdiction, it is only if there is such an enactment that the court has the power conferred by section 37. Indeed, if it were otherwise, *The Siskina* [1979] AC 210 would now be decided differently".

81. Rix LJ said that there was a serious argument that section 37 did not qualify since it "simply provides for a particular remedy within proceedings whose legal basis has to be found elsewhere".

82. *AES* was not therefore concerned with either s.33 or s.34 SCA. I do not consider that there is an analogy between the specific statutory entitlement (subject to rules of court) to make applications pursuant to those sections, and the general power to grant the remedy of an injunction which is conferred by s.37 SCA. Both of the former sections provide a potential self-standing right to make applications against non-parties to proceedings, albeit that in the case of s.33 SCA there may be a potential cause of action to be advanced in subsequent proceedings. They are not ancillary to other remedies against those parties within existing proceedings. In any event, the obiter statements of the Court of Appeal would now have to be reconsidered in the light of the recent decision of the Privy Council not to follow *The Siskina* see *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24.

83. Finally, and at the forefront of his submissions, Mr O'Leary referred to the decision in *Nix*. That case involved an application for service out, pursuant to gateway (20), in respect of a claim under s.34 and CPR 31.17 against a New York law firm for non-party disclosure. The application had been refused by Cockerill J on paper and there was then a renewed oral application. She dismissed the renewed application on the grounds that the court had no jurisdiction, and also on discretionary grounds. I bear in mind that Cockerill J's knowledge of disclosure applications with an international element is considerable: she is the author of *The Law and Practice of Compelled Evidence in Civil Proceedings* (Oxford University Press 2011).

84. On the facts of that case, there was a very clear case for refusing relief on discretionary grounds, as Cockerill J did. However, as far as jurisdiction is concerned, the argument that was presented to Cockerill J was very different to the submissions made by Mr Stanley. The first argument for the claimant, to which I have referred, appears to have been that CPR 6.39 was somehow specifically linked to gateway (20), and that therefore it was applicable to an application under s.34 SCA. The second argument appears to have been that the decision of Hoffmann J in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 somehow demonstrated the jurisdictional basis for the application. Cockerill J rejected both arguments, and Mr Stanley did not suggest that either of them was sustainable. Cockerill J does not have appear to have been presented with the careful analysis of CPR Part 6 as a whole which has been at the forefront of Mr Stanley's submissions.

85. Furthermore, the judge was not referred to the important decision of the Court of Appeal in *Orexim*. That case establishes the neutral approach to be taken to gateway (20), which is arguably contrary to Cockerill J's approach in paragraph [7] of her judgment. *Orexim* also emphasises that the words of gateway (20) contain no limitation other than that the

enactment in question must allow proceedings to be brought against persons not within England and Wales: *Orexim* paragraph [33]. These important points were not brought to the attention of the judge. She does not therefore address the extra-territoriality argument discussed below, and certainly does not do so within the framework provided by *Orexim*. Finally, in dealing with *Obex*, the judge referred to and appears to have accepted the criticisms of that decision by *Hollander*, although that was not critical to her decision. However, for the reasons given, the criticisms by *Hollander* are in my view incorrect.

86. Against this background, I do not consider that, as a matter of judicial comity, I am required to follow the decision in *Nix* on the question of whether gateway (20) gives the court jurisdiction to order service out in respect of a s.34 SCA/CPR 31.17 application. For reasons given in this judgment, I consider that such jurisdiction does exist.

Does s.34 SCA allow proceedings to be brought against persons not within England and Wales?

87. An important aspect of the decision in *Orexim* was that the enactment referred to in gateway (20) must "allow proceedings to be brought against persons not within England and Wales". Mr O'Leary argued that s.34 SCA had no "extra-territorial" effect, and he relied upon the presumption in domestic law that legislation is generally not intended to have extra-territorial effect: see e.g. *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2 para [22] ("*KBR")*, citing a large number of authorities. Although there is a presumption, the question is ultimately who is "within the legislative grasp, or intendment" of the relevant statutory provision: see *Masri*, paragraph [10].

