Neutral Citation Number: [2026] EWHC 2279 (TCC)

Case No: HT-2025-000239

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03/09/2026

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

ROBERT EBERT	**Proposed Claimant**
- and -	
FERRARI S.p.A	**Proposed Defendant**

- -
- -

Andrew Butler KC and **Thomas Dawson** (instructed by **Acuity Law Ltd**) for the **Proposed Claimant/Applicant**
Tim Otty KC and **Rayan Fakhoury** (instructed by **Osborne Clarke LLP**) for the **Proposed Defendant/Respondent**

Hearing date: 7th July 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. This is an application by the proposed defendant ("Ferrari") to set aside an order dated 5 September 2025, granting permission for the proposed claimant, Mr Robert Ebert, to serve an application for pre-action disclosure out of the jurisdiction. The application to set aside is opposed by Mr Ebert.

2. The principal issue is whether the court has power, or should exercise any power, to make an order for pre-action disclosure pursuant to section 33 of the Senior Courts Act 1981 ("the SCA") against a proposed defendant outside the jurisdiction, in respect of documents located outside the jurisdiction.

Background facts

3. On 9 June 2015 Mr Ebert, a British citizen living and working in Hong Kong, was involved in a fatal traffic accident whilst driving a Ferrari 458 Spider. Mr Ebert lost control of the vehicle, which left the road and collided with a security guard, Mr Ku Lap-Chi, who tragically died.

4. Mr Ebert was charged with causing death by dangerous driving. It was common ground that Mr Ebert was speeding shortly before the accident. At trial, his defence was that his brakes suddenly failed, causing him to lose control of the vehicle.

5. Mr Martino Casolari, a technical engineer employed by Ferrari, was called as a witness by the prosecution. He gave evidence in relation to the vehicle's braking system, stating that it was not possible to experience a condition of sudden vacuum loss that disappeared by itself on one single brake. Expert witnesses for the prosecution and the defence inspected the vehicle, produced reports and gave evidence to the court on the question whether the brakes were faulty, causing intermittent failure prior to the crash.

6. Mr Ebert was convicted and his appeal against conviction was dismissed.

7. In October 2016 Mr Ebert was sentenced to 22 months' imprisonment. After 14 months in prison, Mr Ebert was released and deported to the UK.

8. As a result of his conviction, Mr Ebert lost his lucrative employment in investment banking. Although he has established his own financial services business, this is hampered by his conviction and restrictions on his ability to travel to various countries around the world.

9. On 28 October 2021, Ferrari issued a recall notice for certain classes of vehicle, including the 458 Spider model produced in the same year as the vehicle that Mr Ebert was driving at the time of the accident ("the Recall"). The stated basis for the Recall was brake-related defects, described as: *"a braking system that could potentially leak brake fluid, which may lead to partial or total loss of braking capability"*.

10. Mr Ebert's potential claim against Ferrari is that the above brake-related defects caused the fatal accident leading to his conviction. Ferrari knew, or should have known, of the alleged defects and Mr Casolari gave evidence at the criminal trial which was deliberately false, misleading and/or negligent. As a result, Mr Ebert was convicted, imprisoned and suffered substantial consequential losses.

11. Ferrari's position is that, although there were defects affecting some of the 458 Spider models identified in the Recall, they did not affect all vehicles in the recalled class. There is no evidence that those defects were present in Mr Ebert's vehicle; this was an issue that was considered and rejected by the Judge in the criminal trial. The defects identified in the Recall had no relevance or causative effect in respect of the accident or Mr Ebert's conviction.

Procedural steps

12. On 7 August 2025 Mr Ebert issued an application for pre-action disclosure against Ferrari ("the PAD Application") pursuant to CPR 31.16. The application was supported by the witness statement of Hugh Hitchcock, solicitor and partner at Acuity, dated 4 August 2025.

13. The categories of documents in respect of which pre-action disclosure is sought can be summarised as:

    i) minutes of board meetings, reports and other documents concerning Ferrari's knowledge of (a) the braking system issues in respect of Ferrari vehicles leading to the Recall; (b) Mr Ebert's accident; and/or (c) the defence raised in the criminal trial;

    ii) notifications, reports and communications between Ferrari, Bosch (manufacturer of parts), the NV parent company and/or insurers relating to the brake issues, including the outcome of any internal or external investigation(s);

    iii) internal communications within Ferrari and instructions in relation to the evidence given by Mr. Casolari and the experts at the criminal trial.

