

Legal Update

To order limited disclosure or not to order limited disclosure – striking the right balance between a fair trial in the English Courts and the risk of prosecution abroad

SUMMARY

“If you join the game you must play according to the local rules”¹, as the adage goes.

In *Bank Mellat v Her Majesty’s Treasury*², the Court of Appeal had to consider the right balance between the need to fairly dispose of English proceedings brought by Bank Mellat (the “**Bank**”), and the risk to the Bank of prosecution in Iran if it complied with the English Court’s order for unredacted disclosure.

The Court of Appeal upheld the decision of the first instance judge that, notwithstanding the attendant risk of criminal prosecution in Iran, certain unredacted documents be produced to a confidentiality club. The Court of Appeal ruled that the unredacted customer identities to be disclosed were highly relevant to the Bank’s claim for very substantial damages, based on an alleged loss of custom as a result of international sanctions.

In a decision underlining the potential for conflict between the laws of different jurisdictions, the Court of Appeal held that the ability of the English Courts to conduct proceedings in accordance with their own law and procedure should not be overridden by foreign law, even when compliance with the English Court rules entailed an actual risk to a party of prosecution abroad as a result.

BACKGROUND

The case concerned a complex claim brought by the Bank against Her Majesty’s Treasury (the “**Treasury**”) in respect of losses allegedly suffered by the Bank as the result of sanctions against Iran, introduced by the Treasury in 2009. Two broad categories of losses were claimed; the first involved specific transactions said to have failed in consequence of the sanctions, whilst the second, far larger, category, related to the Bank’s anticipated loss of market share of the Iranian foreign currency letter of credit market.

At first instance, the Bank had been ordered, during disclosure, to produce documents in unredacted form but subject to various confidentiality provisions, despite the fact that it was common ground between the Bank and the Treasury that compliance with the first instance order would constitute a breach of Iranian law.

In appealing the first instance decision, the Bank sought permission to produce documents in a more restrictive, redacted form, arguing that more extensive disclosure would expose the Bank to a risk of criminal prosecution in Iran.

¹ *Mackinnon v Donaldson, Lufkin and Jenrette* [1986] 1 Ch 482

² [2019] EWCA Civ 449

THE COURT OF APPEAL'S DECISION

The Court of Appeal identified three principal issues that it needed to consider in its deliberations:

1. the actual risk of prosecution faced by the Bank (or its employees in Iran) should it comply with the disclosure order;
2. the importance of production of the documents in unredacted form to the fair disposal of the trial; and
3. a discretionary balancing exercise as between those two issues.

Before addressing those issues, the Court of Appeal reiterated the parameters of the relevant legal framework, as to which there was no significant dispute between the parties: with regard to litigation in England, the Courts have jurisdiction to order production and inspection of documents. This is the case regardless of the fact that compliance with such an order would or might entail a breach of foreign criminal law in the "home" country of the party who is the subject of the order. Foreign law could not be permitted to override the English Courts' ability to conduct proceedings here in accordance with English law and procedure.

Addressing the issue of risk, the Court of Appeal held that the first instance judge had considered the correct question; namely the actual risk of prosecution under Iranian law, and had ultimately arrived at the correct answer; namely that the risk was more than a purely hypothetical risk, but was less serious than had been suggested by the Bank. Of relevance in this regard was the fact that the Government of Iran had a substantial shareholding in the Bank.

Turning to the issue of need, the Court of Appeal considered that the production of unredacted documents was required for the fair disposal of the issues at trial. The Bank was claiming substantial losses, and the content of the unredacted documents was highly relevant to proving those losses and issues of causation.

Taking both of these points into account, the Court of Appeal held that the first instance judge had exercised her case management discretion lawfully and appropriately in ordering the production of the documents, noting that had it been necessary for the Court of Appeal to exercise its discretion afresh, it would have done so in the same way as the first instance judge.

KEY TAKEAWAYS

This decision underlines the conflict which may arise between the laws of different jurisdictions. Parties submitting to the jurisdiction of the English Courts, in particular – but not only – as claimants, should bear in mind the resulting implications for the conduct of litigation in England, and the potential difficulties in complying with conflicting foreign laws.

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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