

Which gateway? English Court of Appeal considers the scope and interplay of gateways for service out of the jurisdiction

Introduction

The English Court of Appeal recently handed down a judgement, in the case of *Eurasia Sports Limited v Aguad*¹, which could expand the scope of the “jurisdictional gateways” for service of proceedings out of the jurisdiction. The case is of relevance to parties who find themselves having to pursue multiple foreign defendants, and can found jurisdiction on the basis of a contract or tort cause of action against some, but not all, of those defendants.

Background

For litigants wishing to pursue counterparties based outside of the United Kingdom, they will first need to establish either that the English courts have jurisdiction to hear the claim on the basis of the Brussels/Lugano Regime, the Civil Jurisdiction and Judgments Act 1982 or the Hague Convention; or that there is some alternative way of serving the prospective defendant within the English jurisdiction, for example by serving that foreign principal’s agent within the jurisdiction. Failing that, the claimant litigant will require the Court’s permission to serve the defendant out of the jurisdiction (under CPR 6, Section IV), on the basis that (i) there is a serious issue to be tried; (ii) there is a “good arguable case” that each cause of action falls within one or more of the jurisdictional gateways set out in CPR Practice Direction 6B; and (iii) in all of the circumstances, the Court ought to exercise its discretion to permit service out of the jurisdiction, which it will only do if it is satisfied that England is the proper place to bring the claim².

The jurisdictional gateways enable the English courts to exercise jurisdiction over foreign defendants in circumstances where the subject matter of the dispute has a sufficient connection with England, such as where a remedy is sought against a person domiciled within the jurisdiction; where the claim relates wholly or principally to property within the jurisdiction; where the claim relates to a contract which, inter alia, is made in the jurisdiction, is governed by English law, or contains a term by which the parties submit to the jurisdiction of the English courts (the “contract gateway”); or in the context of claims in tort, where damage was sustained, or will be sustained, within the jurisdiction, or results from an act committed or likely to be committed within the jurisdiction (the “tort gateway”).

In addition to the contract and tort gateways, the two gateways relevant for present purposes, which are “complementary in their operation”, allow proceedings to be served out of the jurisdiction with the permission of the Court where:

- First, there is a “real issue” between the claimant and a defendant who has been or will be served, “which it is reasonable for the Court to try”, and the claimant wishes to serve the proceedings on another party “who is a necessary and proper party to that claim” (the “necessary and proper gateway”³); or
- Secondly, a claim is made against a defendant on the basis of another of the gateways, and “a further claim is made against the same defendant which arises out of the same or closely connected facts” (the relatively new “ancillary claim gateway”⁴).

¹ [2018] EWCA Civ 1742

² Per Lord Collins, in the Privy Council, in *AK Investments v Kyrgyz Mobil* [2017] UKPC 7

³ Contained in CPR Practice Direction 6B, paragraph 3.1(3)

⁴ Contained in CPR Practice Direction 6B, paragraph 4A, added on the recommendation of the Lord Chancellor’s Advisory Committee on Private International Law, and which came into effect from 1 October 2015.

The effect of the ancillary claim gateway is that, where a claimant has established jurisdiction for a cause of action against a defendant on the basis of, for example, the contract or tort gateways, the claimant will be able to introduce a second cause of action against that defendant provided that the facts relating to the second cause of action arise out of the same or closely connected facts.

The position is more complicated, however, where there are multiple defendants, and the claimant is only able to found jurisdiction for a cause of action against some, but not all, of those defendants, i.e. the claimant cannot bring all of the defendants within the contract or tort gateways. How does the claimant reach the defendant who is not a party to the contract or tort claim? This was the issue considered in *Eurasia Sports*, which Lord Justice Longmore said “*may well be the first appellate case to have considered the new 4A gateway*”.

The Eurasia Sports Limited v Aguad case

Eurasia Sports, which operates a betting agency, alleged that a number of defendants, of which Mr Aguad was one, all resident in Peru at the time of the events in question, conspired to defraud it. The present case involved Mr Aguad’s challenge before the Court of Appeal, as the sole appellant (despite being one of eleven defendants), of the jurisdiction of the English court to try the proceedings against him, following the first instance court’s rejection of his jurisdictional challenge.