14. On 3 September 2025 Mr Ebert issued a further application for permission to serve the PAD Application on Ferrari out of the jurisdiction, in Italy, pursuant to CPR 6.36 and 6.37 and, in the alternative, an order under CPR 6.15 permitting service of proceedings on Osborne Clarke, Ferrari's solicitors. The application was supported by Mr Hitchcock's second statement dated 4 September 2025.

15. By Order dated 5 September 2025, Waksman J granted permission to Mr Ebert to serve the PAD Application on Ferrari at its address in Italy ("the Service Order").

16. There was a dispute regarding service of certain documents, which led to an application by Ferrari on 16 October 2025 for a declaration that service was invalid and/or an extension of time for challenging the Service Order. By Order dated 27 October 2025, Joanna Smith J granted an extension of time for Ferrari to apply to set aside the Service Order within 28 days after service of various documents by Mr Ebert.

17. On 26 November 2025 Ferrari issued its application under CPR 23.10, seeking to set aside the Service Order. The application is supported by the witness statements of Thomas Ellis, of Osborne Clarke, dated 26 November 2025; Alfredo Scifo, head of chassis at Ferrari, dated 25 November 2025; and Pietro Lopreiato, in-house legal counsel at Ferrari, dated 20 March 2026.

18. Mr Scifo's evidence is that Ferrari is an Italian registered company, incorporated in Italy with its headquarters located in Maranello, Italy. Although its ultimate parent

company is a Dutch entity and Ferrari has certain group companies located overseas, the main operations of the business are in Italy. Ferrari has responsibility for the overall management of investigations, including recalls regarding vehicle faults, from Italy.

19. Mr Scifo and Mr Lopreiato state that the documents sought by Mr Ebert by way of pre-action disclosure, to the extent that they exist, would be stored at Ferrari's headquarters in Italy, within email boxes of the relevant Ferrari employees or devices in Italy, and on a cloud-based back-up server in the Netherlands.

20. In response to Ferrari's application, Mr Ebert filed Mr Hitchcock's third witness statement dated 29 January 2026 and a witness statement by David Cousar, the owner of a 458 Spider Ferrari that suffered braking defects, resulting in an accident, dated 29 January 2026.

21. On 11 June 2026 a witness statement was filed by Mr Ebert, explaining the financial losses he has suffered as a consequence of his conviction.

Applicable test

22. The application before the court is Ferrari's application for:

    i) an order setting aside the Service Order, which granted permission to Mr Ebert to serve the PAD Application out of the jurisdiction; and

    ii) an order declaring that the court has no jurisdiction in relation to the PAD Application and/or will not exercise its jurisdiction in relation to that application.

23. The Service Order was made by Waksman J on 5 September 2025, in accordance with usual practice, without a hearing and without prior notice to Ferrari.

24. CPR 23.10(1) provides that a person who was not served with a copy of the application notice before an order was made may apply to have the order set aside or varied.

25. It is common ground that, on an application to set aside an order for service out of the jurisdiction, Mr Ebert must satisfy the court that he was entitled to an order permitting service of the PAD Application out of the jurisdiction: *Golubovich v Golubovich* [2021] EWHC 2099 (Ch) per Deputy Master Marsh at [12].

26. There is no dispute as to the principles applicable on an application for service out of the jurisdiction in respect of an application for pre-action disclosure – see *Gorbachev v Guriev* [2023] KB 1 (CA) per Males LJ at [19]:

    i) The applicant must show that there is a good arguable case that the application against the foreign respondent falls within one or more of the jurisdictional gateways set out in paragraph 3.1 of Practice Direction 6B. Good arguable case in this context means that the applicant has a much better argument than the foreign respondent.

    ii) The applicant must show that there is a serious issue to be tried on the merits of the application for pre-action disclosure. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim.

iii) The applicant must show that in all the circumstances: (a) England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute; and (b) the court ought to exercise its discretion to permit service of the application out of the jurisdiction.

27. Mr Ebert's case is that each of the above limbs of the test is satisfied. Ferrari's position is that none of the above tests is satisfied on the facts of this case.

28. Where, as in this case, a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction, such as whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B, then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law: *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804 at [81].

(i) Jurisdictional gateway

29. The issue is whether an application under section 33(2) of the SCA and CPR 31.16 falls within the jurisdictional gateway in paragraph 3.1(20) of Practice Direction 6B, so as to give the court power to permit service of such an application outside the jurisdiction in respect of documents located outside the jurisdiction.

30. The gateway relied on by Mr Ebert to establish the court's jurisdiction to permit service of the PAD Application outside England and Wales is paragraph 3.1(20) of Practice Direction 6B, which provides:

> "A claim is made – (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."

