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Scenna v Persons Unknown – Extraterritorial Norwich Pharmacal and Bankers Trust orders

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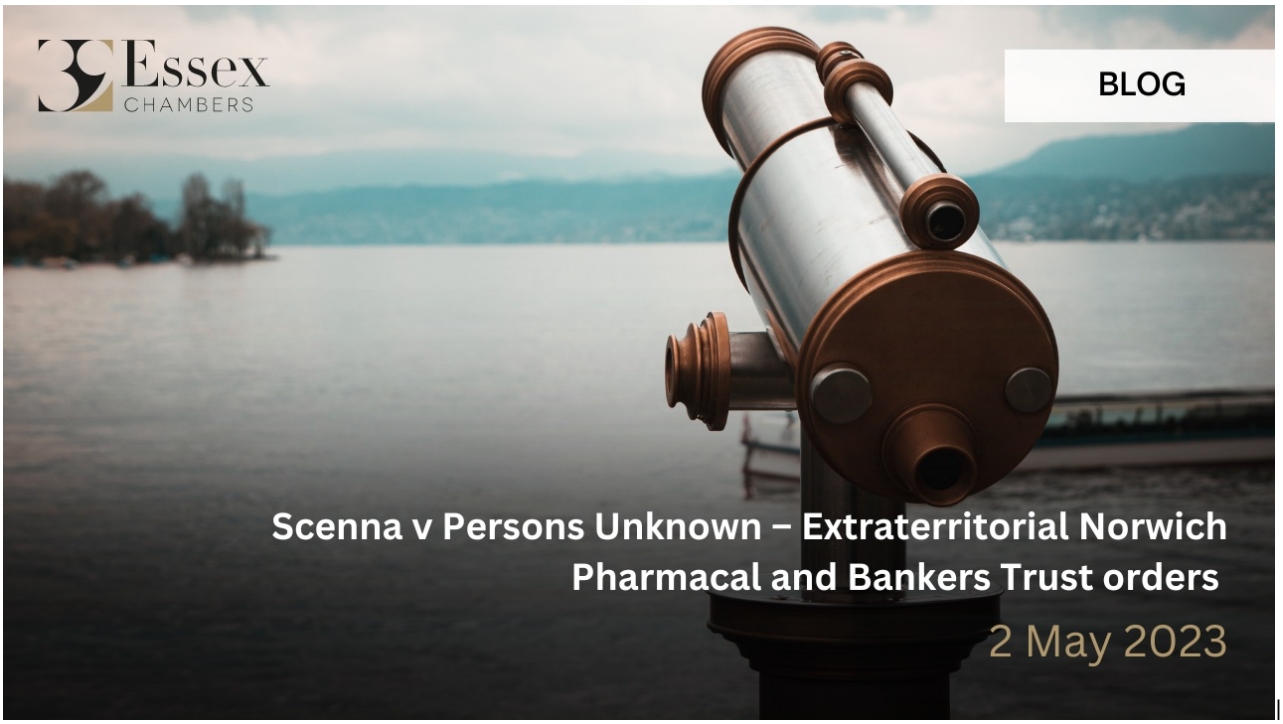

In October 2022, very substantial revisions to the gateways for service out of the jurisdiction under Practice Direction 6B, paragraph 3.1 entered into force in England and Wales. Perhaps the most prominent change was the introduction of a new gateway (25) dealing with service out of the jurisdiction of *Norwich Pharmacal, Bankers Trust* and other disclosure orders against (innocent) third parties. Together with Ashley Pratt, I considered the major implications of this new gateway in an article published in the Solicitors Journal on 25 October 2022. Our conclusion in those early days of the new gateway was that while the expansion of the gateways was a reform to be welcomed, it forms part of a wider shift in jurisdiction disputes whereby the heavy-lifting in both service out applications and responsive Part 11 jurisdiction or set aside challenges will now be done by the *forum conveniens* test and the applicable merits threshold for a cause of action or other relief (such as disclosure).

