NEW SQUARE Chambers

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Chabra injunctions and foreign defendants: was the Court of Appeal's decision in Gilbert v Broadoak a missed opportunity?

Alexander Farara



Can a party rely on one of the service gateways under PD6B to obtain or sustain an interim freezing injunction against a non-cause of action defendant based out of the jurisdiction? In *Gilbert & anr v Broadoak Private Finance Ltd* [2026] EWCA Civ 1172 the Court of Appeal recently said no.

(i) Chabra injunctions and the (until now) academic debate

Chabra injunctions, the brainchild of Mummery J following his landmark decision in *TSB Private Bank v Chabra* [1992] 1 WLR 231, is a rather useful tool available to fraud victims and judgment creditors who find themselves in the not infrequent scenario of suing (or having sued) a defendant who has been surreptiously dissipating his assets by placing them in the hands of third parties. Provided there is good reason to suppose that the defendant is the true owner of the assets (or at least beneficially interested in them), and there is a consequent risk of (further) dissipation, Chabra-injunctive relief may be made against that third party even though the respondent is not (nor will be) a defendant to the substantive action.

In the wake of that decision, it fell to later courts to refine the parameters of its powers. One of those limits, the ensuing case law established, was that where the third party (or to adopt the phraseology, a 'non-cause of action defendant' or 'NCAD' for short) is based out of the jurisdiction and has not submitted to the court's *in personam* jurisdiction there are few (if any) gateways under PD6B, §3.1 that would permit foreign service.

One's chances were thought to be marginally better if Chabra relief was sought before judgment was made in the substantive proceedings. Although inevitably dependent on the facts of the given case, there have been a number of encouraging comments from the bench that it may be open to an applicant to rely upon the necessary or proper gateway under §3.1(3) to serve a foreign NCAD, perhaps most definitively by Flaux J in *Linsen International Ltd v Humpuss Sea Transport pte Ltd* [2011] EWHC 2339 (Comm) at [161]-[164] [1] and, more recently, by Foxton J (as he then was) in *Commercial Bank of Dubai v Al Sari* [2024] EWHC 3304 (Comm), [2024] 12 WLUK 391at [246]-[282].

[1]Although Males J in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm) expressed some doubted over that analysis at [74].

In the post-judgment context, the prevailing view was that there was no suitable gateway available: see *Gee on Commercial Injunctions* (7th ed) at [6-093] and *Grant and Mumford*, *Civil Fraud: Law Practice and Procedure* (1st ed) at [18-171]. That view, however, came under increasing scrutiny in the wake of three decisions, each of which advanced the law on injunctions and foreign service.

(a) The first was *Orexim Trading Ltdv Mahavir Point and Terminal Private Ltd* [2018] EWCA Civ 1680, [2018] 1 WLR 4847, a decision of the Court of Appeal, which held that a claim under s.423 of the Insolvency Act 1986 could be affected through the enactment gateway (§3.1(20)). In reaching that decision the court concluded that where an enactment enabled a claim to be brought against persons or property outside of the jurisdiction a gateway permitting foreign service would be "*expected to exist"*.

(b) The second was the Privy Council's decision in *Broad Idea v Convoy Collateral Ltd* [2021] UKPC 24, [2023] AC 389. There the board held that, where the court had personal jurisdiction over a (foreign) defendant, it had the power to grant a freezing injunction against that defendant and, importantly, that it could do so to facilitate the enforcement of a prospective (or existing) foreign judgment even where the application for injunctive relief could not be said to be ancillary to substantive proceedings. This was a particularly important decision, as it overturned significant precedent, including the House of Lords' decision in *The Siskina* [1979] AC 210, which held that one's right to obtain interlocutory injunctive relief was "*dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff".* Although a Privy Council decision (on appeal from the BVI), *Broad Idea* marked the end of what was a long-held view.

(c) The third was *Gorbachev v Guriev* [2023] EWCA Civ 1270, [2023] KB 1 where the Court of Appeal held that the enactment gateway could be relied upon to facilitate the foreign service of an application under ss.33 and 34 of the Senior Courts Act 1981. Those sections, which appear in the same part of s.37 of the 1981 Act (the section that confirms the court's power to grant injunctive relief) permits applicants to seek various forms of evidence gathering in relation to property that may become the subject of subsequent substantive proceedings.

The corollary of these decisions, it was said among the growing faction of dissenters, was that a foreign NCAD could now be served under the enactment gateway:

(a) The relevant enactment is section 37(1) of the 1981 Act, which states that the High Cout can order interlocutory or final injunctive relief in "*all cases in which it appears to the court to be just and convenient to do so*".

(b) It has long been settled that the court could grant injunctive relief against foreign defendants. Indeed, that controversy, which arose from inconsistent judgments made in the 1970s was in part settled by the enactment of the 1981 Act – specifically s.37(3) – which states explicitly that interlocutory injunctive relief can be granted irrespective of the jurisdiction the respondent was in.

(c) It therefore follows, adopting the court's reasoning in *Orexim*, that there must be a suitable gateway permitting foreign service and the enactment gateway was as suitable as any.