31. The court's power to make an order for pre-action disclosure is set out in section 33(2) of the SCA:

> "On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
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> (a) to disclose whether those documents are in his possession, custody or power; and
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> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
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> (i) to the applicant's legal advisers; or

> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
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> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant."

32. Mr Butler KC, leading counsel for Mr Ebert, submits that, following the Court of Appeal decision in *Gorbachev v Guriev* [2023] KB 1, it is settled law that a pre-action disclosure application pursuant to section 33 of the SCA falls within the scope of the jurisdictional gateway in paragraph 3.1(20) of PD6B. Any questions as to the location of any documents and the application of the principle of territoriality are matters that fall to be considered at the later stages of the test, not as a matter of the jurisdictional gateway.

33. Mr Otty KC, leading counsel for Ferrari, submits that, properly construed in accordance with the principle of territoriality, section 33 of the SCA does not empower the court to make an order for pre-action disclosure against a foreign respondent in respect of documents located abroad. That question was identified but not decided in *Gorbachev*. The evidence indicates that the documents of which Mr Ebert seeks pre-action disclosure are, where they exist, located or electronically stored outside England and Wales. There is accordingly no proper jurisdictional gateway on which Mr Ebert can rely as a basis for serving the PAD Application out of the jurisdiction.

Claim giving rise to proceedings

34. It is not disputed by either party that a pre-action disclosure application is a claim giving rise to proceedings as referred to in CPR 6.36 and Paragraph 3.1(20) PD 6B.

35. CPR 31.16 gives effect to the provision in section 33(2) of the SCA regarding applications for pre-action disclosure and states:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started."

36. The Service Order, allowing service of the PAD Application in Italy, was made pursuant to CPR 6.36, the material part of which provides that, in proceedings, 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.

37. CPR 6.2(c) provides that for the purpose of CPR Part 6, which would include CPR 6.36 and PD 6B, "claim" includes *"any application made before action"* and that "claim form", "claimant" and "defendant" are to be construed accordingly. The definition of "claim" in CPR 6.2 is broad in scope, encompassing both procedural and substantive claims, including an application for pre-action disclosure. It follows that, for the purpose of CPR Part 6, an application for pre-action disclosure under section 33(2) of the SCA is a "claim" made by a "claim form".

38. "Proceedings" must be given a similarly broad interpretation for the purpose of CPR Part 6, given its close connection to "claim". In that context, an application for pre-action proceedings can properly be regarded as the commencement of proceedings against the respondent to the application. On that basis, the reference to "proceedings" in paragraph

3.1(20)(a) PD 6B is not confined to proceedings in which a claim form has been issued for substantive relief; it may include proceedings in the form of an application for pre-action disclosure under CPR 31.16.

39. The above summary is in line with the conclusion reached following careful judicial analysis, in the context of an application for pre-action disclosure in *ED&F Man Capital Markets LLP v Obex Securities LLC* [2017] EWHC 2965 (Ch) per Catherine Newman QC at [13]-[25] and, in the context of an application for third party disclosure, in *Gorbachev v Guriev* [2022] EWHC 1907 (Comm) per Jacobs J at [48]-[50] and [61]-[64].

40. The Court of Appeal approved the conclusions of both judges in *Gorbachev v Guriev* [2023] K.B. 1 per Males LJ at [33]-[34].

41. Accordingly, I am satisfied that the PAD Application is a "claim" giving rise to "proceedings" as referred to in CPR 6.36 and paragraph 3.1(20) of PD 6B.

42. That settled position is a necessary element but not sufficient to engage paragraph 3.1(20) of PD 6B.

43. As explained in *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] EWCA Civ 1660, by Lewison LJ at [33]-[35], a claim does not fall within paragraph 3.1(20) of PD 6B simply because it is a claim made under an enactment which allows some form of proceedings to be brought; the enactment under which the claim is made must be one that on a true construction contemplates proceedings against persons who are not within the jurisdiction.

Principle of territoriality

44. The issue in dispute is whether, for the purpose of paragraph 3.1(20) PD 6B, section 33(2) of the SCA is an enactment which allows proceedings to be brought against a party out of the jurisdiction in respect of documents located outside the jurisdiction.

45. A definitive answer to this question has been provided by the Court of Appeal in *Gorbachev* (above) in relation to documents located *within* the jurisdiction per Males LJ at [88]. Having carried out a comprehensive review and analysis of the relevant authorities, the court held that section 34 of the SCA allows an application to be brought against a third party out of the jurisdiction for an order to produce documents which are located within England and Wales. However, the court expressly left open the question whether the court would have power to permit service out of the jurisdiction if the documents were located *outside* the jurisdiction at [89]-[90]. It is to that issue that I now turn.

