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FRAUDSTERS BEWARE: THIRD-PARTY DISCLOSURE ORDERS ARE ABOUT TO BECOME EASIER TO OBTAIN

A new 'jurisdictional gateway' underlines the willingness of the English legal system to support victims of fraud, therefore ensuring it remains a jurisdiction of choice for these claims.

From 1 October 2022, in order to identify wrongdoers or the whereabouts of assets, claimants will be able to bring disclosure applications against innocent third-parties based outside the jurisdiction without, as is currently the case, first having to commence an action against them.

What are Third Party Disclosure Orders?

English law has developed processes enabling parties suffering a loss but unable to identify the wrongdoers or location of the assets to obtain this evidence from innocent third-parties caught up in the fraud or similar wrongdoing via disclosure orders often referred to as i) *Norwich Pharmacal* (**NPO**); and ii) *Bankers Trust Orders* (**BTO**).

The NPO was created in the case of *Norwich Pharmacal v Commissioners of Customs & Excise* [1974]¹ and requires innocent third-parties, who are caught up in a fraud or wrongdoing to identify the wrongdoer, and / or the whereabouts of the target assets.

A form of NPO is the BTO, which arose from the *Bankers Trust Company v Shapira anors* [1980]² case. BTOs are limited to fraud claims and require innocent third-party banks to disclose documents in order to assist claimants in tracing assets or bringing claims.

In order to obtain these orders it is necessary to show that:

- a wrong has been carried out;
- the disclosure order is required in order to enable proceedings to be brought or continued; and
- the respondent is either the wrongdoer or able to identify the wrongdoer, or the whereabouts of the assets.

Why the change and why now?

It is recognised that third party disclosure orders have had limited success where third-parties are located outside of England and Wales because none of the 'jurisdictional gateways' in the Civil Procedural Rules (**CPR**) apply and therefore the courts do not currently have jurisdiction to make these orders.³

Where it is not possible to use the NPO or BTO procedures parties are left with few options but to commence an action against the innocent third-party in order to obtain this information, with the associated time and cost involved.

The increase of global digital-asset fraud, e.g. crypto currency frauds, has led to a keener focus on the gap in the 'jurisdictional gateways', which it is recognised is a growing obstacle preventing claimants from identifying the wrongdoer and commencing proceedings against them.

¹ UKHL 6

² 1 WLR 1274

³ See the HFw case of *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2016]

This issue has been resolved by the creation of a new 'gateway'⁴ enabling claimants to serve a claim form out of the jurisdiction, with the permission of the court. The new gateway can be used:

1. to identify information regarding:
 - the identity of a potential defendant; or
 - what has become of the claimant's property
2. where the information is required for the purposes of proceedings commenced (or which, subject to the information received, are intended to be commenced) in the English courts.

In addition to the new 'gateway', it will still be necessary to show that England is the proper place to bring the claim, that there is a serious issue to be tried and the claim has a reasonable prospect of success.

NPO and BTO considerations

Those considering NPO and BTO applications on non-parties based out of the jurisdiction should have in mind the following, namely that:

- the change supports claimants seeking redress against fraudsters, but that these applications remain highly strategic;
- permission of the court is still required, and the new 'gateway' test and jurisdiction requirements must be satisfied to show that the claim falls within one of a number of categories or 'jurisdictional gateways';
- it may be possible to obtain the evidence another way, for example via a disclosure application under the Pre-action Protocols, or even using GDPR;
- the courts are reluctant to award third-party disclosure orders in all but the most appropriate of cases: independent data shows that the courts award them only about 50% of the time;⁵ and
- claimants should be aware of the potential cost consequences that may follow any misuse of the process e.g. by seeking to use them as a 'fishing' exercise.

Conclusion

From 1 October 2022, identifying wrongdoers and the location of assets hidden behind jurisdictional barriers is now an achievable goal. However, and as set out above, there are still challenges to overcome in obtaining third-party disclosure orders.

That said, this is an exciting development, which shows the English legal system is ready and willing to keep pace with the realities of a globalised digitised world.

For more information, please contact the authors of this alert



DAMIAN HONEY

Partner, London

T +44 (0)20 7264 8354

E damian.honey@hfw.com



ANDREW WILLIAMS

Partner, London

T +44 (0)20 7264 8364

E andrew.williams@hfw.com



NICOLA GARE

Knowledge Counsel (Dispute Resolution, London)

T +44 (0)20 7264 8158

E nicola.gare@hfw.com

Additional research undertaken by Nicholas Smith, Trainee Solicitor

⁴ Paragraph 3.1(25) of CPR PD6B

⁵ Solomonik data as at 15 September 2022