# Do you have to tell the Court that your claim is time barred when applying, without notice, for permission to serve out of the jurisdiction?

## *Libyan Investment Authority v JP Morgan Markets Limited and others* [2019] EWHC 1452 (Comm), 10 June 2019

## By Adam Heppinstall

**Yes, according to Bryan J in this anchor defendant case, in which the Claimant had to pass the real issue / summary judgment test in order to obtain permission to serve out. The claim was time barred, and Bryan J considered that the Claimant ought to have admitted that much in its without notice application, and further ought to have to set out the means by which it intended, nevertheless, to clear the real prospect of success hurdle. The punishment for not doing so was for the service out order to be set aside, effectively ending the claim in this jurisdiction. The case is a salutatory reminder of the consequences of failing to discharge the duty of full and frank disclosure.**

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## Background

1. This is the latest claim in multiple rounds of litigation brought by the LIA following the fall of Colonel Ghaddafi. In this round, the LIA claim that one of the Defendants, a Mr Giahimi (allegedly Ghaddafi's son's right-hand man), was paid a commission of US$6m to procure the entry of the LIA into a US$200m derivative transaction with Bear Stearns (now JP Morgan Markets Limited, the First Defendant.) The trade took place in 2007.

2. The LIA has sued Mr Giahimi before, in the "SocGen proceedings", which were settled in 2017, when the proceedings against Mr Giahimi were discontinued.

3. Teare J granted a without notice application to serve Mr Giahimi and a related company out of the jurisdiction. The LIA asserted jurisdiction based on the anchor defendant ground (para 3.1(3) PD6B CPR), which has recently been considered by the Supreme Court and the Court of Appeal in the context of parent company liability for their subsidiaries' alleged wrongdoing abroad (see for example, *Vedanta Resources PLC v Lungowe* [2019 UKSC 20, [2019] 2 WLR 1051, *Okpabi v Royal Dutch Shell PLC* [2018] EWCA Civ 191, [2018] Bus LR 1022 and *AAA v Unilever PLC* [2018] EWCA Civ 1532, [2018] BCC 959).

4. As Lord Briggs summarised in *Vedanta*, to rely on this gateway for service out, the applicant must demonstrate "*(i) that the claims against the anchor defendant involve a real issue to be tried; (ii) if so, that it is reasonable for the court to try that issue; (iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) that the claims against the foreign defendant have a real prospect of success; (v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign*

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*jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."* (para 20.)

5. The "real issue test" is determined by applying the summary judgment test (see Lord Briggs at para 42.)

6. Mr Giahimi and another corporate Defendant ("Lands") challenged jurisdiction and sought to set aside the service out order on the basis that the claims were time barred and therefore failed the summary judgment test. Interestingly, they also argued that LIA ought to have been more candid with Teare J about the time bar issue and therefore that the service out order should be set aside for breach of the duty of full and frank disclosure which applies on a without notice application for permission to serve out. It is this aspect of the case which this alerter will focus on.

7. Bryan J granted the application to set aside, on both the summary judgment and the full and frank disclosure bases.

8. The other bases of challenge were that the proceedings were a *Henderson v Henderson* abuse because they should have been brought in the SocGen proceedings, and further, that they should be stayed awaiting an application to discharge the Receivership under which the LIA are bringing these proceedings. These later two grounds failed.

## No real prospect of success on limitation

9. Bryan J held that the claims had no real prospect of success because they were time barred and further, LIA would not be able to rely on the concealment extension of time provision in section 32 Limitation Act 1980.

10. The usual 6-year limitation period expired in 2012. Therefore LIA had to show a real prospect of successfully proving that it did not know the facts

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giving rise to its claim and could not have discovered them with reasonable diligence prior to 2012. After an analysis of the claim being alleged, its underlying facts, and the sources of information which were or reasonably could have been at the LIA's disposal, Bryan J found that there was no such real prospect and set aside service out on that basis alone (para 88). However, he described that finding as *"academic given the findings I make below concerning the LIA's failure to give full and frank disclosure, as a result of which service is to be set aside in any event quite apart from the lack of any real prospect of success"* (para 89.)

## The Duty of Full and Frank Disclosure

11. Bryan J directed himself as to the relevant authorities (paragraphs 92 to 98) including a reference to the "golden rule" set out in *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, that *"an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion"*. He also pointed out that what was relevant and material was a matter for the Court: A party could not escape the order being discharged on the ground that it honestly thought about mentioning something to the Court, but, in good faith, thought better of it (para 97.) Bryan J also noted that there is useful guidance in the Commercial Court Guide (para 98).

12. The main problem for the LIA was that Mr Ghiahmi had already raised a limitation defence under English Law in the SocGen proceedings, and LIA had raised section 32 in response. Bryan J therefore thought that the issue ought to have probably crossed LIA's English legal team's mind when applying for service out in respect of these new proceedings (para 101).