46. The principle of territoriality is a presumption in domestic law that legislation is not generally intended to have extraterritorial effect. In *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 Lord Bingham defined the principle at [11], citing *Bennion*, that unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom. Unless the contrary intention appears, an enactment applies to all

persons and matters within the territory to which it extends, but not to any other persons and matters.

47. Explanation as to the underlying policies for such a principle can be found in the judgment of Lord Rodger:

> "[44] So far as the application of statutes is concerned, there is a general rule that legislation does not apply to persons and matters outside the territory to which it extends: *Bennion, Statutory Interpretation*, p 306. But the cases show that the concept of the territoriality of legislation is quite subtle – "slippery" is how Lord Nicholls of Birkenhead described it in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, 545, para 32.
>
> [45] Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, "so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law": *Maxwell on the Interpretation of Statutes*, 12th ed (1969), p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within "the legislative grasp, or intendment," of Parliament's legislation, to use Lord Wilberforce's expression in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152C-D. In *Ex p Blain; In re Sawers* (1879) 12 Ch D 522 the question was whether the court had jurisdiction, by virtue of the Bankruptcy Act 1869, to make an adjudication of bankruptcy against a foreigner, domiciled and resident abroad, who had never been in England. James LJ said, at p 526:
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>> "But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation." … "

48. More recently, in *R (Marouf) v Secretary of State for the Home Department* [2025] AC 130 Lady Rose JSC re-stated the principle at [39]-[40], stating at [41]:

> "It is a well-established principle that has been applied for very many years to very many enactments. In the absence of express words, the extra territorial application of legislation may be implied but it is a high threshold that needs to be overcome… the starting point is indeed, as Simler LJ stated, that there is a presumption which it falls to the appellant to rebut."

49. The principle was stated succinctly in *Gorbachev* by Males LJ at [49]:

> "The principle, therefore, is that legislation does not generally apply to persons and matters outside the jurisdiction. But Parliament may and sometimes does provide in express terms that legislation is to apply to persons anywhere in the world. Equally, it may appear by necessary implication from the language, or from the object or subject matter or history of the enactment, that it is intended to have such application."

50. When considering the principle of territoriality, it is important to recognise that it may be of less significance where, on the facts of a case, there is evidence that the entity or matter concerned has made itself subject to the jurisdiction. A distinction must be drawn between an attempt to use domestic legislation to usurp illegitimate authority over the subject of another sovereign state and the use of domestic legislation to impose legitimate authority over persons and matters that have rendered themselves subject to the jurisdiction – see *Orexim* (above) per Lewison LJ at [22] and *Gorbachev* per Males LJ at [54]:

> "Implicitly, therefore, legislation which affects foreign nationals who have done something to render themselves subject to the jurisdiction of the United Kingdom does not, or at least may not, infringe the principle of territoriality. Such legislation does not amount to the usurpation of an illegitimate authority over such foreign nationals."

51. Of particular significance in this case, when construing the intended reach of section 33 of the SCA, are the parallel processes that have been introduced, by international convention, statutory framework and procedural rules, for international assistance in relation to evidence and documents from outside the jurisdiction.

52. The UK and Italy are both parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded on 18 March 1970 ("the Hague Convention"), an international treaty making provision for international legal assistance in civil and commercial matters. The material provisions are as follows:

> Article 1:
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> "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
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> A letter of request shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated …"
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> Article 3:
>
> "… Where appropriate, the Letter shall specify, inter alia –

> (g) the documents or other property, real or personal, to be inspected…"
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> Article 23:
>
> "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

53. One of the declarations made by the United Kingdom on ratifying the Convention was the following:

> "In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:
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> a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
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> b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power."

54. That general reservation is reflected in the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"), which regulates incoming letters of requests from courts outside the jurisdiction. Section 2(1) provides that when an application is made pursuant to such a request, the court shall have power to make such provision for obtaining evidence as may appear to the court to be appropriate for the purposes of giving effect to the request. Such an order may make provision for the production of documents as set out in section 2(2)(b). However, a significant restriction is contained in section 2(4), which provides that an order giving effect to such a request:

> "shall not require a person –
>
> (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
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> (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

55. When ratifying the Hague Convention, the Italian Government made a declaration pursuant to Article 23, in similar terms to that made by the United Kingdom Government, namely, that it would not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

56. The court's power to make an outgoing request for documents from another jurisdiction derives from its inherent jurisdiction: *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 per Sir Donald Nicholls VC at p.149H. The court clarified at pp.151-152 that, in line with the limitations imposed by the 1975 Act on incoming requests, an outgoing request would not be drawn so widely as to amount to a requirement for the witness to give common law disclosure or to a standard that departs from the standard applicable to an incoming request.

