



Trends in recent decisions on forum and overseas jurisdiction in trusts and estates disputes

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1. Introduction and summary

1. Trusts and estates disputes often involve an international element. This paper¹ will focus on two ways in which such questions commonly arise: a dispute as to whether the English Court is the proper forum in which a dispute should be heard, and, on the other hand, how far the (overseas) jurisdiction of the English Court will reach in a case where there is to be a trial in England of a given dispute.
2. This paper will explore these two issues through a consideration of two recent (sets of) decisions. First, the *Villiers v. Villiers* litigation,² in the family proceedings and financial relief context, in which a spouse seeks to 'attack' a trust structure to which they say their former partner is entitled. Secondly, the decision of the Court of Appeal in *Gorbachev v. Guriev*,³ as to the jurisdiction of the English Court to order trustees based overseas to give third party disclosure for an English trial.
3. The paper's primary conclusion is that the English Court is now less troubled than it once typically expressed itself to be by the often-heard submission that a given jurisdiction is 'exorbitant' and therefore should be constrained or used cautiously. This would now appear to extend across a number of different forms of trust and estates disputes. The second aim of this paper is to highlight this same issue as a practical point to consider going forwards, following a number of significant

¹ This paper is based upon the author's contribution to a talk given at Chambers' 2023 Trusts Litigation conference, and the shorter form paper as was produced as part of the pack of materials for attendees.

² Primarily the decision of the Supreme Court [2020] UKSC 30 and of the Court of Appeal [2022] EWCA Civ 772. Both were split decisions, but the level of detail at which those splits arose is not material to the scope of this paper.

³ [2022] EWCA Civ 1270. The sole reasoned judgment is given by Males LJ, with whom Lewis and Nicola Davies LJJ agreed.

changes in the law when various European legislation was repealed following Brexit. As post-January 2021 cases work their way through the Courts, will this trend continue and indeed strengthen, or will the English Court return to the more cautious terms in which it expressed itself in the not too distant past?

2. *Villiers v. Villiers – The MCA, s27 & financial relief in support of a foreign divorce*

4. The *Villiers v Villiers* litigation is itself an interesting topic and is summarised only briefly here in the context of the broader theme of this paper.
5. A husband and wife (who had one, adult, child) married in England in 1994 but lived in Scotland from 1995 until their separation in 2012. After the separation, the wife returned to England. She petitioned for divorce in England in 2013, to which the husband responded with a petition in Scotland in 2014. The English Court was obliged to stay the English petition in the circumstances, which was later dismissed by consent. Despite this, the wife brought further proceedings in England seeking an order for periodic maintenance payments, and a further lump sum, under Section 27 of the *Matrimonial Causes Act 1973* ("MCA").
6. The *Villiers* litigation went to the Supreme Court [2020] UKSC 30 and then again to the Court of Appeal [2022] EWCA Civ 772. As regards the MCA, s27 itself:
 - a. First, the litigation highlights that s27 is a further weapon in the arsenal of a party in the context of a divorce or a family breakdown. It is more rarely used and in some ways importantly narrower than other forms of financial relief as are available to a party under *the MCA*. For example, the Court cannot order transfers or other adjustments of property, or make a pension sharing order. However, in other respects it is potentially broader. Whilst the applicant must be married to the respondent, s27 applies whether or not any divorce is sought or contemplated; being more generally a power to order maintenance. Further, whilst the order cannot last beyond the joint lives of the parties, it can last beyond any divorce: up to the point of any remarriage. These principles are summarised across the various decisions.
 - b. Secondly, the case highlights how s27 can be used to attack a trust. The husband refused to provide disclosure and presented himself as of limited means. By the time the case reached the EWCA for the second time, it had been found that the husband was interested under certain family trusts. There remained a live issue as to whether he had an interest of even greater potential value under further family trusts. The EWCA explained how *Charman v. Charman (No. 4)* [2007] 1 FLR 1246 was to be applied in this context (*Villiers*, EWCA, 2022 ¶56-60). The result was (i) an order that the husband provide £10,000 p.a. in maintenance, and (ii) a further lump sum to be decided in future

(for a potentially much larger sum), with that part of the decision adjourned in part because of the husband's failures to provide disclosure.