13. Bryan J found that *"LIA knew…that they would need to avail themselves of section 32 of the Limitation Act 1980 (as they had done in the SocGen Proceedings"* (para

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102) and therefore it was clear that *"the issues which arose in relation to limitation are matters which might reasonably have caused the judge to have doubt whether he should grant permission to serve out of the jurisdiction, in the context of whether the LIA had a real prospect of success and as such were relevant matters which ought to have been disclosed"* (para 104)

14. In fact, Bryan J went further. Not only did he find that LIA ought to have informed Teare J about the limitation issue, but he also concluded that it should have gone the extra mile by volunteering the information in its possession at the relevant time relating to its knowledge under section 32. Bryan J essentially concluded that LIA should have confessed to the Court the difficulties it was in on that point and should have set out how it was nevertheless proposing to overcome the summary judgment test:

    *"The LIA further failed to satisfy its duty of full and frank disclosure with respect to raising matters which are adverse to its case by choosing not to highlight to the court the evidence which is set out in the previous section of this judgment in relation to limitation which demonstrates that information pertaining to the relevant matters for bringing a claim was available to the LIA prior to April 2012. These matters were highly material to the issue of limitation, the test of reasonable diligence and to the court's judgment of whether the LIA's case stood a reasonable prospect of success. A failure to place these matters before the court represents a serious failing to provide satisfactory disclosure. With respect to these breaches, the LIA has not provided any satisfactory explanation which excuses these breaches of full and frank disclosure."*(para 105).

15. LIA defended itself by saying that it had made clear that in its view the fraud could only have been discovered after issuing the SocGen proceedings, and therefore that a section 32 argument would have succeeded. Bryan J pointed out that it was not for them to *"determine which defences are credible and to*

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*put only those before the court"* but to take all adverse points in relation to the issue of whether the claim has a prospect of success (paras 106/107).

16. He therefore found that LIA should have (i) told Teare J that the claim was time-barred, (ii) explained that it was going to rely on section 32, and (iii) set out *"sufficient particulars of the basis on which the LIA said that it could not with reasonable diligence have discovered all necessary elements of a proper plea of fraud…so that the judge could consider whether he or she was satisfied that the claims nevertheless has a real, as opposed to fanciful, prospect of success. The LIA did not do so. It is no answer to say that limitation is a point taken by way of defence – when applying for permission to serve out of the jurisdiction the LIA knew that such a defence would be taken"* given what had happened in the SocGen proceedings.

## An apology might have helped…

17. It is also clear that Bryan J would have appreciated an apology for the breach of the full and frank duty. Indeed, the failure to concede the point as early as possible appears to have contributed to him condemning the breach with some vigour: *"LIA's breach…was both conscious, and therefore deliberate, and was, in my view a substantial, indeed an egregious breach of duty in relation to a matter, limitation, which, on any view went to the hear of the application for permission to serve out…I consider that the breach under consideration in itself justifies, and indeed necessitates, that permission to serve out be set aside"* (para 119).

18. He went on to note that whilst he had to pay *"careful regard to the penal nature of the jurisdiction, and the need for proportionality and offence…this was on any view a very serious breach in relation to which it is proportionate and appropriate to discharge the order"* (para 122).

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### When applying for service out, take all the points against you and answer them…

19. As Popplewell J said in *Branco Turco Romana* v *Cotuk* [2018] EWHC 662 (Comm) the duty to give full and frank disclosure is the price you pay for obtaining a remedy without notice to your opponent, such that the Court must be able to *"rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would make…"* (para 45)

20. This case stands as a salutary reminder to all those seeking service out of the jurisdiction on a without notice basis. They must consider all of the points which will be taken against them (and indeed the points which may already have been taken by the putative defendant in pre-action correspondence) which means, when relying on the anchor defendant gateway, points which will be taken against them on the "real issue" summary judgment test. This means anticipating likely defences and explaining why the summary judgment test will be passed on each such likely defence.

21. Often, in an anchor defendant gateway case, a short foreign limitation period may apply to a tort committed abroad and the Claimant, in their without notice application for service out, will need to address how they propose to deal with any potential time bar issue, including any argument they propose to make under, for example, section 2 Foreign Limitation Periods Act 1984 (see for example *Athanasios Sophocleous & Others v Foreign and Defence Secretaries* [2018] EWCA Civ 2167, [2019] 2 WLR 956).

22. It is clear that a failure to do so (or perhaps, in the context of this case, a failure to do so which is not recognised, apologised for and corrected as soon as possible), may result in the claim in this jurisdiction failing, on the

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setting aside of the order giving permission to serve out of the jurisdiction. Although, it is worth recalling that Bryan J did find that the instant claim also failed substantively on the summary judgment "real issue" test. To even take a risk, however, that a claim might fail on a procedural ground alone is best avoided. It will remain to be seen whether the Court of Appeal are asked to look at this case, and this important issue.

**Adam Heppinstall**[1] 13 June 201

[1] Any views or opinions contained in this document are the author's own.

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