Unnatural justice

Andrew Hearn and Matthew Magee review a recent decision on service of proceedings out of the jurisdiction where England is not the natural forum

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'There is a need for cogent evidence if the plaintiff is going to argue that justice cannot be achieved in the natural forum. Allegations that impugn the integrity of the institutions of a friendly foreign state must be distinctly alleged. However, the court is not precluded by comity from considering them in a proper case.'

Arguments about whether the English courts are the right forum for the hearing of a claim can be of great tactical importance. However, they become critical in cases where the claimant alleges that it would not obtain a fair trial in an alternative jurisdiction. The Court of Appeal has recently had to consider the correct approach to such arguments.

To obtain permission under the CPR to serve English proceedings on a defendant who is out of the jurisdiction, it is necessary to establish that:

- one of the jurisdictional gateways set out in CPR 6BPD 3.1 applies;
- there is a serious issue to be tried; and
- England is the proper forum.

'Swinging on a gate', by Andrew Hearn and Edward Allen (*CLJ*20, July/August 2008, p11) considered the decision of Clarke J in *Cherney v Deripaska* [2008]. That decision was appealed. This article considers:

- the Court of Appeal's general attitude to appeals from judgments on service out issues;
- the correct approach on applications for permission to serve proceedings out of the jurisdiction where England is not the natural forum for the claim;
- the requisite standard of evidence where a party wants to establish that it would not receive a fair trial in another jurisdiction; and
- whether the decision will open the floodgates to large numbers of claims being heard in England even though England is not their natural forum.

Original decision

In July 2008 Clarke J gave permission for Michael Cherney to serve his claim form out of the jurisdiction on Oleg Deripaska, a wealthy and prominent Russian businessman. In his claim, Cherney sought a declaration, among other matters, that pursuant to a written agreement Deripaska held 20% and 13.2% of the shares, respectively, in two Russian aluminium companies, Rusal and United Company Rusal, on trust for Cherney. Deripaska denied that the relevant agreement was ever entered into, but it was common ground that if the agreement was made as alleged it was made in England.

The judge found that, on the evidence for the purposes of the application, Cherney had much the better of the argument and that, therefore, a jurisdictional gateway had been established (ie that the claim related to a contract made within the jurisdiction). The judge considered that there was a serious issue to be tried, so the remaining issue was whether England was the proper forum.

The judge considered that the natural forum for the litigation was Russia, not least because the case concerns interests in a major part of the Russian aluminium industry. However, he nevertheless held England to be the appropriate forum, given the risks inherent in a trial in Russia, which, he accepted, were that Cherney would face an increased risk of assassination, that he would face arrest on trumped-up charges, and that he would not receive a fair trial. These, the judge found, were sufficient to make England the forum in which the case could most suitably be

tried in the interests of both parties and the ends of justice.

Deripaska sought to challenge this decision on appeal.

Court's attitude to appeals from service out decisions

The Court of Appeal made clear that appeals from service out decisions should be rare, and cited with approval Lord Templeman's comments in *Spiliada Maritime Corp v Cansulex Ltd* [1987]:

> In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters... I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal shall be rare and the appellate court should be slow to interfere.

As Waller LJ commented in the *Cherney* appeal, the evaluation of evidence is very much the province of the judge exercising discretion, and it is not the function of the Court of Appeal to go through the whole exercise again unless it could be shown that the judge had misdirected himself. Similarly, Sir John Chadwick said:

> ... it is not for this court to reassess the weight to be given to the matters which the judge was entitled to take into account in exercising his own discretion.

Deripaska, however, sought to go further, and argued that the judge had misapplied the *Spiliada* test and did not have sufficiently cogent evidence on which to base his decision.

Natural and appropriate forum

As recognised in *Spiliada*, in applications both to serve out and stay proceedings, the task of the court is to identify the proper place to bring the claim: the place where the case can be tried most suitably for the interests of all parties and the ends of justice.

Spiliada identified a two-stage test for answering that question, but both stages are aspects of this same fundamental question. The common understanding of this two-stage process is reflected in the notes to the *White Book 2010* (see pp241-2) under CPR 6.37.15). The court first considers what is the 'natural forum', namely that with which the action has the most real and substantial connection. The second stage is that if England is not the natural forum permission will not be granted unless:

> ... there are circumstances by reason of which justice requires that permission should nevertheless be granted... one such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction.

Clarke J had applied this conventional two-stage test:

> In a service out case the first stage is for the claimant to show that England is clearly the more appropriate forum for the trial than any other available foreign forum and, hence, the 'natural' forum. Even if England is not the natural forum, the claimant may establish – the second stage – that substantial justice will or may not be done in the natural forum so that justice requires that the case be tried in England. If he does so then the case cannot be tried there more suitably in the interests of the parties and for the ends of justice, and England will be the proper place.

It is conventional to describe the answer to the first-stage investigation as the 'natural forum' and the ultimate answer as to the right forum, following consideration of the second-stage issues, as the 'appropriate forum' (which may or may not be the same as the 'natural forum').

Deripaska's arguments

Deripaska submitted that this two-stage process was not applicable in a service out case where the court found that England was not the natural forum. He argued that once it was established that England was not the natural forum, that was the end of the matter, and the court had no business going into questions such as whether a fair trial could be obtained in Russia. Alternatively, it could only do so in the most exceptional circumstances, such as where the natural forum was simply unavailable (for example if the system of law and order in a country had broken down) and there was a strong English interest in the claim.