57. The need for consistency in the approach by the courts to incoming and outgoing requests was confirmed by Males LJ in *Gorbachev* at [62]:

> "Just as the English courts will not give effect to incoming requests which do not respect these limits, they will not make outgoing requests of foreign courts which would have that effect. As Lord Justice Wilson put it in *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053 at [29], following the decision of Sir Donald Nicholls V-C in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142 at page 152:
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>> "It would be unconscionable for the English court to make an outgoing request in circumstances in which, had it been incoming, it would not give effect to it; nor could the foreign court reasonably be expected to give effect to the English court's request in such circumstances. 'Do unto others as you would be done by', as Lord Denning MR reminded us, in this context albeit obiter, in *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] A.C. 547 at 560H.""

58. In *Nix v Emerdata Ltd* [2022] EWHC 718 (Comm) Cockerill J (as she then was) dismissed an application for third party disclosure against a respondent located in New York on the ground that the court did not have jurisdiction, stating:

> "[18] So far as sovereignty is concerned, again it seems to me that the fundamental point is that one has to respect sovereignty.
> …
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> [27] This application is in essence (and acknowledged to be) a way around the letter of request regime. The letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. It is a very sensitive topic in many jurisdictions; one can see this in relation to disclosure via the many, many reservations to disclosure which are appended to the Hague Convention. Many countries take a still more cautious line as to disclosure generally

> and third-party disclosure in particular than this jurisdiction does. In those circumstances it would be invidious for this court to attempt to impose its standards on a third party based in another jurisdiction by an assertion of direct jurisdiction over them.

59. The principle of mutual respect and comity was considered further by the Supreme Court in *R (KBR Inc) v Director of the Serious Fraud Office* [2022] AC 519. The case concerned a notice issued by the Serious Fraud Office pursuant to section 2(3) of the Criminal Justice Act 1987, requiring a UK company's parent company, incorporated in the United States with no registered office or fixed place of business in the UK, to produce documents held in the United States. The Supreme Court held that section 2(3) included no express provision or implicit indication to rebut the presumption against extraterritorial effect and could not be used to require a foreign company with no presence in the United Kingdom to produce documents held outside the jurisdiction. Lord Lloyd-Jones JSC placed great weight on the principle of mutual respect and comity, having particular regard to the system of international mutual legal assistance agreed by the sovereign states, stating at [45]:

> "… It can be seen that successive Acts of Parliament have developed the structures in domestic law which permit the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. Of critical importance to the functioning of this international system are the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded. (See generally *Gohil v Gohil* [2013] Fam 276.) It is to my mind inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the state where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

Analysis

60. The starting point is the principle of territoriality, giving rise to a rebuttable presumption that domestic legislation does not apply to persons and matters outside the territory to which it extends: *Al-Skeini* at [11] and [44], *Marouf* at [41] and *Gorbachev* at [49]. On a natural and ordinary meaning of the words used in section 33(2) of the SCA, there is no express indication that Parliament intended to depart from the presumed territorial limits of its legislative jurisdiction in respect of documents located in another sovereign state. Nor has any legislative purpose or context been identified that would give rise to such intention by necessary implication.

61. The presumption of territoriality reflects underlying policy whereby legislation should be interpreted, so far as its language permits, so as not to be inconsistent with the comity

of nations or the established rules of international law: *Al-Skeini* at [45]. The Hague Convention and the declarations made thereunder by the United Kingdom and Italy, are strong indicators that Parliament did not intend the reach of section 33(2) of the SCA to extend to extra-territorial orders for pre-action disclosure, a particular feature of common law jurisdictions.

62. As observed by Cockerill J in *Nix* at [27], the provision of documents or evidence in support of foreign proceedings is a sensitive topic in many jurisdictions. This is particularly the case in civil law jurisdictions, which do not utilise the breadth of disclosure that may be ordered in common law jurisdictions. This difference in procedure is apparent from the reference to common law jurisdictions by the Government of Italy in its Declaration under Article (23) of the Hague Convention. Such sensitivities are addressed in the carefully negotiated and delineated regime of international legal cooperation embodied in the Hague Convention, which makes provision for the letter of request procedure governed by international law and is subject to the reservations of individual state parties.