88. The authorities to which I was referred showed, unsurprisingly, that different statutory provisions can be regarded as having different effects. In *Orexim*, the Court of Appeal held (following earlier authority) that the Insolvency Act 1986 section 423 did have extra-territorial effect, so that service out of the jurisdiction proceedings under gateway (20) was permissible. In *KBR*, the statutory provision in question was the Criminal Justice Act 1987 s.2 (3). The question was whether the Director of the Serious Fraud Office could issue a notice requiring a US corporation, with no registered office or fixed place of business in the UK, to produce documents held abroad. *KBR* did not involve any issue of service out of the jurisdiction. If a notice could be issued under s.2 (3), the Director of the SFO was to do it directly against the person to whom the notice was directed. Accordingly, unlike s.423 which was considered in *Orexim*, there was "no scope here for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion": see *KBR* at paragraph [65].

89. It is clear from *Orexim* that, for the purposes of gateway (20), it is not necessary that the enactment in question must expressly authorise the bringing of proceedings against persons outside England and Wales: see paragraph [48]. The question is therefore whether the statute, on its true construction, does so.

90. There is nothing in s.34 which expressly or impliedly provides that an application under that section can only be brought against persons in England and Wales. Mr. O'Leary, in his oral submissions, tentatively argued that this was the effect of, or at least

supported by, SCA s.153 (4). This provides that various provisions of the SCA, including s.34, "extend to England and Wales only". However, Mr Stanley correctly submitted, this provision was only dealing with the extent of the statute in identifying the territory for which it is law: see *Bennion, Bailey and Norbury on Statutory Interpretation,* 8th ed (2020) Section 6.1 (page 186). As Bennion states, "issues to do with people, places or things in relation to which an act applies are matters for application, not extent". A similar argument was pithily rejected by the Supreme Court in *KBR* at [29].

91. Section 34, which is set out above, is a statutory provision which operates in conjunction with rules of court. This is significant, in my view, for at least three reasons.

92. First, the relevant enactment will (unlike the statute in *KBR*) only operate in conjunction with the exercise of a judicial discretion. In cases involving service within the jurisdiction, that judicial discretion will be exercised at the time when the application under the relevant rules (now contained in CPR 31.17) is considered by the court. More importantly, in cases potentially involving persons outside the jurisdiction, the relevant judicial discretion will initially arise when an application is made for service out and again in the context of any challenge on an application to set aside. A further judicial discretion will then be exercised, under CPR 31.17 itself, if the application for permission to serve out is granted and upheld.

93. Secondly, the scope of the power to make rules of court is very broad. At the time when SCA (then entitled the "Supreme Court Act"), was enacted in 1981, the relevant power was contained in section 84. This was in very wide terms as follows:

> "(1) Rules of court may be made for the purpose of regulating and prescribing the practice and procedure to be followed in the Supreme Court.
>
> (2) Without prejudice to the generality of subsection (1), the matters about which rules of court may be made under this section include all matters of practice and procedure in the Supreme Court which were regulated or prescribed by rules of court immediately before the commencement of this Act.
>
> (3) No provision of this or any other Act, or contained in any instrument made under any Act, which—
>
> (a) authorises or requires the making of rules of court about any particular matter or for any particular purpose; or
>
> (b) provides (in whatever words) that the power to make rules of court under this section is to include power to make rules about any particular matter or for any particular purpose,
>
> shall be taken as derogating from the generality of subsection (1)."

94. At that time, the rules (known as the Rules of the Supreme Court or RSC) were dealt with by a committee known as the Rule Committee of the Supreme Court.

95. The rule-making power is now contained in section 2 of the Civil Procedure Act 1997. As discussed below, the scope of this power was considered in *Masri* at paragraphs [10] – [15]. Civil Procedure Rules are now made by the Civil Procedure Rule Committee (often known as the CPRC). Under section 1 (3), the "power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient". This is clearly a very broad rule making power as well.