7. As to jurisdiction, the Scottish divorce proceedings were, under the legislation, in some respects to be treated as an 'overseas' divorce. The UKSC found unanimously that no test of *forum (non) conveniens* applied under the relevant European legislation on jurisdiction as was in force at that time. By a bare majority of 3-2, they construed the phrase "*related actions*" in that same legislation narrowly so that the overseas divorce proceedings did not count as a related action (holding that save in circumstances where there was a risk of irreconcilable judgments, only another maintenance claim would qualify), with the effect that the '*lis alibi pendens*' provisions in that legislation (a requirement or power to stay proceedings where other related proceedings are already on foot elsewhere) did not apply either. The effect was that it was not possible for the husband to challenge the jurisdiction of the English Court to hear the s27 application, despite the divorce proceedings already on foot 'overseas'. The English Court had jurisdiction, and that was that.
8. This result in the UKSC, whilst striking at the time on its facts, is now largely academic in light of the repeal following Brexit of the legislation that the Supreme Court was construing (as to which, see further below). But *Villiers* nonetheless remains a notable example of the trend in recent years as has already been referred to above and will be further explored below. This is perhaps particularly so in circumstances in which the dissenting judges, or judges who were overturned on appeal, across the various decisions in the litigation were predominantly the Judges from a family law background: Baroness Hale and Lord Wilson in the UKSC, and Mostyn J at first instance before being overturned by the EWCA. Indeed, Mostyn J was criticised in uncommonly stark terms by the EWCA, amongst other things for his finding that the approach of the majority of the UKSC and in the submissions that he rejected (but the EWCA followed, overturning the Judge) involved the English Court exercising an 'exorbitant' jurisdiction.

3. *Gorbachev v. Guriev* – third party disclosure against foreign trustees

9. In *Gorbachev v. Guriev* [2022] EWCA Civ 1270 the EWCA held unanimously that the English Court has jurisdiction under the *Senior Courts Act 1981, Section 34* and *CPR 31.17* to order disclosure of documents against trustees based out of the jurisdiction in Cyprus, because those documents were held by the trustees' English solicitors (digitally) within the jurisdiction; with service out of the jurisdiction being permitted by alternative means on those English solicitors.
10. The English proceedings concern a dispute between two businessmen as to their respective interests in a Russian fertiliser business. That dispute was at the time of the hearing before the EWCA (August 2022, judgment September 2022) listed for

a 6-week trial in January 2023. One of the issues at that trial was how and why Mr Gorbachev was financially supported by two Cypriot trusts in 2004–2012.

11. In 2006, the trustees instructed a partner at Lawrence Graham, who later moved to Forsters, to provide advice on certain matters. This led to certain documents being provided to those firms to enable them to provide that advice. The documents were held digitally, and were held accordingly to be within the jurisdiction in England. Further, these were said to concern transactions that had taken place within the jurisdiction, on which the trustees had sought the advice.
12. The first key point to appreciate about the case is that its procedural history is somewhat complex and had the result that the EWCA has not actually ordered that third party disclosure of these documents should be given by the trustees. That issue was remitted to the Commercial Court, and it is unclear to the author whether that issue has (yet) or will (be) considered by that Court.
13. Rather the issue before the EWCA was whether or not the English Court had jurisdiction in the first place to make such an order in any case. This point had been taken upon the return date of the application to serve the third party disclosure application out of the jurisdiction upon the trustees. The question of whether the trustees were the proper respondent to that application or whether it could have been brought directly against their English lawyers (avoiding the need for any application for permission to serve out) was also not before the EWCA.
14. The second key point to appreciate is that it was common ground before the EWCA (¶18–19) that the test for permission to serve the third party disclosure application out of the jurisdiction upon the Cypriot trustees was the same as the test that applies for the service out of a claim: (i) a good arguable case that at least one CPR PD6B ¶3.1 'gateway' applies, (ii) a serious issue to be tried on the merits (of the application for disclosure), and (iii) the *forum (non) conveniens* test.
15. The reasoning of the EWCA turned primarily on two points. The first concerned the CPR PD6B ¶3.1 'gateway', and in particular whether gateway '20' applied: was a third party disclosure application a 'claim' brought under an enactment which (the enactment) allows 'proceedings' to be brought, and which (the claim) are not covered by any of the other gateways? It was in this context that the EWCA cited a pair of passages from two judgments of Lord Sumption, the first in *Abela v. Baadarani* [2013] UKSC 44 at ¶53, and the second in *Brownlie v. Four Seasons* [2017] UKSC 80, ¶34. Both of these had already been cited with approval by the Court of Appeal in *Orexim v. Mahavir* [2018] EWCA Civ 1660 at ¶33–35.⁴ It is sufficient to quote *Abela* at ¶53, and *Orexim* at ¶33:

⁴ Per Lewison LJ (with whom Gross and Leggatt LJJ, as the latter then was, both agreed).