63. Against the established international regime under the Hague Convention, the courts of England and Wales have taken a consistent approach to incoming and outgoing requests for evidence, including requests for documents: *Panayiotou* at pp.151-152; *Gorbachev* at [62]. In circumstances where domestic legislation has restricted the court's power to give effect to incoming letters of request under the 1975 Act, it would be objectionable in terms of international comity for the courts to define a broader scope for their powers to order documents or other evidence outside the jurisdiction, particularly orders which excluded the involvement of the other sovereign state.

64. The development of a system for sharing evidence and documents between sovereign states by specific legislation and processes, incorporating restrictions and procedural safeguards, makes it inherently improbable that Parliament intended by section 33(2) of the SCA to introduce a parallel system for obtaining evidence from a foreign jurisdiction, without recourse to the courts or authorities of the state where the evidence was located and without the protection of any of the restrictions and safeguards put in place under the scheme of mutual legal assistance: *KBR* at [45].

65. On a practical level, it would be futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom in circumstances where that sovereign state has already indicated it will not recognise such authority or assist in enforcement. In that regard, Italy's declaration under Article (23) of the Hague Convention in respect of the execution of requests for pre-action disclosure is a strong indication of its approach to an order for pre-action disclosure made outside the regime. It is unlikely to be favourable.

66. Mr Butler relies on the decision in *Gorbachev* in support of his argument that the law on this issue is settled in his favour but the position of Ferrari in this case can be distinguished from that of the Trustees in *Gorbachev*. Although the respondent in each case is outside the jurisdiction, in *Gorbachev* the documents in question were held by solicitors within the jurisdiction. As recognised by Males LJ at [83]-[85], by sending the documents to England, for advice from the solicitors regarding transactions which would take place in the jurisdiction, the Trustees rendered the relevant matter with which the court was concerned subject to the jurisdiction. As a result, any presumption against extra-territoriality had less force than would otherwise have been the case. In

contrast, in this case, both Ferrari and the documents are outside the jurisdiction. In contrast with *Gorbachev*, there are no special circumstances that can be said to bring Ferrari within the legislative grasp or intendment of section 33(2) of the SCA.

67. Mr Butler's submission, that the court should accept jurisdiction and leave the question of whether any documents are within the jurisdiction to the PAD Application, does not provide a satisfactory answer to the presumption of territoriality. Use of the pre-action disclosure procedure to ascertain whether there are any documents within the jurisdiction, in circumstances where otherwise the court would have no power to order service out, would be contrary to the United Kingdom declaration under Article (23) and contrary to the restrictions in section 2(4) of the 1975 Act. It is said that documents stored on servers in Italy or the Netherlands could fall within the definition of "control" for the purpose of the PAD Application. The difficulty with that argument is that, although it would be sufficient to satisfy the test for pre-action disclosure, in this case the entity with "control" is out of the jurisdiction. It is incumbent on Mr Ebert to demonstrate that there are, or are likely to be, documents within the jurisdiction, if that is relied on as a factor that would bring the matter within the scope of section 33(2) of the SCA, empowering the court to order service out of the PAD Application.

68. Finally, as submitted by Mr Otty, the contention that the existence of a residual discretion might allow the court to do justice in an exceptional case does not provide sufficiently good reason to depart from the principle of territoriality. It is very unlikely that even a compelling case on the merits of the underlying matter would outweigh the above considerations of international comity which support a jurisdictional limit to the power to order pre-action disclosure against foreign respondents. The solution, in an appropriate compelling case, would be to use, rather than to circumvent, the letter of request procedure and seek to persuade the foreign court as to the exceptional justice of the case.

69. For those reasons, I conclude that, on a true construction, section 33(2) of the SCA does not allow proceedings to be brought against a party out of the jurisdiction in respect of documents located outside the jurisdiction.

70. It follows that Mr Ebert does not have a good arguable case that the PAD Application falls within the jurisdictional gateway set out in paragraph 3.1(20) of practice direction 6B. The court has no power to give permission for service out of the jurisdiction in relation to the PAD Application.

71. For completeness I turn to consider the other limbs of the test.

(ii) Serious issue to be tried

72. Mr Ebert must show that there is a serious issue to be tried on the merits of the PAD Application. There must be a real, as opposed to a fanciful, prospect of success on the application.

73. The court should take a broad view of the merits of the potential application but should not embark on an investigation of legally complex and debateable potential defences: *Total E&P Soudan SA -v- Edmonds* [2007] EWCA Civ 50 at [29].