96. I see no reason why, whether one is looking at the s.84 in the SCA as originally enacted in 1981, or the current rule-making powers under the Civil Procedure Act, there would be any limitation on the ability of the Rule Committee of the Supreme Court or the CPRC to make rules which rendered s.34 applicable to persons outside England and Wales. Mr O'Leary accepted that the effect of his extra-territoriality argument was it would be ultra vires for a rule to be made which enabled a s.34 application to be made against a person outside England and Wales. I see no reason why that should be the case. The nature of litigation, and views as to appropriate rules to secure that the civil justice system is accessible, fair and efficient, change from time to time. If the Rule Committee of the Supreme Court or the CPRC had taken a specific decision that s.34 applications could be made against people outside the jurisdiction, because that was an appropriate exercise of the court's powers, it would in my view have been fully entitled to do so. A specific decision is, however, not required. The same result would follow if this is the effect of gateway (20).

97. Thirdly, and related to the second point, the decision in *Masri* firmly supports the conclusion that s.34 can apply to persons outside the jurisdiction. The House of Lords in *Masri* was concerned with the question of whether, pursuant to CPR Part 71, an officer of the judgment debtor domiciled in Greece could be examined in respect of the company's foreign assets. The case was decided in favour of the judgment debtor on the basis of the scope of Part 71. However, the House of Lords considered, and rejected, an initial argument for the judgment debtor that it would be ultra vires the rule making power for a rule to be made which permitted an examination of the Greek domiciled officer. That argument was addressed at paragraphs [10] – [15] of the leading judgment of Lord Mance. He referred to the fact that there had been what he described as a "regular process of amendment and minor extension of the powers under Order 11 to address some new need". (RSC Order 11 was the rule where the "gateways" for service out were then contained: see paragraph [13]). He said (at paragraph [14]) that the statutory rule-making power was "wide enough, in principle, to permit the rule-making authority to enact rules relating to the examination of an officer abroad of a company against which a judgment has been given with the jurisdiction".

98. The process of modifying and adding to the permissible grounds for service out of the jurisdiction continues to this day. It is a process which enables new rules to be fashioned in order to meet changing perceptions as to the cases in which it would be appropriate for the court to exercise jurisdiction against persons who cannot be served in the jurisdiction. If I were to accept Mr O'Leary's argument, it would put what in my view would be an unjustified restraint on the scope of the very wide powers which exist for making rules pursuant to s.34. There is no reason why s.34 should be construed as confined to persons in England and Wales, and in my view every reason not to do so.

99. Accordingly, I accept Mr Stanley's submission that s.34 does allow proceedings to be brought against persons not within England and Wales. It follows that Mr O'Leary's argument, that the present case falls outside gateway (20), fails.

100. Before leaving the jurisdiction argument, I note that the only gateway relied upon was (20). There had been a brief discussion before HHJ Pelling QC as to whether the "necessary or proper party" gateway (gateway (3) under Practice Direction 3B paragraph 3.1) was available. The judge thought not, referring briefly to the decision of Teare J in *AB Bank Ltd, Offshore Banking Unit (OBU) v Abu Dhabi Commercial Bank PJSC* [2016] EWHC 2082. Teare J there held (at paragraphs [19] – [21]) that an application for a *Norwich Pharmacal* order could not be made on the basis that the respondent was a necessary or proper party to the claim being made against the defendant in that case. I would tentatively say, however, that the present case is different, and that it could be argued that the Trustees are necessary or proper parties to the claim, pursuant to s.34 SCA and CPR 31.17, which has been brought against Forsters. This was not, however, the basis of Mr Stanley's argument, and I therefore say no more about it.

Discretion

101. Cockerill J's judgment in *Nix* sets out powerful reasons why, generally speaking, applications against overseas third parties should generally be made using the letter of request regime which is provided for by CPR 34.13 and Practice Direction 34A in particular CPR 34APD.5. It is not necessary for me to repeat those reasons in this judgment, and I take them fully into account.