The English High Court (Chancery Division) has now handed down what appears to be the first considered judgment on the implications of the new gateway (25): *Scenna v Persons Unknown* [2023] EWHC 799 (Ch). That judgment appears to support our hypothesis.

In brief summary, James Pickering KC (sitting as a Deputy High Court Judge) decided to discharge the *Bankers Trust* orders and/or set aside the permission to serve out previously granted on an *ex parte* application against Australian banks said to have held funds connected to a cross-border fraud (the "**Australian Banks**"). Interestingly, the Judge conducted an analysis based both on the substantive

grounds for *Bankers Trust* orders and, alternatively, satisfaction of the requirements for permission to serve out of the jurisdiction. His conclusion was that the *Bankers Trust* order against the Australian Banks did not satisfy the requirements for such an order against a foreign bank, principally because of local law concerns and the lack of urgency in seeking such an order in England rather than Australia. He also concluded that even if one analysed the issue from the perspective of service out requirements, for the same reasons the claimants had failed to established that there was a *serious issue to be tried* applying the test in ***Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd*** [2011] UKPC 7; [2012] 1 WLR 1804 at [71], and also failed to show that England was the *forum conveniens*.

Background

In *Scenna*, the Claimants alleged that they were victims of a cross-border fraud. The Judge had granted *ex parte* worldwide freezing orders against D1-D6. The Australian Banks were D7-D8. A Hong Kong bank was D9. As against D7-D9, the Judge refused to grant any worldwide freezing orders but made certain disclosure orders, in particular *Bankers Trust* orders. There were also substantive claims in knowing receipt and unjust enrichment against D7-D9.

The Australian Banks applied to challenge the *Bankers Trust* orders against them, and also challenged the jurisdiction of the English courts in respect of the substantive claims.

Approach to *Bankers Trust* orders against foreign banks

The majority of the judgment in *Scenna* analyses the requirements for the grant of *Bankers Trust* orders: [22]-[45]. In addition, the Judge also considered whether he should set aside service out of these disclosure orders: [46]-[51]. He described these as two alternative approaches. In the event, they both led to the same result.

As to satisfaction of the requirements for the grant of the *Bankers Trust* orders, the Judge acknowledged that *"where the respondent to the application is a foreign bank, additional and special considerations apply"*: [24]. In doing so, he followed the decision of Hoffmann J in ***Mackinnon v Donaldson, Lufkin & Jenrette Corp*** [1986] Ch 482. The Judge concluded at [25] that the effect of this decision was that the general requirements for a *Bankers Trust* order, summarised in ***Kyriakou v Christie Manson and Woods Ltd*** [2017] EWHC 487 (QB), had to be taken into account but that *"because of the strong likelihood that compliance with such an order would put the [foreign] bank at risk of being in breach of local laws or regulations, ultimately an order should be granted only in exceptional circumstances."*

Factual application in *Scenna*

The Australian Banks essentially argued that:

1. Compliance with the English *Bankers Trust* order would put them in breach of Australian law. They relied on expert evidence to that effect.
2. There is nothing to stop the claimants from applying to the Australian courts where a similar procedure for disclosure relief is available. Indeed, the Australian Banks had both confirmed that if the claimants were to make such an application to the Australian courts, neither would oppose the making of a disclosure order and (unsurprisingly) both would comply with any such order made.
3. Given the above, the only potential exceptional circumstance which would justify the keeping of the disclosure order was if this was a "hot pursuit" case. They argued this was not such a case and that there had been considerable delay on the Claimants' part.

Local law issues:

The Judge considered the expert evidence on behalf of the Banks and accepted that there were two local law issues. First, common law liability for breach of the implied duty of confidentiality owed by a bank, as recognised in ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461. Secondly, potential breach of the Privacy Act 1988, an Australian statute which requires certain entities (including banks) not to act or engage in a practice that breaches an "Australian Privacy Principle". The Judge was satisfied that an English disclosure order would not provide an exception to either of these local law

disclosure prohibitions: [27]-[32].

