



CAREY OLSEN

## Guernsey Court denies US regulator access to Guernsey Litigation

Service area / [Dispute Resolution and Litigation](#)

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In a judgment handed down last week, the Royal Court has confirmed the requirements for non-parties seeking to be joined to litigation and that the test is equally applicable in respect of interpleader proceedings. It also provided some helpful guidance as to the factors that will be taken into account when assessing whether to make a joinder order.

### Background

Interpleader proceedings were issued in March 2013 by EFG Private Bank (Channel Islands) Limited (“EFG”) in respect of assets held in accounts in Guernsey (the “Assets”), on behalf of a number of hedge funds which were incorporated in the BVI (in one case, Anguilla). With one exception, the hedge funds are in liquidation, with two BVI insolvency practitioners appointed as joint liquidators (the “Joint Liquidators”).

The need for the interpleader proceedings arose as a result of two civil complaints being brought in the United States of America. The U.S. Securities and Exchange Commission (the “SEC”) and the U.S. Commodity Futures Trading Commission (the “CFTC”) filed civil complaints against Mr Nikolai Battoo and a number of entities owned or controlled by him as a consequence of an allegedly fraudulent scheme which he employed to mask losses incurred due to the Madoff Ponzi scheme and to induce investors to plough further funds into his investment portfolios. Monies invested as part of that process are alleged to have been transferred to the hedge funds for onward investment. The CFTC obtained an order appointing a Receiver over the assets of Mr Battoo and his related entities (the “US Receiver”) and liquidators have been appointed over a number of the defendant entities in the US proceedings (the “Bahamas Liquidators”). Both the Joint Liquidators and the Bahamas Liquidators have been formally recognised by the Royal Court in Guernsey.

The Joint Liquidators have sought to repatriate the Assets in order to progress the liquidation process, (which would include an assessment of creditor and investor claims to the Assets), however their attempts to do so have been blocked by the US Receiver and the Bahamas Liquidators. Belatedly, the SEC applied to join the proceedings, and it is that application which gave rise to the judgment.

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## Overview of decision

Rule 37(1)(b) of the Royal Court Civil Rules 2007 (as amended) (the "Rule") deals with the power of the Court to order the joinder of persons to existing litigation (whether they be individuals or corporate entities). The Court in this case affirmed the test established in *Gresh v RBC Trust Company (Guernsey) Ltd and HM Revenue and Customs [2009-2010]* GLR 239, which was the first case to fully explain the requirements of the Rule. The Court also confirmed that the Gresh test applies in respect of interpleader proceedings, which brings further certainty to this area of civil procedure in Guernsey.

The Court retains a discretion not to grant the application for joinder, even if the above elements are met.

Consideration was also given to the guidance set out in the commentary to Order 15, rule 6 of the Rules of the Supreme Court in England, to which the Royal Court can have regard when interpreting the requirements of local civil procedure. The guiding principles which the Court found to be of assistance include:

- the goal is to enable an effectual adjudication of the issues and to prevent a multiplicity of proceedings.
- the party seeking to be joined should have more than a mere commercial interest in the matter, and they should not be added "for the convenience of the Court or otherwise".

The Court emphasised the need for there to exist a direct "interest" in the subject matter of the proceedings, which should go beyond a mere commercial interest, although it did not necessarily have to be sufficient to found a cause of action. In this case, the SEC had no direct claim to the Assets, but was "interested" in the outcome to the extent that it wished the Assets to be repatriated to the U.S. for distribution to defrauded investors generally, including those who may not have been able to establish legal claims over the Assets. In effect, it was a "curious bystander", without a cause of action or a commercial interest in the proceedings.

Whilst the point was not taken in argument, the Royal Court expressly recognised the SEC's right to bring the joinder application, following established principles of international law regarding comity between jurisdictions.

The Court reiterated the need for parties obtaining injunctions overseas to apply for an appropriate "mirror" order in Guernsey should they wish to rely on the terms of that injunction for enforcement (or indeed other) purposes in Guernsey.

## Application of the Gresh test

Gresh outlines a 3-part test:

- There must be a question or issue between [the joinder applicant] and a party to the action.
- The question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings.
- It must be just and convenient to determine that issue as between him and that party as well as between the parties to the proceedings.