102. Cockerill J was, however, dealing with a case where the only party against whom the application was made, and the relevant documents, were overseas. In the present case, however, the documents are in England, and are held by English solicitors who are officers of the court. As Mr Stanley submitted, this is not as a result of chance. The documents are in the hands of English solicitors because they concern transactions where the Trustees engaged the English solicitors for advice. They also related to transactions to take place in the jurisdiction. I consider that these are circumstances which distinguish the present case from *Nix*. They also distinguish the case from *MacKinnon*, where Hoffmann J refused to grant orders where proceedings had been properly served within the jurisdiction, but whose effect would be to compel the production of documents held by the respondent in the United States.

103. A further important factor in the present case is that there are as yet unresolved proceedings, pursuant to s.34 SCA and CPR 31.17, against Forsters. Those proceedings are taking place here, and indeed were the subject-matter of the hearing before HHJ Pelling QC which led to the service out of the jurisdiction proceedings on the Trustees. HHJ Pelling QC clearly considered it appropriate to order service out in circumstances where Forsters were contending that the Trustees were the parties against whom any orders should be made, and where that issue had yet to be (and remains) unresolved. The effect of his order was that all relevant parties would be before the court when the application was finally determined. This is generally desirable in litigation, but of course it cannot always be achieved.

104. I consider that these matters are sufficient to justify the exercise of the court's discretion to order service out of the present proceedings on the Trustees, notwithstanding that (as shown by *Nix*), applications should generally use the letter of request procedure.

105. Mr O'Leary relied upon a number of specific matters. I did not think that any of them led to the conclusion that the court's exercise of its discretion should come down against permitting service out.

106. He submitted that there was a material difference between the specificity required for the identification of documents in both inwards and outwards letters of request, as compared to the position under CPR 31.17. If the letter of request route had to be followed, the Claimant would therefore have to be more specific in identifying the documents sought. However, as Mr Stanley acknowledged, this is a matter which can if necessary be taken into consideration, in the exercise of the court's discretion, when the court considers whether to make any order under CPR 31.17, and if so the precise terms of the order.

107. Mr O'Leary also submitted that it is irrelevant that the letter of request procedure would be slow: Mr Gorbachev could have invoked that procedure much earlier. I consider that it is relevant, to the exercise of the court's discretion to permit service out, that the evidence indicates that the letter of request procedure, if now invoked, would produce nothing of benefit. That is because the evidence indicates that the procedure in Cyprus is slow, and would take at best 12 months. That would mean that it would not lead to any disclosure until well after the conclusion of the trial. I do not consider that this can be disregarded, when it comes to the exercise of the court's discretion. It is in my judgment a further factor which supports the exercise of the court's discretion in the manner which I propose, although I would reach the same conclusion without it.

108. Mr O'Leary submitted that it was wrong to regard, as relevant or critical, the fact that the relevant documents were within the jurisdiction. In the modern world, where documents are held on servers which could be anywhere, this was not important. Moreover, this was not an application for documents as such: it was an application to compel overseas Trustees to take steps to produce documents. In my view, however, it is important that the documents are here, that they are held by English solicitors, and that this is not a matter of chance. It is also the case, as Mr Stanley submitted, that in practical terms the Trustees will not be required to carry out work in Cyprus. If the court makes an order, all they will have to do is to give a necessary instruction to Forsters.

109. Accordingly, this is an appropriate case for the court to exercise its discretion in favour of permitting service out.

Service by alternative means

110. HHJ Pelling QC also ordered service by alternative means. In my view, that order was properly made. In *M v N* [2021] EWHC 360 (Comm), Foxton J identified different situations in which orders for alternative service can be made, notwithstanding that the jurisdiction in which the defendant is to be served is a party to the Hague Service Convention. They include (see paragraph [9] (i)):

> "Cases in which an attempt is being made to join a new party to existing proceedings, where the effect of delay in effecting service on the new party under the [Hague Service Convention] will be either substantially to interfere with directions for the existing trial, or require claims which there is good reason to hear together to be heard separately."

111. This is applicable in the present case, given that there is an existing and outstanding application against Forsters, and an obvious need for that application to be determined quickly.

112. Mr Stanley put forward other reasons why the Hague Service Convention was not significant in the present context, but it is not necessary to address these.

Conclusion

113. Accordingly, the Trustees' application fails.