(d) This view was re-enforced by *Broad Idea*, which confirmed that a litigant could indeed pursue a free-standing interlocutory application for injunctive relief and *Gorbachev*, where the applicants, who sought free-standing interim relief based upon sections that appeared in the same part of the 1981 Act as s.37 does, were allowed to rely upon the enactment gateway to carry out foreign service.

This, broadly, was the argument that fell to the Court of Appeal (Foxton, Miles and Jeremy Baker LJJ) to consider in *Gilbert*.

(ii) *Gilbert:* the background facts

The claimants, Mr Gilbert and a related company, obtained judgment against Broadoak in respect of unpaid loans. Broadoak did not participate in the proceedings; nor did it pay up upon being served with the judgment. As part of their efforts to enforce, the claimants obtained non-party disclosure orders against banks where Broadoak, its principal, Mr Bleakley and his wife held accounts. The disclosures revealed that Mrs Bleakley, who lived in Spain, and King Street Capital SL (**KSC**), a Spanish company over which she was *administrator unico* (an office similar to that of sole director) and which her husband solely owned, received millions of pounds from Broadoak in unexplained payments.

The claimants sought and obtained a without notice worldwide freezing order against Mrs Bleakley and KSC on the basis of that new found information. The injunction was obtained on the Chabra basis as Mrs Bleakley and KSC were not defendants to the initial action, and nor was it the claimants' intention to sue them on the basis of a specific cause of action.

The respondents, upon receiving notice, challenged the injunction on several bases and at the return date failed in all but one of them. The judge, David Quest KC sitting as a Deputy Judge of the High Court, took the view that there was no appropriate gateway under PD6B, §3.1 by which the respondents could be served. The injunction therefore had to be discharged.

The claimants challenged this decision on appeal, arguing that there were three suitable gateways:

(a) The enactment gateway under §3.1(20). It permits service where a claim is made "*under an enactment* [that] *allows proceedings to be brought*";
(b) The injunction gateway under §3.1(2). It permits service where a claim is made "*for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction*"; or
(c) The property gateway under §3.1(11), which requires the subject matter of the claim to relate *"wholly or principally to property within the jurisdiction"*.

(iii) Court of Appeal's Decision

In a comprehensive decision, the court dismissed the appeal.

The primary argument the appellants ran concerned the enactment gateway and what they called the '*synergetic effect*' of the three aforementioned cases. But Foxton LJ, who delivered the leading decision, was unpersuaded by the argument (which is itself ironic as he had arguably given credence to the controversy, first in a lecture he gave two years earlier before the Manchester Business Property Courts Forum and latterly by suggesting the argument to the parties in *Al Sari*, but which, given time constraints, was not properly heard).

He held that:

(a) S.37(1) was not the source of the court's power to grant injunctive relief. Its ability to do so was recognised in the preceding years before the 1981 Act in the much-celebrated decisions of *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulkcarriers* [1975] 2 Lloyd's Rep 509, the latter of which, as Foxton LJ pointed out, won the battle for naming rights. S.37(1), therefore, simply confirmed a power the court already possessed.

(b) That observation was, in the court's view, important when one came to construe the wording of the gateway itself. It did not say that the claim must '*relate to'* the enactment; it states that it must be brought "*under"* an enactment which "*allows the proceedings to be brought*". In other words, it was not s.37(1) that allowed a claim for interlocutory injunctive relief to be brought but the common law as the landmark 1975 decisions had confirmed.

(c) Indeed, the much-developed law of injunctions that has developed since those decisions show that s.37(1) is a "*provision of the most general kind*". The forms of relief a litigant can obtain by invoking that section were numerous: domestic and worldwide freezing injunctions, proprietary and freezing injunctions, the appointment of receivers, interim and final injunctions, quia timet injunctions, anti-suit, anti-enforcement and anti-recognition injunctions, as well as Chabra injunctive relief. And the requirements for obtaining a particular type of relief were not to be found in s.37(1) but in the body of case law that has developed. To use Foxton LJ's words, the fact that s.37(1) has a "*very different character for different types of injunction*" coupled with the "*absence of any language within* [that section] *indicative of a legislative intention that that provision alone 'allows proceedings to be brought',* made it impossible to conclude that the requirements for the enactment gateway had been met.

(d) This, furthermore, was the view of the Court of Appeal in an earlier decision in *AES v Ust-Kamenogorsk Hydropower Plant LLP* [2011] EWCA Civ 647, [2012] 1 W.L.R. 920. There each of the three Lord Justices had concluded that s.37(1) could not be relied upon to trigger the enactment gateway and that analysis had not been disturbed by *Gorbachev*, which concerned an application not under s.37(1) but different sections seeking different relief.

He also rejected the appellants' alternative attempts to rely upon the injunction and property gateways.