[Abela] [53] *"This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. ... Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. ... It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."*

[Orexim] [33] *"... In construing the words of the paragraph it is also worth 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. ..."*

16. The EWCA held that the proper approach in light of this guidance was to give a 'neutral' construction to the words of each of the gateways in CPR PD6B (neither construing these broadly or narrowly). As a matter of the proper construction of these words, a 'claim' was not in this context limited to substantive causes of action, and included such an application for third party disclosure. So too 'proceedings'. For the analysis of this issue in detail, see ¶31-37.

17. The second, and which was the main focus of the judgment, is the canon of statutory construction that is often expressed as a general rule that legislation is presumed not have extra-territorial effect. As a shorthand, this was referred to as the 'principle of territoriality'. In short, the EWCA's summary of and approach to that principle highlights that this canon of construction is context specific and, properly understood, is more nuanced than the terms in which it is often expressed. For the analysis of this issue in detail see: ¶¶24, 38-92, esp. 81-92.

18. The key takeaways from the judgment are as follows:

- a. The "critical fact" in the case was that the documents were located in England. The Court in so finding specifically rejected that this was of little or no consequence in circumstances in which the documents were stored electronically. It was sufficient that the documents had been sent to the English lawyers for the purpose of seeking their advice on transactions within the jurisdiction; with the key significance here seeming to be that it was not merely the result of chance that the English lawyers held these documents within the jurisdiction. This made the documents subject to the jurisdiction of the English Court, and the trustees could be regarded as having "accepted the risk" that

these documents might be made subject to production by the English Court. In such a case, the principle of territoriality had little or no application, and there was no *illegitimate* interference with a foreign sovereign (¶83-84). Further, “*there will be no difficulty in enforcing any order for their production*”, despite the trustees being overseas (¶86). *Obiter*, the same considerations would apply to documents created in the jurisdiction (¶86).

b. Further, there was “*no question*” in the case of the letter of request and *Hague Convention* procedure being circumvented. Rather, it was unclear that either of those procedures could be used where the documents were within the jurisdiction of the English Court, as opposed to a foreign court (such as the Courts of Cyprus, where the trustees were located) (¶87).

c. The Court left open what should happen if the documents were located elsewhere. It summarised *obiter* the competing positions, which it saw as that either there was no jurisdiction in such a case, or that there might be in an exceptional case e.g. due to urgency, in light of an impending trial and the time the letter of request or *Hague Convention* process can take (¶89-91).

d. That said, the Court held *obiter* that in a typical case where an order is sought from persons abroad and concerning documents abroad, there was “*no doubt*” that the principle of territoriality would have an “*important role*”. Further “*The existence of the letter of request procedure and the limitations to which it is subject would be circumvented if wide-ranging disclosure of documents held by third parties abroad could be too readily obtained by means of an application under section 34 and CPR 31.17. That would infringe international comity in ways that would be objectionable to foreign states, just as the United Kingdom has objected when other states have sought to obtain documents here without using the letter of request procedure and, even then, has limited the documents which can be obtained through that procedure. Moreover, such orders could not readily be enforced unless the persons against whom they were made chose to come within the jurisdiction.*” (¶82).

19. The question of whether the Judge (Jacobs J) had exercised his discretion as to the question of service out impermissibly was dealt with briefly, and it was held that this could not be said to be wrong so as to be capable of being set aside on appeal (¶¶6, 93-4). Similarly, the EWCA dealt briefly with the appeal as to alternative service, holding that the circumvention of the *Hague Service Convention* was justified in the circumstances of the imminent trial date: ¶95-8.