74. The documents in respect of which pre-action disclosure is sought are:

i) documents pursuant to which the Board Members of SpA first became aware of (a) the issues with the Braking System which led to the Recall ("the Brake Issues") (b) the accident involving Mr Robert Ebert which led to the Trial or (c) the defence raised in the Trial, namely that the brakes on his vehicle malfunctioned;

ii) all reports and/or notifications globally from owners or drivers of Ferrari vehicles to SpA in relation to the Brake Issues, whether directly from themselves, or via Ferrari dealers and/or indirectly through official dealers and/or through after-market dealers;

iii) any communications between SpA and Bosch relating to the Brake Issues;

iv) any communications between SpA and NV relating to the Brake Issues;

v) any communications between SpA and their insurers relating to the Brake Issues;

vi) the outcome of any internal or external investigation(s) undertaken by SpA and/or Bosch in relation to the Brake Issues;

vii) all board minutes of SpA concerning (a) the Brake Issues and (b) the Recall;

viii) all reports commissioned and/or produced by SpA and/or Bosch in relation to the Brake Issues;

ix) all instructions given to Mr Martino Casolari in advance of, and during, the evidence given by him at the Trial;

x) all internal communication within SpA in relation to the evidence given by Mr. Casolari and the defence experts during the Trial.

75. The PAD Application is made under CPR 31.16(3), which provides:

> "The court may make an order under this rule only where—
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to—
>
> (i) dispose fairly of the anticipated proceedings;

> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs."

76. The relevant legal principles on an application under CPR 31.16 were summarised by Blair J in *Assetco Plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Comm) at [17], and adopted by Jacobs J in *Carillion Plc v KPMG LLP* [2020] EWHC 1416 (Comm) at [66]:

> "i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely …
>
> ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.
>
> iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16(3)(d).
>
> iv) In considering whether to make an order, among the important considerations are the nature of the loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure …
>
> v) The anticipated claim must have a real prospect of success.
>
> vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual."

77. I accept Mr Butler's submission that Ferrari and Mr Ebert are both likely to be parties to any subsequent proceedings. Mr Hitchcock's evidence is that the purpose of the PAD Application is to ascertain what Ferrari knew, or ought to have known, about the braking defects affecting the Spider 458 at the time of the criminal trial, to enable Mr Ebert to clarify and refine his intended claim against Ferrari. As set out above, it is not necessary for Mr Ebert to show that the initiation of such proceedings is itself likely. Contrary to the suggestion by Mr Otty, for this element of the test, considerations of the appropriate forum are not relevant, although they are significant for the purposes of the exercise of discretion.

78. Based on Mr Hitchcock's articulation of the potential claim in his evidence, I consider that at least some of the classes of documents sought appear to fall within the scope of

standard disclosure which Ferrari might have to give in the anticipated proceedings. The potential allegations are that the braking defects were present in Mr Ebert's vehicle, causing him to lose control and crash; Ferrari and/or Mr Casolari knew, or ought to have known, of the braking defects at the material time but failed to draw attention to the same at the criminal trial; had they done so, Mr Ebert would not have been convicted. Against those allegations, in principle, the categories of documents identified in the PAD Application could fall within the scope of standard disclosure in CPR 31.6.

79. However, this is not a case in which pre-action disclosure is desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs.

80. First, it is accepted by Mr Hitchcock that Mr Ebert could plead a claim against Ferrari without any further disclosure. This is of significance where the potential allegations have been identified but at a very superficial level and on a number of speculative permutations. A pleaded claim would clarify the factual and legal basis of the claim, which would enable the parties and the court to identify the issues against which disclosure should be given.

81. Second, the categories of document sought are not carefully circumscribed as required. Although in principle they appear to relate to the subject matter of the anticipated claim that Mr Ebert's vehicle suffered from braking defects that were the subject of the Recall and there was a deliberate or inadvertent 'cover up' by Ferrari, they are very widely drawn, not linked to any draft list of issues and amount to a fishing expedition.

82. Third, the absence of specificity as to how the anticipated claim might be put precludes the court from being satisfied, even for the purpose of the PAD Application, that there is a real prospect of success of the anticipated (substantive) claim. Mr Hitchcock has identified a wide range of possible legal bases of claim, stating that there is an almost infinite variety of potential permutations. I recognise that, without the documents, it is difficult for Mr Ebert to plead a particularised claim but there has been no attempt to define, even in outline, the factual and legal basis of the putative claim. Essential elements for any claim by Mr Ebert would be a plausible case, explaining how the accident was caused by intermittent braking defects found in the vehicle and the basis on which it is believed that Ferrari knew, or should have known, about the existence of such defects at the time of the accident.