(a) The injunction gateway could not be relied upon because there was established authority to the effect that it applied only where an injunction was sought as final, substantive relief, not merely as interim relief. This was the ruling of the House of Lords in *The Siskina* (and of the Privy Council in *Mercedes Benz AG v Leiduck* [1996] AC 284), both of which the board in *Broad Idea* upheld despite being invited by the appellants to overturn them. In the board's view, if a wrong turn had been taken in interpreting the gateway, the appropriate step was to amend the (BVI's) procedural rules. Foxton LJ agreed.

(b) As for the property gateway, it was wrong to consider a claim for a post-judgment freezing order as one that related "*wholly or principally*" to the judgment debt. The claim for interim injunctive relief plainly related to assets out of the jurisdiction, in the hands of the Spanish defendants. This gateway, therefore, also did not assist.

(iv) Commentary

Was this a missed opportunity? Some, particularly attracted by the High Court's analysis in *Orexim* – that where it is settled that a claim can be made against a foreign defendant, there ought to be a gateway available to permit such a defendant to be served – would argue that it was.

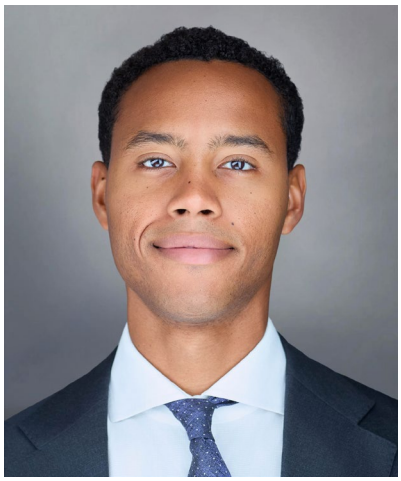
(i) The court's analysis of the enactment gateway hinged on the history of the court's powers to make injunctions and the relationship between its common law power and the confirmatory status of s.37(1). In the court's view, that relationship was too *"loose*" for it to be appropriate to rely upon the enactment gateway. But is that not overly formulaic? Does a claimant, in the absence of clear authority, need to research the origins of a claim that is on its face enabled by statute to assess whether he can rely upon the enactment gateway? Although the court said this was not the intended consequence of its decision ([65]), it arguably will be given the distinction it has drawn between a claim brought "*under*" an enactment and one "*relating to*" it ([81]). S.37(1) is, of course, not the only statute that confirms a power first recognised at common law; it may, therefore, rightly be said that requiring an analysis of the origins of a statutory claim is not only impractical but can lead to cases where a litigant (and his legal advisors) cannot confidently interpret and apply the service gateways. If so, that is an unsatisfactory position.

(ii) As for the injunction gateway, plainly the Court of Appeal was bound by superior authority (*The Siskina* but also *Mercedes-Benz* and *Broad Idea* which are highly persuasive). But is it right that those authorities should not be disturbed? In *Broad Idea* the board declined to do so because, in the words of Lord Leggatt, who delivered the leading decision, "*the common law does not operate on a principle of third time lucky*" and thus whatever merit there may be in hearing the argument afresh in light of developments to the law of injunctions, it would be wrong to re-litigate the matter now as litigants ought to be able to consistently interpret and understand the law, especially matters of procedure. But one cannot help but observe the asymmetry in the precedent that *Broad Idea* in particular has now set. The board has, on the one hand, recognised the ability to seek free-standing interim injunctive relief, but on the other, limited one's ability to pursue that relief against a foreign defendant (who has not submitted to the court's personal jurisdiction). To put it differently, the idea that interim injunctive relief could only be granted when tethered to a substantive cause of action was so entrenched of a precedent prior to *Broad Idea* – would it therefore really have been an overstep to re-construe the injunction gateway to bring it in line with the precedent the board was there setting to permit free-standing applications for interim injunctive relief? Perhaps the board was hesitant to make such a pronouncement about the procedural rules of another jurisdiction (the BVI). Might it have been more inclined if it were an appeal from this jurisdiction?

It is therefore of note that the appellants have, since the Court of Appeal's decision, lodged an application for permission to appeal to the Supreme Court.

But in the meantime, it must be said, for the benefit of fraud and asset recovery specialists, that this decision does not mean that litigants in the post-judgment context do not have any recourse to recover assets wrongly placed in the hands of foreign third parties. Section 423 of the Insolvency Act 1986 allows creditors to set aside company transactions made at an undervalue or whose purpose was to put assets beyond the reach of a claimant that has made (or established) a claim against the company. There may also, in certain circumstances, be a basis to establish a substantive claim against the third-party (e.g. dishonest assistance, knowing receipt or the Marex tort[2]). There are established gateways permitting foreign service in respect of those claims and injunctions can be granted to protect the advancement of those claims. As Foxton LJ noted in his concluding remarks, the claimants have indeed brought claims under s.423 and for constructive trust relief in respect of which there are gateways available and open to them to pursue injunctive relief: [123]

[2] Named after *Marex Financial Ltd v Sevilleja Garcia* [2017] EWHC 918 (Comm).



Alex Farara

alexander.farara@newsquarechambers.co.uk

Alexander Farara | New Square Chambers

Alexander Farara | LinkedIn