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In *Spiliada* Lord Goff discussed how the principle of *forum non conveniens* was to be applied in stay cases and in service out cases. Although Lord Goff thought that the question of both cases was essentially the same, namely to identify the forum which serves the interest of all parties for the ends of justice, he pointed to some distinctions between stay cases and service out cases, and concluded in respect of service out applications:

Key points

- Appeals from the exercise of the judge's discretion on service out applications will be rare.
- England can be the appropriate forum to try a claim even if it is not the natural forum.
- Cogent evidence will be required before the court will find that there is a real risk that a claimant cannot obtain justice in another jurisdiction. However, the court, in assessing the evidence, is assessing questions of risk, not conducting a trial on the balance of probabilities about what will happen in the future.

> The effect is not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but he has to show that this is clearly so. In other words the burden is quite simply the obverse of that applicable where a stay is sought in proceedings started in this country as of right.

Deripaska argued that the reference to 'appropriate forum' in this passage was used by Lord Goff in the sense of 'natural forum'. Accordingly, he submitted that in a stay case, once the defendant had failed to show that another jurisdiction was the 'natural forum', that was the end of the matter and no second stage was necessary. The 'obverse' of that, he claimed, was that a conclusion that England was not clearly the natural forum concludes the argument in a service out case. This was so even if it could be demonstrated that justice could not be achieved in the 'natural forum'.

This argument was rejected by the Court of Appeal. As Waller LJ observed, if this argument was right it would mean that the object of identifying the forum in which the case should be tried for the interests of all parties and for the ends of justice might, in service out cases, not be achieved. Lord Goff had been using the word 'appropriate' in this passage in *Spiliada* in the sense of 'natural' forum and had meant by 'obverse' simply that the burden of proof is the 'obverse' in service out cases from that in stay cases.

The Court of Appeal also rejected Deripaska's argument that there was an additional requirement that the court could not hold England to be the appropriate forum unless there was a sufficient English interest in the claim over and above the requirement that one of the jurisdictional gateways was met. It was the jurisdictional gateway which supplied the English interest, and no more was required.

Standard of evidence

What level of evidence is required to satisfy the court that justice cannot be achieved in the natural forum? Was a finding of a risk that justice would not be done sufficient, or would the claimant have to establish that justice would not in fact be done?

Waller LJ referred to the comments of Lord Goff in *Spiliada* and Lord Diplock in *The Abidin Daver* [1984] that there was a need for cogent evidence if the plaintiff was going to argue that justice cannot be achieved in the natural forum. Allegations that impugn the integrity of the institutions of a friendly foreign state must be distinctly alleged and supported by positive and cogent evidence, and will not be lightly accepted. However, the court is not precluded on the grounds of comity from considering them in a proper case. The requirement is that the claimant should 'clearly establish' that England is the appropriate forum.

Judges on service out applications are not conducting trials; they do not have to be satisfied on the balance of probabilities that the facts have been established. Judges are looking at the risks of what might occur in the future.

Could the judge's exercise of his discretion be attacked? As Waller LJ made clear, judges on service out applications are not conducting trials; they do not have to be satisfied on the balance of probabilities that the facts have been established. Judges are looking at the risks of what might occur in the future, and it is not and cannot be a requirement that they should find on the balance of probabilities that the events would in fact occur (eg in this case that Cherney would be assassinated if he went to Russia). The requisite degree of likelihood of a risk happening required depends on the risk; a person cannot reasonably be expected to accept more than a slight degree of increase in the risk of assassination.

The Court of Appeal was satisfied that the judge did have evidence on which to have based his decisions and, on the issue of a fair trial, 'cogent evidence' to support his findings.

The Supreme Court subsequently refused Deripaska's application for permission to appeal further.

Have the floodgates been opened?

The decision is unlikely to open the floodgates to other litigation involving Russian parties being heard in England, nor to England becoming, as Deripaska argued, 'the default home for the waifs and strays of international litigation'.

Both the judge and the Court of Appeal emphasised the exceptional facts of the case and made clear that no blanket condemnation of the Russian legal system was being made. As Clarke J stated at paragraph 247:

> I am not deciding that a fair trial can never be obtained in the Russian arbitrazh system. On the contrary I do not doubt that there are many honest and good judges in the system at every level, who conscientiously seek to do justice according to the relevant legal principles and procedures, who are developing the arbitrazh system to relate to the commerce of the new Russia, and who do so without improper interference.

Indeed, in a subsequent decision, *OJSC Oil Co Yugraneft v Abramovich & ors* [2008] Clarke J distinguished *Cherney* and refused permission to serve out in a case where corruption in the Russian courts had been alleged. Similarly arguments that the claimant would not obtain a fair trial in Ukraine failed in *Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd & ors* [2009]. ■

Cherney v Deripaska
[2009] EWCA Civ 849;
[2008] EWHC 1530 (Comm)
OJSC Oil Co Yugraneft v Abramovich & ors
[2008] EWHC 2613 (Comm)
Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd & ors
[2009] EWHC 1839 (Ch)
Spiliada Maritime Corp v Cansulex Ltd
[1987] 1 AC 460
The Abidin Daver
[1984] AC 398