Navigating International Jurisdiction in Fraud Cases: Scenna v Persons Unknown and Its Implications

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Introduction

The introduction of a new jurisdictional gateway into the UK Civil Procedure Rules (CPR) in October 2022 has attracted significant attention from practitioners involved in cross-border fraud disputes. The new gateway, provided under CPR PD6B, para 3.1(25), allows parties to obtain 'Norwich Pharmacal' relief from foreign non-parties, significantly expediting the process of obtaining evidence from overseas parties in comparison to older, more cumbersome mechanisms such as the Hague Evidence Convention. However, a recent High Court decision, Scenna v Persons Unknown, has demonstrated that the new gateway may not be the panacea it was initially perceived to be.

The New Jurisdictional Gateway

Purpose and Scope

The new gateway under CPR PD6B, para 3.1(25) was introduced to address the challenges faced by victims of cross-border fraud in obtaining information from non-parties based in other jurisdictions. The gateway permits applications for disclosure orders to be served on foreign non-parties for the purposes of identifying a defendant or establishing the whereabouts of the claimant's property.

Benefits for Practitioners

The new gateway has been widely welcomed by practitioners in the field of fraud disputes with a cross-border element. The key advantage of the new gateway is its speed and efficiency in obtaining evidence from foreign parties, especially when compared to the more time-consuming and complex processes under the Hague Evidence Convention, or mutual legal assistance treaties.

The High Court Decision in Scenna v Persons Unknown

Background and Facts

In Scenna v Persons Unknown, the claimants, a Canadian resident and his Ontario-registered company, were victims of an alleged fraud. The first to third defendants, the alleged fraudsters, persuaded the claimants to make various payments totaling around US$2.9 million to accounts held at banks in Hong Kong and Australia.

The claimants sought disclosure orders against two Australian banks to obtain information needed to establish the whereabouts of their monies. The court granted the disclosure orders under the new jurisdictional gateway, but the banks argued that complying with these orders would put them in breach of their local laws.

The Court’s Ruling

The High Court ultimately set aside the disclosure orders against the Australian banks, stating that such orders should only be allowed in exceptional circumstances. The court reasoned that the risk of foreign banks breaching their local laws when complying with disclosure orders outweighed the benefits of the new jurisdictional gateway. In the Scenna case, the court characterized the pursuit as “luke warm” rather than a “hot pursuit,” and thus determined that the appropriate course of action was for the claimants to obtain a

disclosure order from the Australian courts.

Implications of the Scenna Decision

Limitations of the New Jurisdictional Gateway

The High Court's decision in Scenna highlights the limitations of the new jurisdictional gateway, which may not be the 'magic bullet' practitioners initially hoped for. While the gateway has streamlined the process of obtaining evidence from foreign parties, it is crucial for parties and practitioners to be aware of the potential legal risks and obstacles involved in obtaining disclosure orders against foreign non-parties, particularly financial institutions.

Balancing Interests and Compliance

The Scenna decision underscores the importance of striking a balance between the interests of victims of cross-border fraud and the need for foreign non-parties to comply with their local laws. Practitioners should carefully assess the likelihood of foreign non-parties being able to comply with disclosure orders without breaching local laws before pursuing such orders under the new gateway.

Utilizing Common Law Courts Worldwide

Common law courts in various jurisdictions, such as Singapore, Dubai International Financial Centre (DIFC), Abu Dhabi Global Market (ADGM), Canada, Australia, and others, can consider Mareva injunctions, Norwich Pharmacal orders, and Anton Piller orders. Whether a court has the authority to grant these orders depends on the rules of the jurisdiction and the nexus between the parties and the court.

In some jurisdictions, such as the DIFC and ADGM, the courts can grant these orders even if the parties have no direct nexus to the court's jurisdiction, provided that there are sufficient grounds to justify the exercise of jurisdiction. In

other jurisdictions, such as Canada and Australia, the courts may require a more direct connection between the parties or the dispute and the jurisdiction to grant these orders.

A Mareva injunction is a worldwide freezing and asset disclosure order. It extends to all a defendant’s assets worldwide, limiting the defendant from utilizing those assets except for regulatory purposes (i.e., paying employment salaries) unless consent is granted by the plaintiff.

Norwich orders – or Norwich Pharmacal orders – are injunctive orders obtained against an innocent third party in order to identify a wrongdoer or details related to a potential wrongdoer. A Norwich order compels an innocent third party (such as a bank) to disclose relevant information to a plaintiff/applicant.

Anton Piller orders, also known as search orders, are a legal remedy granted by common law courts to preserve evidence that may be at risk of destruction or concealment. These orders permit the applicant to enter the defendant’s premises to search, inspect, and seize relevant evidence, often without prior notice.

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