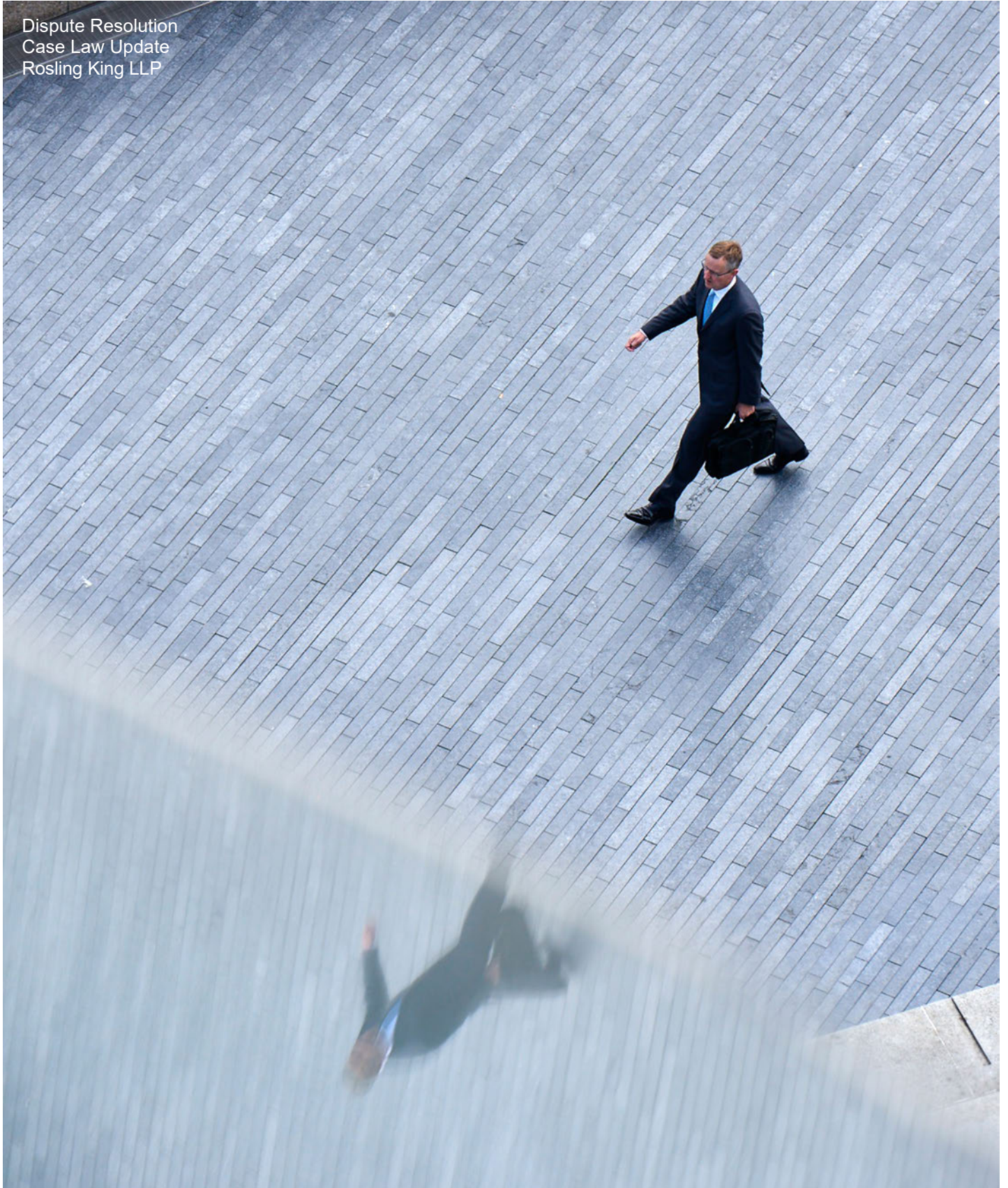


Dispute Resolution
Case Law Update
Rosling King LLP



October 2022
Page 2

Background

The Court of Appeal has clarified that it is possible for a non-party disclosure order to be made against persons outside England of Wales under section 34 of the Senior Courts Act 1981 and CPR 31.17, and that the Court has jurisdiction to permit the application to be served out of the jurisdiction under CPR PD6B para 3.1 Gateway 20.

