Alternative methods of service and jurisdictional issues (Goshawk Aviation Ltd v Terra Aviation Network)

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Dispute Resolution analysis: This case provides a useful summary of the guiding principles in respect of an application for an alternative method of service pursuant to CPR 6.15. It also considers the added complexities in respect of a claim in which service is required to be effected outside of the jurisdiction. It makes clear that there is a distinction when considering alternative service between countries which are party to the 1965 Hague Service Convention or other bilateral treaties, and those which are not. It further provides guidance in respect of the various factors which a court will take into consideration when weighing up what amounts to a 'good reason' to allow for alternative service. In this instance, there was a good reason to permit alternative service. The defendants were fully aware of the claims against them and had a legal team fully up to speed with the litigation as a whole. It was desirable in the interests of justice for all claims to advance together, so far as possible, and not to be unduly delayed. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Goshawk Aviation Ltd and other companies v Terra Aviation Network SAS and other companies [2021] EWHC 1029 (Comm)

What are the practical implications of this case?

This case gives a helpful overview of the guiding principles in respect of an application for service outside of the jurisdiction and by alternative means in general.

Consideration will first need to be had in respect of whether the country in which service is intended to take effect is a party to the Hague Service Convention or other bilateral treaty. Where such a convention or treaty does not apply, an alternative service order does not run the risk of subverting the provisions of any such treaty or convention. In a case of that kind, the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought. It should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended on their own facts. Critical factors are also whether or not a defendant has learned of the existence and content of a claim form (although that without more cannot constitute a good reason) and delay may well be an important consideration.

Where there is a good reason for the making of such an order, parties seeking to defend such applications should do so cautiously, if the primary reason for doing so is an intention to simply delay litigation. In the instant case, while it was said that the coronavirus (COVID-19) pandemic had an adverse effect on airlines such as the defendants, it could be assumed to have had an equally adverse effect on companies such as the claimants who leased planes. Costs consequences may well follow by way of an unreasonable objection to such an application.

What was the background?

The first claimant was an aircraft leasing and financing company, and the second to ninth claimants (collectively 'the claimants') were special purpose vehicles that each owned an aircraft which was the subject of the claim. The claimants claimed sums said to be due in respect of aircraft which were the subject of leases between one of the claimants and one of the defendants, either under the leases themselves or under guarantees /indemnities/notices of assignment, or by way of a side letter dated 14 November 2019 (the Side Letter). The claimants asserted that the defendants had use of their planes for over a year without payment.

Save for the side letter, all of the relevant contractual documents contained express provisions permitting service of the claims on (variously) two process agents in England. Such service was purportedly effected on those agents in August 2020. The second defendant (Lion) and the third defendant (Thai Lion) applied on 1 October 2020 to set aside service on them. The basis of that application was that, although the majority of the claims against Thai Lion and Lion would be served

under the service agent provisions, the claims under the side letter could not, and that CPR 6.11 permits a claim form to be served on a proceed agent only where all of the claims in it are covered by the relevant agreement. This application was later conceded by the claimants, and only remained before the court in terms of the question of costs.

In the meantime, the claimants had sought to serve the solicitors acting for Lion and Thai Lion (to avoid the need for a formal application), but this invitation was rejected. Accordingly, they applied for permission to serve the solicitors acting for Lion and Thai Lion by alternative means and, in the alternative, for permission to serve outside of the jurisdiction and to extent the time for service. Lion would require to be served in Indonesia and Thai Lion in Thailand (as necessary). By this point in time, there were also conciliation proceedings underway involving some of the parties in the Paris Commercial Court.

Pursuant to an order of Mr Justice Moulder dated 24 November 2021 (the Moulder order) the claimants were permitted to serve Lion and Thai Lion by an alternative method, namely, the service by email on their solicitors. They had sought permission to serve out of the jurisdiction in the alternative to alternative service and, therefore, service out of the jurisdiction did not form part of the Moulder order.

Lion and Thai Lion contended that the claimants should not have been permitted to serve the claim form on them by an alternative method, and that the claimants obtained the Moulder order through material non-disclosure. The claimants sought an order varying the Moulder order to include permission to serve out of the jurisdiction and (if necessary) declaring the steps already taken pursuant to the Moulder order constituted good service.

What did the court decide?

The judge considered the various authorities in cases such as this, which drew a distinction when considering service in respect of countries who were parties to the Hague Service Convention or some other bilateral treaty, and those which were not. Where a convention or treaty did not apply, an alternative service order does not run the risk of subverting the provisions of any such treaty or convention, and the key when considering service by an alternative method under CPR 6.15, whether prospectively or retrospectively, is that the court should simply ask itself whether there is a ‘good reason’ to allow the same. Factors to weigh up in that regard include (but are not limited to) whether the defendant had learned of the existence and content of the claim form, delay, any limitation issues, and whether or not any conduct of the claimants could be considered as an abuse of process.

In the present case, the judge considered that, there was at the time of the Moulder order and the date of hearing, good reason to permit alternative service. Lion and Thai Lion were fully aware of the claims against them and had a legal team available to them who were fully up to speed on the litigation as a whole. There was no dispute that the claimants would be entitled to permission to serve outside of the jurisdiction, as there were connections in commercial terms between the claims and parties involved in the litigation as a whole. It was desirable and in the interests of justice for all of the claims to advance together, so far as possible, and to not be unduly delayed. There was significant risk that, absent an order for alternative service, significant delays would be experienced in serving Lion and Thai Lion, which would lead to fragmentation and further delay.

The question then arose as to whether the conclusion on alternative service meant that the Moulder order could simply stand, or whether the absence of permission to serve out meant that Moulder J lacked the power to make an order for alternative service. As Lion and Thai Lion put it, the claimants in the present case asked for permission to serve outside of the jurisdiction in the alternative, and Moulder J gave them their (defective) first choice.

The judge accepted the submission that the wording of CPR 6.37(5)(b)(i) indicates that the power to give directions about service arises only where the court has given permission to serve out. Moulder J did not have power to make the alternative service order. Further, it appeared that the court could not confer such jurisdiction retrospectively by granting later permission to serve out.

However, the court could (a) grant permission to serve out at the later hearing and (b) make an alternative order to the effect that the steps taken to effect service in light of the Moulder order should constitute good service, subject to further provision about the impact of timing and further steps in the litigation. Accordingly, the judge took the provisional view that it was appropriate to make such an order. The parties were invited to make any further submissions as to the appropriate relief to be granted in light of the judgment.

Case details

- Court: Queen's Bench Division (Commercial Court)
- Judge: Mr Justice Henshaw
- Date of judgment: 15 April 2021

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