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A New Gateway Opens – More English Court Options for Victims of Overseas Fraud

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Recent rule changes allow claimants full access to key English law mechanisms to discover the identity of defendants and location of assets, even where the wrongdoers and third parties are not based in England. This is highly relevant for victims of cyber-crime and crypto frauds.

To bring an English Court claim against a non-English defendant, a claimant must serve proceedings out of the jurisdiction. This typically requires permission of the English Court, who will consider – among other matters – if it falls within one of the defined sets of circumstances or service "gateways" listed in the Civil Procedure Rules (**CPR**). These include where the contract is made in England or governed by English law, where one of a group of defendants is within the jurisdiction, or where a claim is made to enforce a judgment or arbitral award.

Victims of fraud often do not know the identity of the fraudster or the current location of their stolen assets, particularly in cases of cybercrime and crypto-asset litigation. English law contains a number of useful tools for such claimants, which can collectively be considered as "information orders":

- Norwich Pharmacal Orders (**NPOs**) – this order requires a third party who has been innocently mixed up in wrongdoing to disclose documents or information, to, for example, enable the applicant to uncover the identity of a wrongdoer.
- Banker's Trust Orders (**BTOs**) – this order is available where there is a fairly clear-cut case of fraud, to require disclosure of confidential documents, normally from the defendant's bank, to support a proprietary claim or trace assets.
- Documents can also be obtained in various circumstances at the pre-action stage from third parties, or during the course of proceedings by way of a non-party disclosure order.

In addition, English courts, and their highly qualified, tech-savvy judiciary, have at their disposal a range of effective asset tracing measures and interim remedies, including worldwide freezing orders against persons unknown in their arsenal to assist victims of (crypto-) fraud.

Until very recently, however, there has been a real question about whether claims for the "information orders" described above fall within any of the service gateways.

In the recent case of *Gorbachev v Guriev* [2022] EWCA Civ 1270, the Court of Appeal considered there was power under the then existing rules to permit service of third-party disclosure applications abroad in circumstances where the documents in question are located in England & Wales, such as by a foreign defendant's English solicitors, but where the third party itself is based outside the jurisdiction. While a promising indication of the Court's likely approach to other similar applications, this was necessarily a fact based decision on that particular claim.

Fortunately, the position for all "information orders" has now been put beyond all doubt by targeted amendments to the CPR, which came into effect on 1 October 2022. The key change is the introduction of a new service "gateway" – gateway 25 – that allows service on a defendant out of the jurisdiction of a claim or application to obtain information regarding the true identity of a defendant or potential defendant or what has become of the claimant's property and that information is intended to be used in existing proceedings, or proceedings to be commenced, in the English Courts. This will, in most cases, cover NPOs and BTOs.

While the new gateway is, of course, not limited to crypto-fraud, and will have utility in a broad range of cases, it coincides with a wider push by the UK to become a global crypto-asset technology hub, promoting the flexibility and certainty of English law with the aim of English law and courts becoming the law and forum of choice for crypto-asset disputes. We discussed these issues in detail in a series of articles here, here and here.

Another move in this direction comes from the Law Commission's recent consultation paper on digital assets, which aims to ensure that English law can conceptualise emerging categories of digital assets, and to encourage a principled, modern development of the law in this area. The results of the public consultation, which closed on 4 November 2022, to be published in due course, are likely to be followed by the final recommendations for law reform in this area.

Several other gateways have also been added:

- for claims concerning the operations of a branch, agency or other establishment in England & Wales;
- claims for unlawfully causing or assisting in certain breaches of contract, trust, fiduciary duty and confidence or misuse of private information respectively; and
- for breach of fiduciary duty with an English connection.

These represent significant extensions to the previous gateways, including by augmenting the options available to a claimant to pierce the corporate veil.

All these changes help ensure that the jurisdiction of England & Wales remains an attractive choice for litigants by adapting its procedures to 21st century disputes (including those related to crypto-assets), and providing the relevant tools and flexibility for parties to resolve their disputes.

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