

Hague Convention Letters of Request Part 2: Witness evidence and the risk of oppression.

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In our previous article [Hague Convention Letters of Request: Non-Disclosure and Oppression](#), we reported that we had acted for the Applicant, Compagnie des Grands Hôtels d'Afrique S.A. in an *ex parte* or "without notice" application to the English court for orders against an individual within the jurisdiction (Ms Purdy) and a company registered in England (Maquay Investments Limited) respectively requiring them to give evidence and produce documents for use at trial in proceedings in Delaware under section 2 of the Evidence (Proceedings in other Jurisdictions) Act 1975 and CPR 34.17 to 34.21.

The Respondents had applied to set aside the orders to give or produce evidence on the grounds of oppression. The alleged oppression arose because Ms Purdy and Maquay were the subject of a criminal investigation in Morocco. As the criminal investigation, and potential prosecution, were in a foreign state and not in the US or the UK, Ms Purdy did not have the right to remain silent under the US Fifth Amendment nor was she entitled to rely on the English law privilege against self-incrimination. The Applicant relied on a Protective Order made by the court in the Delaware proceedings regarding the use that could be made by the parties of discovery obtained in those proceedings and various written undertakings that it had offered to give the witnesses to ensure that their oral and documentary evidence did not become available to the Moroccan authorities. Further information on the background to the issues in the case can be found in our previous article.

The Senior Master held that not every risk of oppression had to be averted before a witness could be compelled to give evidence. The English court had to balance the interests of the court requesting the evidence (by letters of request addressed to the English court) against those of the witness. Where there is a risk of oppression to the witness which can only be alleviated and not eliminated, the court is willing to order the evidence to be given if there are adequate protections in place. The court applied the approach set out in *Akcinė Bendrovė Bankas Snoras (in bankruptcy) v. Antonov and another* [2013] EWHC 131 (Comm.). The Senior Master in the exercise of her discretion decided that the undertakings offered were adequate to protect the witnesses and refused the set aside the orders (*Compagnie des Grands Hôtels d'Afrique S.A. -v- (1) Sarah Purdy and (2) Maquay Investments Limited* [2020] EWHC 2785 (QB)).

On 11 December 2020, Ms Purdy appealed the Senior Master's judgment on oppression on the grounds that the Senior Master had given insufficient weight to the level of oppression she was likely to face by being compelled to give evidence in the civil proceedings in Delaware which could come to the attention of the Moroccan authorities and might be used against her in a criminal prosecution. She submitted that the case of *Akcinė* was distinguishable on the facts and was not appropriate for an application under section 2 of the 1975 Act because she was being compelled to give evidence which could be used against her in a Moroccan court in breach of her right to a fair trial under Article 6(1) of the European Convention on Human Rights (Morocco not being a signatory to the Convention). Whilst accepting the English court had a discretion, Ms Purdy's position was that the risk of oppression had to be eliminated before the court could compel the evidence to be given. Whilst the Protective Order and the offered undertakings alleviated the risk of oppression, they did not eliminate it or were not a sufficient safeguard.

The appeal was heard on 17 March 2021 in front of Freedman J. and judgment was handed down on 23 April 2021 (*Compagnie des Grands Hôtels d'Afrique S.A. -v- (1) Sarah Purdy and (2) Maquay Investments Limited* [2021] EWHC 1031 (QB)).

The court dismissed Ms Purdy's appeal and held that there was no absolute right to privilege against self-incrimination under English law. In reaching his decision, Freedman J. determined that the Senior Master was correct in her application of the law and facts and had correctly engaged in the balancing exercise between the interests of the witness and those of the requesting court. The Senior Master had considered the risk of oppression and had thoroughly evaluated the protections available to the witness in the Delaware proceedings and the additional protections that had been offered by the Applicant in the form of written undertakings. This had enabled her to determine that the protections were adequate to a sensible and realistic degree. The protections against self-incrimination did not have to be absolute, as established by the case authorities, nor did domestic law enacted after the coming into force of the ECHR require there to be absolute protection against the risk of self-incrimination in order to comply with Article 6.

The court held that the Senior Master was correct in her application of *Akcinė*. A case did not have to have

all features in common for it to apply to a given situation and although there were factual differences there were also common features which could be applied in this case.

The appeal court therefore formed the view that there was no error of law or principle in the Senior Master's judgment. The judge observed that the appeal seemed to be an attempt by Ms Purdy to interfere with an exercise of discretion.

Conclusion

This case illustrates that the English court does have a discretion to compel evidence to be given by a witness in the perhaps unusual circumstances described above where the witness faces potential prosecution in a foreign state and is not therefore entitled to rely on the privilege against self-incrimination and remain silent. There is no right to be put in the same position as the witness would have been in if the privilege had existed. The risk of oppression does not have to be eliminated altogether. The court will consider all the facts and the existing and offered safeguards and will exercise its discretion accordingly.



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