Hague Convention Letters of Request: Non-Disclosure and Oppression

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Senior Master Fontaine yesterday handed down judgment in the case of Compagnie Des Grandes Hôtels D'Afrique S.A. (the "**Applicant**") and (1) Sarah Purdy and (2) Maquay Investments Limited (the "**Respondents**"). Humphries Kerstetter acted for the Applicant.

The Applicant is the claimant in proceedings in the United States District Court for the District of Delaware against companies in the Starman Group against whom it seeks to enforce a Final Arbitration Award for approximately $57 million on the grounds of alter ego liability.

The Applicant sought and obtained Letters of Request from the Delaware court to the English court requesting evidence from the Respondents for use at the trial of the proceedings in Delaware. Neither were Parties to the Delaware proceedings.

In September 2019, the Senior Master made orders (the "**Orders**") under section 2 of the Evidence (Proceedings in other Jurisdictions) Act 1975 and CPR 34.17 to 34.21 for:

- The oral examination of Ms Purdy; and
- The production by Maquay of a small number of specified documents.

The applications were made without notice, as is expressly permitted by CPR 34.17(b).

The Respondents applied to set aside the Orders. They did so on two grounds:

- The Applicant had not disclosed to the court the existence of a criminal investigation being carried out by the prosecuting authorities in Morocco following a complaint by the Applicant in which the Respondents and others were named; and
- Due to the Moroccan investigation, it would be oppressive for Ms Purdy to be examined and for Maquay to produce the documents required, and that no sufficient protections removing or minimising such oppression had been offered or put in place.

Non-Disclosure

The Applicant accepted that the usual principle applied and that it was obliged on the *ex parte* application to disclose all matters relevant to the court's assessment of the applications (*Brinks-Mat v. Elcombe* [1988] 1 WLR 1350). It also admitted that the Moroccan investigation was a material matter and should have been drawn to the attention of its English solicitors and disclosed to the court. The issue between the parties therefore was what the court should do.

The Respondents submitted that the non-disclosure was serious and could not be excused. Further, the applications for the Orders should have been made on notice to the Respondents. In these circumstances, the penal sanction of setting aside the Orders was justified. The Applicant submitted that the non-disclosure was unintentional and not serious because the Delaware court had issued the Letters of Request with knowledge of the Moroccan investigation, the Respondents were both aware of the Moroccan investigation, the Applicant had not gained any advantage from the non-disclosure, and the Respondents had not suffered any prejudice that could not be compensated in costs.

The court accepted that the non-disclosure was not deliberate. However, if the Moroccan investigation had been disclosed, the court would have directed the applications to be on notice to the Respondents. The court stated its view (which should now be followed by practitioners) that it is best practice for there to be advance communication with witnesses to identify whether they are prepared to provide the evidence on a

voluntary basis, unless there is a real concern that there will be an attempt to evade service as a consequence.

In addition to *Brinks-Mat*, the court considered *Akcine Bendrove Bankas Snoras (in bankruptcy) v. Antonov* [2013] EWHC 131 (Comm) and *Libyan Investment Authority v. JP Morgan Markets Ltd* [2019] EW 81452 (Comm) citing guidance approved by Christopher Clarke J. in *OJSC ANK Yugraneft v. Sabir Energy plc* [2008] EWHC 2614 (Ch). These cases emphasise that the court's discretion to impose a lesser sanction than setting aside an order made on an application where there has been material non-disclosure should be exercised sparingly but that such discretion should be exercised proportionately and in accordance with the overriding objective.

Whilst the court accepted the Respondents' submission that the non-disclosure was far from being at the least serious end of the spectrum (as the Applicant contended), it also accepted that the only real prejudice to the Respondents could be compensated for in costs. Taking into account all the circumstances, the court considered that it would not be an appropriate or proportionate sanction to set aside the Orders for non-disclosure.

Oppression

It is well established that the court should not order an examination pursuant to a letter of request where it would be oppressive to the witness. The court must hold a fair balance between the interests of the requesting court and the interests of the witness: see *First American Corp v. Al Nahyan* [1999] 1WLR 1154 and *Microtechnologies LLC v. Autonomy Inc and Mr Sushovan Hussein* [2016] EWHC 3268 (QB).

The Respondents submitted that the Orders were oppressive because they required them to give evidence for use in proceedings in Delaware in relation to matters that were the subject of complaint and investigation against them in Morocco including the alleged crimes of swindling and money-laundering. They were concerned that the evidence given for use at trial in the Delaware proceedings might find its way to Morocco and be used against them in the Moroccan investigation.

The issue of oppression has particular relevance where fraud is alleged against the proposed witness: see *First American*. However, unlike in *Microtechnologies*, the Fifth Amendment privilege was not available to the Respondents because it does not extend to fear of prosecution in a foreign country. Similarly, the English law privilege was not available as of right.

The court was of the view that following *Microtechnologies*, the jurisprudence is now clear that the mere existence of other proceedings where the intended witness is a defendant in respect of the same issues as in the proceedings in which the evidence is sought, will not necessarily lead to the court reaching the conclusion that the letter of request is oppressive to the witness. In *First American*, the order sought was declined because the applicants would not "come off the fence" in respect of allegations of fraud made against the witnesses sought to be examined by either joining them as defendants to the US proceedings or giving undertakings that it would not bring civil proceedings against them based on the alleged fraud in the future.

The approach of the court in these circumstances is to consider whether any protections can be put in place so that the requesting court can receive the evidence, and the witnesses can be sufficiently protected.

In the present case, the Delaware court had issued a typical protective order pursuant to which the Respondents could designate their oral and documentary evidence as "Confidential" so as to protect it from disclosure and use outside the proceedings. Further, the Applicant had offered the Respondents a

number of undertakings for the protection of their evidence. It had also undertaken not to bring civil proceedings against them based on the alleged fraud in the future (so as to "come off the fence" in line with the judgment in *First American*).

In the case of Maquay, the court held that in light of the protective order and the additional protections offered to Maquay by the Applicant, producing the specified documents (which were independent pre-existing documents) would not be oppressive.

The position of Ms Purdy was less straightforward. The court adopted the approach that it was not obliged to refuse to make orders for the obtaining of evidence unless every conceivable risk of oppression was eliminated. The risk of oppression, which could not be averted in this case, could be alleviated to a sensible and acceptable degree by the combination of the protective order and the protections offered by the Applicant. The court therefore declined to set aside the Orders on the grounds of oppression.

Conclusion

The case provides useful guidance on applications for deposition orders and orders to produce documents under the Hague Convention for use in proceedings in other jurisdictions. In cases where the application for the obtaining of evidence presents complex issues such as potential oppression of the witness, the court has stated that best practice is to make the application on notice to the witness if possible. It also demonstrates that, with proper protections in place, the court is willing to order evidence to be given for use in foreign proceedings where the issues to which the evidence is directed are also raised in a criminal investigation or prosecution in which the witness is involved.

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