Falcon Chambers

The BSA, Foreign Defendants, and proceeding "as if" by the CPR where FTT Rules are silent

Grey GR Ltd Partnership v Edgewater (Stevenage) Ltd [2023] 7 WLUK 424

1. This Falcon Chambers "BSA Short" is a proper short. That's because we only have an extempore judgment of the High Court to explore. But it has an importance that will be clear to all.

The issue

2. What happens when the FTT directs a Claimant to serve documents on a foreign Defendant out of the jurisdiction, and to apply for permission from the requisite High Court to do so?

3. Well, we turn to the CPR. Here's why.

Facts

4. Our drama begins in Stevenage where turning office blocks into residential flats had led to proceedings before the FTT. The applicant's case concerned fire risks: it said the flats had a number of defects in breach of building regulations and the Defective Premises Act 1972. The applicant wanted remediation orders and remediation contribution orders under ss.123-124 of the Building Safety Act 2022.

5. The applicant had purchased the relevant freehold interest from the first respondent, itself a developer and former landlord. The respondent being within the jurisdiction, so far all appeared so simple. Likewise, 16 other identified respondents lay within England and Wales. So, numerous defendants but still straightforward.

The interest

6. But the interest in the case arises because the applicant came to identify that another company ("M") was the controlling entity of the first respondent. M was based in Switzerland and the applicant decided it rather wanted to sue M.

7. The question was how could it? For the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") say nothing about service out.

Cause of action

8. This lay in establishing that M was "partnership or a body corporate" sufficiently associated with the first respondent. An entity is deemed to be associated with another person for the purposes of ss.122-125 BSA in various ways, one of which is having control of them: BSA s121.

9. The relevance before the FTT was that that a remediation contribution order can be made by the tribunal under s.124 where it is just and equitable to do so if the specified party subject to the order is a "body corporate or partnership".

10. But, for these purposes, s.124(3) of the BSA provides a further limitation. A body corporate or partnership "may be specified only if it is-":

    (i) a landlord under a lease of the building; or,

    (ii) a person who was a landlord at the qualifying time; or,

    (iii) a developer, or a person associated with those persons.

11. Presumably on the third basis, the applicant decided it fancied a remedy against M.

Service out

12. The FTT made directions in respect of proceedings, including the service of documents on the respondents. As seen, against 16 Defendants this was straightforward. But how to serve M? Was it even possible? Service out required permission. The Rules said nothing on how to get it.

The law in play

13. The Westlaw report is terse however it appears the applicant's case was that, because the Rules did not contain specific rules on service out of the jurisdiction, the High Court could use its inherent jurisdiction to assist the FTT. This was said to be possible because

the BSA's purpose was submitted to be that of enabling a freeholder with a suitable interest to make claims against a range of defendants. Further, this should include defendants abroad.

Decision

14. It appears that the Court's approach was first to determine whether service out would be possible if a mechanism to use the CPR could be found in these circumstances, before going on to see if that mechanism existed.

15. Part 6 of the CPR and PD6B control service out. Subject to exceptions, CPR r.6.36 provides that "the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply". In turn, paragraph 3.1(3) of PD6B provides:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where […]
>
> > (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and—
> >
> > > (a)there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> > > (b)the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

16. The other provision of relevance was PD6B para 3.11. It reads:

> **Claims about property within the jurisdiction**
> (11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.

17. The Court found that all of the necessary conditions were satisfied.

A "claim"

18. But there was a further hurdle. CPR r.6.2 defines "claim" in these terms:

> ""claim" includes petition and any application made before action or to commence proceedings".

19. Yet the CPR wasn't in play, the instant proceedings were before the FTT and under its rules. The CPR definition of claim was not going to be sufficient to avail the applicant.

Do the FTT rules preclude use of the CPR?

20. Again, the report of the judgment requires some inference, but it appears that as it was understood that there are circumstances where the High Court is called upon to deal with matters that the FTT cannot (such as an interim injunction), the High Court asked whether it was prevented from giving assistance given the silence of the Rules.

21. Enter the broad definition of "document" in the Rules. Rule 1.3 defines it as anything in which information is recorded in any form. In the absence of any words of prohibition in either the Rules or the CPR, the breadth of that definition unlocked the problem.

22. The analysis thereby proceeded simply: the FTT had given directions to the applicant to serve documents on M and, crucially, it mandated the particular way the applicant was to do this i.e. with the permission of the High Court. As such, the High Court could be called upon to give assistance so long as the service out tests were met, as they were.

Conclusion

23. The judgement is ex tempore so the issue cannot be taken as settled. Still, it appears this is the first decision on what happens when the FTT determines that proceedings need to be served outside of the jurisdiction (neither counsel nor the Judge appear to have been able to discover any authority on this).

24. And the approach has much to commend it, especially in light of the number of foreign-based body corporates or partnerships who have interests in English property and the purposes of the BSA. The question is: have we heard the last word?

DANIEL BLACK, October 2023