

TRUST LAW COMMITTEE

SERVICE OF TRUST CLAIMS OUT OF THE JURISDICTION:

WIDENING THE GATEWAYS

RESPONSE ON BEHALF OF THE CHANCERY BAR ASSOCIATION

Introduction

1. This is the response of the Chancery Bar Association (“**the ChBA**”) to the Trust Law Committee’s paper on service of trust claims out of the jurisdiction.
2. The ChBA is one of the longest-established Specialist Bar Associations and represents the interests of some 1,000 members handling the full breadth of Chancery work, both in London throughout the country and overseas. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.
3. The ChBA operates through a committee of some 23 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users’ Committee and various Bar Council committees.
4. This reply to the consultation by the Ministry of Justice on the Trust Law Committee’s paper has been produced by Christopher Tidmarsh QC and Richard Wilson, members of the ChBA who specialise in trust litigation conducted in the courts of England & Wales as well as other jurisdictions.

The ChBA's Position in Outline

5. The ChBA welcomes the Trust Law Committee's proposal to 'widen the gateways' to service of trust claims out of the jurisdiction.
6. The ChBA agrees with the Trust Law Committee's assessment (at paragraph 3 of its paper) of the advantages of broadening the right of parties to trust disputes to litigate trust disputes in England and Wales. Whilst the ChBA recognises that its view might be said to be coloured by the likelihood that its members will benefit financially if a greater amount of trust litigation takes place in England and Wales rather than in another forum, the reality is that members of the ChBA are frequently instructed to appear in the other common law jurisdictions where such disputes would otherwise take place.
7. Any widening of the jurisdiction of the High Court to hear trust claims might prompt two related criticisms: (1) that it will encourage 'forum shopping' by litigants and (2) that it widens an already exorbitant jurisdiction (that is, a jurisdiction going beyond what is recognised at common law). The ChBA does not consider that the second ground is a reason for failing to rationalise the present gateways. Further, the ChBA's view is that both of these criticisms can (and will) be dealt with by a sensible and proportionate application of the Appropriate Forum Test. As the Trust Law Committee has rightly commented (at paragraph 15: "*In practice, the Appropriate Forum Test represents a substantial hurdle to many claimants who wish to serve a claim form on a defendant resident outside the UK, even where the claim falls within one of the gateways in 6BPD.3.*")
8. In the view of the ChBA, the High Court is well used to applying the Appropriate Forum Test, and can be relied upon to ensure that

permission to serve out will only be given in those cases in which England is the appropriate forum. The ChBA therefore considers that existence of a safeguard (in the form of the Appropriate Forum Test) means that the relevant gateways may be sensibly widened without creating any significant problems of principle or practice.

The Proposed Amendments

6BPD.3(12)

9. We now turn to the specific amendments to 6BPD.3 and CPR 6.37 that have been suggested by the Trust Law Committee.

10. The first amendment suggested by the Trust Law Committee is the replacement of the existing sub-paragraph (12) of 6BPD.3 with the following provision:
“A claim is made for any remedy in relation to the trusts of a written instrument governed by the law of England”.

11. The ChBA considers that this would be a welcome change. The current provisions are (as the Trust Law Committee has observed) unnecessarily narrow. As a matter of principle, the English Courts are those best placed to determine questions of English Law, yet at present, the requirement in 6BPD.3 that the Defendant being served is the trustee means that a number of such claims may not be determined in England. For example, in addition to the case noted by the Trust Law Committee of a claim being brought by the Trustees, the requirement would prevent a claim against a protector being served out of the jurisdiction even where the trust is governed by English Law. An increasing number of trusts governed by English Law contain provision for the appointment of a protector or some similar office. It is hard to see how such a restriction can be justified. This amendment would bring the position into line with article 5.6 of the Judgments Regulation.

Express choice of jurisdiction

12. The ChBA considers it to be anomalous that in cases where the trust instrument purports to confer jurisdiction on the courts of England and Wales, the CPR should prevent proceedings being served out of the jurisdiction.

13. The ChBA therefore endorses the suggested extension of the gateways by the addition of provisions permitting service out of the jurisdiction where the trust instrument confers jurisdiction on the courts of England and Wales.

Further Extensions

14. As to the further extensions referred to at paragraph 18 of the Trust Law Committee's paper, the ChBA responds as follows:
 - (1) The ChBA considers that it would be appropriate for the gateway to be extended to a trustee resident within the jurisdiction regardless of the governing law or the location of the other necessary parties to that claim. In many cases litigating in England will be cheaper and more convenient. The Appropriate Forum Test will weed out those cases where it is not. We therefore consider that such an extension should be introduced.

 - (2) It is now common for trusts to hold assets in a number of jurisdictions. The ChBA believes that a gateway which requires *the whole* subject matter of the claim to be located in England and Wales is unnecessarily restrictive, and that service out should be permitted where the trust fund *includes* property within the jurisdiction. A widened gateway of this nature might conceivably enable a claimant to commence proceedings in England by virtue of a very small proportion of the trust property situated in the jurisdiction, but the proper application of the Appropriate Forum Test will ensure that only cases which the Court considers ought properly to be heard in England and Wales will be so heard.

Conclusion

15. Because the Appropriate Forum Test will enable the High Court to ensure that permission to serve out can be refused in proceedings which ought properly to be heard in a different forum, the Gateways can, in the view of the ChBA, be widened without any significant problems of principle or practice arising. Indeed the changes suggested by the Trust Law Committee are necessary in order to deal with some of the anomalies that currently exist in the rules for service out.

16. The ChBA therefore wholeheartedly endorses the changes suggested by the Trust Law Committee, together with those expressed to deserve serious consideration.

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