Mr Aguad, who owned a casino in Lima, became a client of Eurasia Sports and was granted certain amounts of unsecured credit with which to gamble. Within the space of less than a month in late 2014, the amount owing on his account had increased to in excess of US\$2 million. Eurasia Sports’ claim against Mr Aguad was based in part, therefore, on his indebtedness. In addition, Eurasia Sports alleged that Mr Aguad was involved in a conspiracy to defraud it by virtue of his close links with certain of the other defendants. Those other defendants had, it was said, procured Eurasia Sports to provide online gambling services to various parties by falsely representing that money had been or was about to be transferred by way

of security, or alternatively that the gambling services had been secured by a cheque for US\$10 million. The cheque was drawn on an account which, it subsequently transpired, had insufficient funds to honour it. In short, therefore, Eurasia Sports had, it said, “*suffered loss and damage in the sum of US\$12,642,982.90, being the total of the amounts due and owing to [it] on the accounts of the First to Eleventh Defendants*”, which amounts were unsecured.

At first instance, Mr Justice Edis held that Eurasia Sports’ claims against Mr Aguad satisfied the three tests set out in CPR 6, Section IV, discussed above. With regard to the second of those tests regarding jurisdictional gateways, Edis J held that the conspiracy claim against Mr Aguad fell within the tort gateway on the basis that the damage was sustained in London; that the claim in debt against Mr Aguad was “*so closely bound up with the action against him and others in conspiracy*” that Mr Aguad was a “*necessary or proper party*” to that action; and that, in light of the admissibility of the tort claim, the indebtedness claim fell within the “*ancillary claim*” gateway. The key question on appeal, therefore, was whether the lower court had been correct in granting permission for a conspiracy claim to be served on a foreign defendant. Aguad contended that the tort gateway could not be invoked because damage had not been sustained within the English jurisdiction, and Edis J’s finding in respect of the necessary and proper party gateway was also therefore wrong.

Mr Aguad’s appeal was rejected, although the Court of Appeal overturned Edis J’s decision insofar as it related to the tort gateway. Edis J had concluded that the place of the damage was England on the basis that the Eurasia Sports had allowed bets to be made in England, in the belief that the risk arising from the lack of security for the credit facility was less than in fact it was. The Court of Appeal’s view, however, was that the credit line was “*merely prefatory to the sustaining of damage and does not itself constitute damage for the purposes of the tort gateway*”; it merely exposed Eurasia Sports to the risk of damage. Rather, the damage had in fact been felt in the place where the necessary funds to clear the debts was supposed to be received, which was in Malta. Edis J, the Court of

Appeal said, “*fell into error in holding that the conspiracy claim passed the tort gateway on the basis that the harm was felt in London*”. That did not determine the appeal in Mr Aguad’s favour, however, because of Eurasia Sports’ reliance on other gateways.

The Court of Appeal agreed with Edis J, however, that Mr Aguad was a necessary and proper party to the conspiracy claim, on the following basis. Eurasia Sports’ claims against the other defendants in respect of their betting accounts properly satisfied the contract gateway, because those contracts had been made in England. The conspiracy claims arose out of the same or closely related facts as those indebtedness claims, thereby satisfying the ancillary claim gateway test. The English courts therefore had jurisdiction to hear the conspiracy claim against Mr Aguad on the basis that he was a necessary and proper party to that claim, thereby satisfying the necessary and proper party gateway test. In those circumstances, Mr Aguad’s jurisdictional challenge was dismissed.

Key points to note

The ruling reflects a somewhat complex application of the gateway tests on jurisdiction. The Court of Appeal considered, and relied upon, the interplay of four of the gateways to found jurisdiction in respect of a conspiracy claim against a foreign defendant which might not have satisfied just one of the gateways.

It is possible that this decision will usher in a broader application of the rules on jurisdiction, and may reflect a growing willingness of the English courts to found jurisdiction in respect of claims and parties that they might not historically have done so.

If you have any questions or comments in relation to the above, please contact Alistair Graham or James Whitaker, or your usual Mayer Brown contact.

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