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Legal Update

English Courts Dealing with Letters of Request from Foreign Jurisdictions – Ensure the client is prepared…

Case note on *Atlantica Holdings, Inc & Anor v Sovereign Wealth Fund & Ors* [2019] EWHC 319 (QB)

Key Considerations

Recently, the English High Court delivered its decision in *Atlantica Holdings, Inc & Anor v Sovereign Wealth Fund & Ors* [2019] EWHC 319 (QB) in which it refused an application to set aside an order for United Kingdom-residents to be orally examined under oath in proceedings taking place in the United States.

The judgment, handed down by Julian Knowles J, offers useful insight into the Court's current approach as to the *Evidence (Proceedings in Other Jurisdictions) Act* 1975 (the "**Act**") and the extent to which the Court will be willing to use its discretion under the Act to refuse a letter of request (**"LOR"**) transmitted under the provisions of the Hague Convention of 1970.

The key message from the decision is that if an LOR is being obtained, then it is best to make sure that it is clear on its face that the referring Judge has considered and determined relevance. However, generally, English Courts will respect the principle of comity with foreign jurisdictions and there is usually a high threshold to be met, before an English judge will set aside a valid LOR.

Background

Pavel Prosyankin and John Howell (the "**Applicants**"), both UK residents, were the subject of LORs issued in the US District Court. The LORs were transmitted to the English Court pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

At a high level, the underlying proceedings in the US concerned the purchase by the Plaintiffs of securities in BTA Bank (the "**BTA Bank**"), a bank ultimately owned by the sovereign wealth fund of Kazakhstan. It was claimed that the purchase was made in reliance on false statements and omissions by the Defendants, amounting to a much wider and more complex fraudulent scheme, whereby the Defendants diverted assets from BTA Bank over the course of two debt restructurings for the benefit of the sovereign wealth fund, the result being that the securities lost their value to the detriment of the Plaintiff.

It was believed by the Plaintiff that the Applicants had relevant evidence to be used as testimony in trial including, among other things, evidence that BTA Bank had under-reported its asset recoveries. Mr Prosyankin was believed to have been a member of BTA Bank's asset recovery sub-committee and subsequently became a member of the Bank's management board. Mr Howell was a consultant who specialised in asset recovery and had previously advised BTA Bank in the restructure.

Legal questions to be determined

As a preliminary step, the Court had to determine whether it had jurisdiction to hear the LOR. In determining jurisdiction, there are three conditions with which the Court must be satisfied:

- First, the relatively small hurdle in that there must be an application for an order for evidence to be obtained in England and Wales;
- Second, the application must be made pursuant to the request of a Court exercising jurisdiction outside of England and Wales; and
- Third, the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting Court or the institution of which is contemplated.

All of these conditions were met in this particular instance and so the Court then had to consider whether it would exercise its discretion to have the application set aside. The arguments advanced by the Applicants to have the LOR set aside were that:

- It was oppressive;
- The LOR requested material that was not relevant; and
- That the LOR had been obtained for an ulterior motive.

Oppression

At a high level, the Applicants argued that the timescales allowed for in the US proceedings were too tight to allow the Applicants to prepare for the hearing.

The Court considered prior authority in which it was held that the Court must "*hold a fair balance between the interests of the requesting court and the interests of the witness*".

However, none of the arguments put forward by counsel for the Applicants "*came close*" to meeting the threshold for setting aside such an order on the basis of oppression.

Relevance

The fundamental question in granting an LOR is that an English Court can only require relevant evidence to be given.

Drawing on from the judgment in *Allegan Inc v Amazon Medica* [2018] EWHC 307 (QB), the Judge considered that there are two key questions to be asked when considering relevance:

- First, whether the intended witness can reasonably be expected to have relevant evidence to give on the topics mentioned; and
- Second, whether the intention underlying the formulation of these topics is an intention to obtain evidence for use at the trial or is some other investigatory, and therefore impermissible, intention (i.e. a "*fishing expedition*").

The second question was not relevant to the decision in this case. However, in determining the first question, a critical consideration was whether the requesting Court had determined relevance. In this regard it was considered that an English Court should not itself embark on its own investigations as it is to be expected that the foreign Court will have all of the relevant facts and understand the question of relevance better than the English Court. In this regard, the Judge stated:

> "*if it is plain (and, I emphasise, plain) that the requesting court has not considered the question of relevance where it is clear, even on a broad examination, that the evidence is not relevant, then the English Court should consider the question of relevance for itself: CH(Ireland) Inc v Credit Suisse Canada, supra, [15]; Allergan Inc v Amazon Medica, supra, [59].*"

The evidence before the Judge in this case was that his Honour Justice Furman (of the United States District Court for the Southern District of New York City) had made the request in the first person (for example saying "*I find it necessary for the purposes of justice..*") and therefore the LOR was not just a replication of an applicant's request (as sometimes may be the case). The Judge confirmed that this type of language was more than sufficient stating:

> "*I completely reject the suggestion that I should infer he merely rubber-stamped the Plaintiff's application without applying his mind to the merits*".

On this basis, the LOR was considered to be requesting relevant information.

Ulterior motive

In brief, the Judge dismissed the idea that Judge Furman would not be aware of any ulterior motivation, if such existed, or in fact was deceived into signing and sending the LORs as "*far-fetched*".

Conclusion

As stated in the Key Considerations section, the key point from the decisions is that if an LOR is being obtained, then it is best to make sure that it is clear on its face that the referring judge has considered and determined relevance.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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