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# Another gateway opens: UK court allows service out for antecedent transaction claims

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## *Orexim Trading Limited v Mahavir Port and Terminal Private Limited* [2018] EWCA Civ 1660

We recently updated you on the Court of Appeal's decision in the *Eurasia Sports* case, which signified the Court's interpretation of the jurisdictional gateways for service outside of the jurisdiction. Similar decisions have since followed, clarifying when proceedings may be served outside of the jurisdiction for claims made "under an enactment which allows proceedings to be brought" - known otherwise as the "**Enactment Gateway**". The trend is an important development, especially in the area of insolvency. Under section 423 of the Insolvency Act 1986 ("**Section 423**"), liquidators and other 'victims' of the antecedent transaction will now be allowed to bring claims against foreign defendants domiciled outside of the EU, which has often proved difficult for creditors to achieve previously.

## Background

The plaintiff Orexim, which was a Maltese company, raised proceedings against the defendants who were domiciled in India and Singapore. It was alleged, as part of this claim, that one of the defendants had sought to defeat its creditor by transferring ownership of a vessel to the Second Defendant, who in turn transferred it to the Third Defendant. In doing so, it was further alleged that the transactions complained of were made at an undervalue designed to defraud creditors. Orexim therefore sought to set aside those transactions under Section 423.

At first instance, leave was granted to serve the proceedings outside the jurisdiction *ex parte* but that permission was later set aside by the Court upon the challenge by the defendants. In order satisfy the requirements for leave to serve proceedings outside the jurisdiction, it was incumbent on Orexim to demonstrate that 1) it had a good arguable case and that the case fell within one of the jurisdictional gateways under CPR Practice Direction 6B; 2) that the claim had a real prospect of success and 3) that England and Wales was the proper place in which to hear that claim. The judge held that in relation 1), the Enactment Gateway, was not available to Orexim as a jurisdictional gateway. Applying the previous authority of *Re Harrods (Buenos Aires) Ltd (No.2)* [1992] Ch 72, the judge reasoned that the Enactment Gateway was only available to those statutes in which it was intended to have extra-territorial effect. The judge concluded that from a strict reading of Section 423, extra-territoriality was not intended and Orexim's application for leave for service out of the jurisdictions was therefore denied.

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Orexim appealed.

## Findings of the Court of Appeal

Firstly, in relation to the applicability of the Enactment Gateway and Section 423, the Court of Appeal disagreed with the reasoning of the Court at first instance. It held that the *Re Harrods* decision did not apply to the Enactment Gateway. Rather, the Court of Appeal held that service outside of the jurisdiction was permitted under Section 423 and that "*the time has now come to say that the court does have he power under "gateway" (2) to permit service of a claim under section 423 outside England and Wales*". However, in broadening the scope of the Enactment Gateway, the Court was also keen to stress the important safeguards in place to prevent frivolous claims being given leave to serve outside the jurisdiction. For example, as noted above any such application will also need to satisfy requirement 3) that England and Wales was the proper place in which to hear that claim. The Courts will therefore maintain their discretion to refuse permission in such instances where England and Wales are not the proper place to hear the dispute.

It is on this ground that Orexim failed. The Court of Appeal ultimately held that notwithstanding the applicability of Section 423 and the Enactment Gateway, there was not a sufficient connection between Orexim's claim against the defendants and England and Wales, and England was not the proper place to decide the claim. Orexim's appeal was therefore refused.

## Effects

This is a significant development in the law governing when leave will be granted by the Courts to serve proceedings out of the jurisdiction. Given that Section 423 is necessarily broad in its scope, it potentially empowers liquidators and creditors to challenge transactions where previously it would have been impossible or at the very least, more difficult. It is now clear that should a claimant wish to challenge a transaction under Section 423 on a foreign defendant, it will have a viable jurisdictional gateway in which to do so.

This decision has particular relevance for Guernsey in two respects.

First, given that many Guernsey registered and administered companies do business in England themselves or are part of corporate groups with interests in England, this development may mean that these companies are directly made the subject of English proceedings challenging antecedent transactions. To the extent they were not already concerned, Guernsey directors should be careful to avoid being mixed up in any colourable transactions in the course of administering client companies.

Second, Guernsey's company insolvency provisions are currently undergoing significant revision which will see, amongst other things, the introduction of a local equivalent to Section 423 of the UK Act. Assuming that the Royal Court will follow the English Court of Appeal in extending the Enactment Gateway to claims to recover antecedent transactions, this will present a more convenient and cost effective way for local liquidators to recover funds on behalf of creditors.

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