The Deputy Bailiff considered that the first limb of the test had been met, notwithstanding that there was no clarity as to precisely what form the adverse claims to the Assets would take (the US Receiver and the Bahamas Liquidators have yet to file materials outlining the nature and scope of any such claims). Using materials filed in other jurisdictions, the Deputy Bailiff was able to deduce that the SEC's claim was likely to be similar to that of the US Receiver. On that basis, the Deputy Bailiff held that there exists a question or issue as between the SEC and one or more of the parties to the proceedings.

However, the SEC failed to persuade the Court that it satisfied either of the remaining two elements of the test and also failed to persuade the Court to exercise its discretion and allow it to be joined to the proceedings.

The Court analysed the relief sought in the proceedings and noted that it was aimed at "determining the rights and claims of the Respondents to the Assets". The SEC was not asserting any direct claims to the Assets, instead relying on a freezing order obtained in the United States, with the intention of supporting the position adopted by both the US Receiver and the Bahamas Liquidators.

However, the freezing order is limited in scope (arguably having no effect over EFG in any event) and the SEC had not taken any steps to obtain a mirror order in Guernsey, which placed it at some distance from the position of someone with a proprietary claim to the Assets or a creditor. Previous case law had indicated that even a creditor who had obtained a valid freezing order to support its position was not capable of being joined to proceedings. There would have to be exceptional circumstances to justify joinder in aid of a foreign freezing order, without anything further. No such circumstances existed here.

The third limb of the test involves the Court conducting a balancing act to assess whether it would be "just and convenient" to allow the SEC to join. Having regard to the overriding objective, and noting that as a result of the number of proceedings already instigated elsewhere, the principle of avoiding a multiplicity of proceedings was unlikely to be achieved, the Court decided that the joinder application may not be supportive of the overriding objective, not least because if granted would likely have an adverse impact on the timetable already in place.

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In addition, the SEC had effectively conceded in correspondence that it wished to be joined in part to act as an advocate for the US Receiver's position. The Court noted that the evidence and arguments that would be used by the SEC would be closely aligned with those of the US Receiver. There was no evidence to support the stated contention that the SEC would be able to provide additional documentation not available to the other parties, or run arguments that could or would not otherwise be dealt with (as was the case in Gresh, as the case HMRC was pursuing would otherwise have been without a voice). In essence, the SEC little to add that would assist in the determination of the issues and which could not have been put before the Court by the existing parties.

Turning to the final element of the test, the Court held that it would not exercise its residual discretion in favour of joinder. Despite hints from the Deputy Bailiff in several of the preceding court hearings, the SEC had taken no steps to obtain a "mirror" order and had also not sought to pursue alternative routes such as asset forfeiture under appropriate civil asset recovery legislation. The Court also explored the possibility of joining the SEC for limited purposes, however as the question of the appropriate forum for the determination of the matter is the next main question for determination, the Court felt that this was not something in respect of which the SEC could add any value and so decided that joining it for this purpose was not appropriate.

## Commentary

This decision is to be welcomed, as it provides further certainty and additional guidance as to the requirements for joinder and the factors that will be taken into account by the Court. It also sends a clear message that those wishing to become involved in proceedings should have a substantive interest in the subject matter and not simply seek to act as "cheerleader" for an existing party to proceedings.

A further point of interest was the Court's reminder that parties having the benefit of foreign injunctions should take the necessary steps to obtain "mirror" orders in Guernsey should they wish to rely upon their terms in litigation in Guernsey. Similarly, where there are appropriate legislative civil and/or criminal routes towards asset recovery, these should be explored. Whilst there are reasons why these steps may not have been possible in this litigation, they are certainly worth bearing in mind as steps to be taken to progress litigation efficiently in the future.

Carey Olsen's litigation department acted on behalf of the Joint Liquidators in their successful opposition to the joinder application and continue to act on their behalf in the ongoing proceedings. The team consisted of Partner John Greenfield, Senior Associate Richard Field and Associates Kasey Lynch and Jamie Oldfield.



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