4. A common trend

20. It is suggested that *Villiers* (in particular in the UKSC, but also the approach of the EWCA) and *Gorbachev* both evidence a trend: the English Court is becoming more comfortable than it was previously with the breadth of the scope of its jurisdiction. Or at least, the English Court is now expressing itself to be less troubled than it once typically expressed itself to be by the often-heard submission that a given jurisdiction is 'exorbitant' and therefore should be constrained or used cautiously. This appears to be the case across a number of forms of trusts and estates disputes, and is well-captured in the passages quoted above at paragraph 15, as well as the result in both *Villiers* (in particular in the UKSC) and *Gorbachev*.
21. There appear to be at least two separate developments that are themselves driving this trend. The first is 'the way we live now': in a seemingly ever-increasingly globalised and digitalised world, in which cross-border trade and digital communication are typical features of day to day life. The second is that the English Court is now less of an outlier in its approach to international litigation. It is not just that cross-border litigation is happening in more and more jurisdictions, but that those jurisdictions are adopting aspects of the English Court's historic approach to such litigation which the English Court has historically been concerned might be considered (by the Courts or otherwise of such jurisdictions) to be exorbitant. In short, 'other Courts are now doing this'.
22. At a level of detail, which leads into the practical point to watch going forwards that this paper will turn to next, it is important to bear in mind that what is meant here by the author by the use of the term 'jurisdiction' is the typically binary ('yes/no') question of whether the English Court has power to make the order in question at all, as opposed to whether or not the Court should do so on the facts of the given case before it. It is the former binary matter of jurisdiction as to which the approach of the English Courts is suggested to have changed in recent years, at least compared to the attitude expressed on such matters in the not-too-distant past. The detail is important as a common plank of the reasoning in these cases, when concluding that the English Court does in theory have power to make the order in question in an appropriate case, is that this will be subject to the Court's discretion or in any event decision on the facts of the given case. In other words, the floodgates have not necessarily been thrown open, all that is being decided is that there is a gate at all. *Gorbachev* is an acute example of this.

5. A practical point to watch going forwards

23. The point of detail in the paragraph immediately above links to the practical point going forwards that it is suggested will be a key one to watch in coming years. Much of the European legislation (which typically originally took the form of a

convention) with which legal practitioners across a number of fields had become familiar over the past few decades as to when the English Court had jurisdiction has now been repealed. Whilst that has been so now for just over two years, with the repeal taking effect as of 1 January 2021, this is only starting to really feed through now, as new claims have been brought since January 2021 and have progressed through the Courts.

24. The further link between this practical point and the trend identified above is that what remains following the repeal of this European legislation is – at least for the most part – the historic approach under English Common law. By and large, this is more flexible (although, as the flip-side of the same coin, less predictable) than the European approach, and gives greater scope to the discretion or decision of the Court on the facts of any given case.
25. An obvious example of this is the repeal of the *Brussels Regulation* on jurisdiction and the recognition of foreign judgments in civil and commercial matters, and the re-introduction of the traditional English law *forum (non) conveniens* test from decisions such as *The Spiliada* [1987] A.C. 460 (UKHL). Another is the approach under the *Civil Jurisdiction and Judgments (Maintenance) Regulations 2011* as was the subject of the decision of the Supreme Court in *Villiers*.
26. The point is an important one first on an obvious practical level in that the law governing such issues of jurisdiction is now potentially quite different to what it was only a few years ago. Although the *forum (non) conveniens* test is well-established and never ceased to form a part of English law (having continued to be applied regularly in a number of contexts), many Courts, Judges and practitioners will have to re-familiarise themselves with its application.
27. Secondly, again linking back to the trend that we identified above, it will be interesting to see whether the switch back to this broader and more flexible *forum (non) conveniens* test (or similar) will affect the approach of the English Court to the scope of its jurisdiction in the first place. On one view, if it is the application of such a discretion (albeit under the narrower scope for this that typically applied under the European legislation) that has been giving the English Court comfort in recognising a broader (as opposed to narrower) scope of its jurisdiction in recent years, then any broader discretion should give it even more comfort. That might in turn lead to ever more relaxed attitudes to the scope of the Court's jurisdiction.
28. On the other hand, it was during the pre-European legislation (or convention) era of the *forum (non) conveniens* test that the English Court began to express itself in more cautious terms as to that jurisdiction being exorbitant. Query whether (a) the more restrictive approach under the European legislation (which tied the English Court's hands in some regards, as can be seen from the result in the

Supreme Court in *Villiers*) and (b) that a large number of other Courts had signed up to apply the precise same regime, is what caused the English Court to relax in its outlook. If so, query whether the above trend will now be thrown into reverse, with the English Court once again expressing itself in more cautious terms.

6. Conclusion

29. It is suggested that this will be a key practical trend to watch in the coming years in trusts and estates disputes. For an early example (for which the author is grateful to Lavinia Randall at Stewarts, who has written an article on the decision) see *Al Assam v. Tsouvelekakis* [2022] EWHC 451 (Ch) (March 2022), in which a *forum (non) conveniens* challenge to the jurisdiction of the English Court (in favour of the Courts of Cyprus) was dismissed; in a claim concerning (amongst other things) alleged breaches of fiduciary duty concerning a Cypriot trust.

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