Powers to grant equivalent disclosure in Australia:

The Judge also accepted, as was common ground, that the Australian courts have powers to grant disclosure orders similar to those granted in England and noted that the Australian Banks would not oppose such an application in Australia and both would comply with any order made. The Judge questioned the claimants' counsel as to why that course had not been taken. He was not satisfied that the reluctance to have proceedings in multiple jurisdictions (England, Australia and, possibly, Hong Kong) constituted a sufficiently good reason (without more) not to have made the disclosure application in Australia: [34]-[35]. However, it is notable that the Judge considered this all went to the balancing exercise he was required to conduct, rather than a hard-edged criterion for seeking a disclosure order against a foreign bank in England.

Lack of urgency:

Lastly, the Judge considered the urgency of the disclosure relief sought. He concluded that while the claimants cannot be criticised for delay in fraud case of this kind (the fraud had in March/April 2022 and the freezing and disclosure applications were made in October 2022), this was not a "hot pursuit" case. The Judge described it as, at best, a "luke warm" pursuit case: [36]-[38]. Again, notably, the Judge made clear that "hot pursuit" is not a separate requirement for a *Bankers Trust* order of this kind, but rather again formed part of the balancing exercise.

In an important passage, at [39], the Judge stated: *"In the context of a jurisdiction where a disclosure order will only be made against a foreign bank in exceptional circumstances, one example of where exceptional circumstances might arise is where there is an urgent necessity."* This he considered could justify the infringement of sovereignty of making a disclosure order against a foreign bank.

Conclusions in *Scenna:*

On the facts, the Judge concluded that on the balancing exercise the following matters stand out:

1. *"If the disclosure order stays in place, there is, as I have found, a real risk that the Banks will be in breach of Australian law and thereby be exposed to financial and/or reputational damage."* ([42])
2. *"[T]here is an alternative (and broadly equivalent) remedy in Australia which the Banks have indicated they would not oppose and with which they would comply."* ([43])
3. The claimants had failed to show any exceptional circumstances, such as "hot pursuit" (extreme urgency) or that the claimants did not know the jurisdiction in which the documents relevant to the fraud were held. ([44])

Accordingly, the Judge decided to discharge the *Bankers Trust* orders against the Australian Banks. As noted above, he considered the same result was reached by reference to the permission to serve out test, given the *serious issue to be tried* and *forum conveniens* requirements, and also decided to set aside the grant of permission to serve out. As to *forum conveniens*, he concluded (at [50]): *"The proceedings concern the disclosure by an Australian bank of information in Australia where a key issue is the application of Australian law (and in particular the Tournier principle and the operation of the PA 1988). On no basis, so it seems to me, can it be said that England is clearly or distinctly the most appropriate forum."*

Comment

This is clearly a significant decision in demonstrating that the substantive requirements for relief, including disclosure in the form of *Bankers Trust* (and, by parity of reasoning, *Norwich Pharmacal* and other third party disclosure orders), are not altered by the new gateway (25). The principal effect of the new gateway (and others introduced in October 2022) is to avoid arid disputes about whether the English court has the power or jurisdiction to serve out. It does not revolutionise the underlying jurisdiction of the English courts on the substance. That said, by providing for a new gateway for disclosure on foreign banks, corporate services providers and others, it is likely to be easier than before to obtain such extraterritorial disclosure orders by removing a key practical or procedural impediment.

Further, the *Scenna* decision does not preclude such disclosure orders being sought and granted in the cyber-fraud context where urgency is usually a given or in other "hot pursuit" cases. The Judge also acknowledged cases where the location of documents is unclear as a further category in which the position may well be different. As such, the new gateway (25) continues to be a significant reform that goes hand in hand with other procedural innovations in this context, including the grant of alternative service under CPR 6.15 and/or CPR 6.27 by WhatsApp, Facebook, text message and on crypto platform messenger services.

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