The underlying claim related to how two Cypriot trusts had supported the Defendant. English solicitors had been engaged by the trustees and they held electronic copies of documents that the Claimant was seeking disclosure of. The Claimant applied for a non-party disclosure order against the English solicitors, who retorted that an order could not be made against them as they held the documents on behalf of the trustees. The Claimant therefore joined the Cypriot trustees to the application and requested permission to serve outside of the jurisdiction pursuant to CPR PD6B para 3.1 Gateway 20 and by alternative means pursuant to CPR 6.15, which was granted at first instance.

First Appeal

The trustees appealed to Jacobs J sitting in the High Court to set aside the order, raising the following grounds:

- The Court did not have the power to order non-party disclosure against a party out of the jurisdiction under Gateway 20 as that only applied where a claim had been brought;
- If there was such a power, the Court was wrong to exercise its discretion in permitting service out of the jurisdiction as the correct procedure was by means of the letter of request regime under the Hague Evidence Convention (as explained by Cockerill J in *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm)).
- That alternative service should not have been allowed and the Claimant ought instead to have been required to serve the application via the Hague Service Convention.

The High Court rejected the trustees' arguments and refused to set aside the order.

Court of Appeal Judgment

The trustees appealed to the Court of Appeal. The issues on appeal were:

- Jurisdiction: Whether the Court could make an order for disclosure of documents against a third party based outside of England and Wales.
- Discretion: Whether the judge was wrong to exercise the Court's discretion and permit service outside of the jurisdiction.
- Service: Whether the judge had erred by permitting service by alternative means.

The appeal was dismissed, for the following reasons:

Jurisdiction

The Court of Appeal had to consider whether an application for non-party disclosure was a “claim” for the purposes of Gateway 20. Gateway 20 allows the Court to permit service outside of the jurisdiction where a claim was being made under an enactment, which allowed proceedings to be brought. Agreeing with the decision in the lower court, the Court of Appeal held that the broad definition of the word “claim” in CPR 6.2 included applications made before proceedings had started. A “claim” meant a claim to enforce a substantive right rather than a procedural right, and the application for a non-party disclosure order under the Senior Courts Act 1981 (the “**Act**”) was therefore a “claim” and constituted “proceedings” for the purposes of Gateway 20.

The Court gave consideration to the longstanding presumption in English law that legislation is not intended to have an extra-territorial effect. The Defendants argued that this principle applied in the circumstances where the non-party was based abroad. However, an important factor for the Court was that the documents in the instant case were held in England, despite the fact that the trustees were located outside of the jurisdiction. Accordingly, the Court held that the territoriality principle had little or no application as requiring the production of documents that were held in England would not interfere with the sovereignty of another state. Section 34 of the Act allowed an application for the production of documents held within the jurisdiction by a non-party based outside of the jurisdiction, and the Court had jurisdiction to make the order and to permit service under Gateway 20.

Discretion

It was acknowledged by the Court that, normally, applications against non-parties outside of the jurisdiction should be made using the letter of request regime. The immediate case could however be distinguished due to a number of factors: (i) the documents were held within the jurisdiction (ii) some of the relevant transactions had taken place within the jurisdiction (iii) English solicitors had been engaged (iv) there were proceedings against those English solicitors under section 34 of the Act and CPR 31.17 that it would be convenient to determine with the trustees before the Court. Accordingly, the Court of Appeal held that the High Court’s exercise of discretion was correct in this case.

Service

CPR 6.15 and the Hague Convention (to which Cyprus is a signatory) require the Court to be satisfied that there is a “good reason” for permitting service by alternative means. The Court of Appeal held that the outstanding application for non-party disclosure against the English solicitors, and the need for a quick determination given the imminent trial date, constituted good reasons and therefore dismissed the appeal.

Impact

The Court of Appeal’s decision provides some welcome clarification of the interpretation of the

October 2022
Page 4

words “claim” and “proceedings” when applied to applications for non-party disclosure orders. Whilst decisions on non-party disclosure applications will be still be highly fact sensitive, it has been clarified that the letter of request regime is not exclusive and that there is scope for other means of obtaining disclosure of documents from non-parties.

Non-parties based outside of the jurisdiction should be mindful of where documents belonging to them are held. By sending documents to solicitors based in England, the Cypriot trustees had subjected the documents to the jurisdiction of the courts of England and Wales and accepted the risk of their being subject to production.

Should you wish to discuss this in more detail, please do not hesitate to contact [Kate Rigby](#), or the Partner with whom you usually deal.