83. Fourth, pre-action disclosure in the context of commercial litigation is, if not exceptional, unusual. Raising serious allegations of conspiracy, fraud or concealment should not be used as a basis for pre-action disclosure unless the allegations are clear and specific, demonstrate some evidential foundation and the request for disclosure is appropriately focused. Deceit and conspiracy are identified as potential claims but without any supporting evidence or basis for inference. In response to issues of limitation raised by Ferrari, reliance is placed on deliberate concealment, in respect of which there is no more than bare assertion.

84. It is recognised that it is not for this court to carry out a mini-trial or investigation into the anticipated claim. However, the paucity of detail produced by Mr Ebert does not satisfy the test that pre-action disclosure would dispose fairly of the anticipated proceedings, assist in a resolution or save costs.

85. For those reasons, there is no serious question to be tried on the merits of the PAD Application.

(iii) Appropriate forum

86. It is acknowledged that Mr Ebert is resident in England and there would be some logistical advantages in dealing with the matter in this jurisdiction. However, the court is not satisfied that in all the circumstances England and Wales is clearly or distinctly the appropriate forum for the trial of the PAD Application.

87. First, although Mr Ebert is resident in England and the losses to be claimed are said to be incurred in England, there is no other link to this jurisdiction. Ferrari and the material witnesses are based in Italy and Hong Kong.

88. Second, the documents of which disclosure is sought are not located in this jurisdiction but in Italy. It is said by Mr Butler that the Italian system does not permit pre-action disclosure in a case of this kind. That might be an indication that the court should not exercise its discretion in favour of allowing what in Italy would be an impermissible application to be made against an Italian entity. But even if it indicated that Italy was not the appropriate forum, it would not be a persuasive factor that this jurisdiction was distinctly the appropriate forum.

89. Third, a more appropriate forum would be Hong Kong, where the fatal accident, examination of the scene and the vehicle, and the criminal trial took place. Mr Hitchcock states that Mr Ebert's claim is likely to focus on the evidence that was given against him in the criminal proceedings in Hong Kong. There is no evidence that an application for pre-action disclosure could not be made in that jurisdiction. The documents are not located in Hong Kong but they are not located in England; therefore, that does not favour this jurisdiction. It is suggested that there is a real risk that justice would not be done in Hong Kong but this case has no political overtones and no evidence has been produced to suggest any wider concerns regarding the quality of justice in commercial claims for damages.

(iv) Discretion

90. It is common ground that, even where the court has jurisdiction to order service out, it retains a residual discretion to refuse permission for service of the application out of the jurisdiction.

91. As observed by Cockerill J in *Nix* at [23]-[27], the court is unlikely to exercise its discretion to order service out of a third-party application for disclosure where the application is an inappropriate attempt to circumvent the letters of request regime, particularly in respect of disclosure of documents which could not be obtained by use of the appropriate procedure.

92. This was echoed by Males LJ in *Gorbachev* at [90]:

> "Even if jurisdiction exists to make an order against a third party for production of documents held abroad, in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that

> jurisdiction for the reasons given by Cockerill J in *Nix v Emerdata Ltd*. Still less would it be appropriate to do so in order to obtain documents (for example, classes of documents) which could not be obtained pursuant to a letter of request."

93. In this case the application for service out of the PAD Application is an attempt to circumvent the letter of request procedure. Further, it seeks disclosure in respect of classes of documents which would not be permitted by the proper procedure.

94. Of particular significance in this case, the application is for pre-action disclosure that is contrary to the express reservations made by both Italy and the United Kingdom under the Hague Convention. Such an order would be inconsistent with the comity of nations and the established rules of international law.

95. In those circumstances, even if the court had discretion to permit service out of the PAD Application, I would decline to exercise such discretion.

Conclusion

96. In conclusion, for the reasons set out above:

    i) There is no good arguable case that the application against Ferrari falls within the jurisdictional gateway set out in paragraph 3.1(20) of Practice Direction 6B.

    ii) There is no serious issue to be tried on the merits of the application for pre-action disclosure.

    iii) The court is not satisfied that in all the circumstances: (a) England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute; and (b) the court ought to exercise its discretion to permit service of the application out of the jurisdiction.

97. Ferrari is entitled to the following relief:

    i) an order setting aside the Service Order, which granted permission to Mr Ebert to serve the PAD Application out of the jurisdiction; and

    ii) an order declaring that the court has no jurisdiction in relation to the PAD Application and/or will not exercise its jurisdiction in relation to that application.

98. The parties are invited to draw up and agree an appropriate order. Any disagreement as to its terms and all other consequential matters arising out of this judgment, including any applications for permission to appeal and costs, will be determined by the court on a date to be fixed following hand down.