

Obtaining evidence in England in aid of United States proceedings: recent developments and the keys to success

With increasing trade and communication across borders, it is inevitable that evidence will often be located outside national boundaries. Given the volume of trade between the United States and England, and London's continuing importance as an international business centre, important evidence in United States proceedings will at times be located in England. The English High Court has powers pursuant to England's ratification of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 to assist United States courts to obtain evidence for use in United States proceedings.

The willingness of the English courts to assist reflects judicial and international comity. Lord Denning explained that the English court viewed it as their duty and pleasure to do what they could to assist foreign courts in obtaining evidence: see *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* ("Westinghouse"); see also the comments of Waller LJ in *Genira Trade and Finance Inc v Refco Capital Markets Ltd*. Indeed, the recent high profile request by the United States to obtain evidence from British American Tobacco's ("BAT") English solicitor for the purpose of its action against tobacco companies in the United States, has again highlighted the willingness of the English courts to assist in the evidence gathering process for use in United States proceedings: see *United States of America v Philip Morris Inc and ors* ("Philip Morris").

However, despite this general willingness, in *Philip Morris* and other cases in recent years, the English courts have

made it clear that applicants must keep in mind the scope and nature of any evidence that the English court will be likely to deem permissible when considering the letter of request: see *State of Minnesota & anor v Philip Morris Inc et al* ("State of Minnesota"); and *First American Corporation et al v Sheikh Zayed et al* ("First American Corporation").

This article considers the principles and practice which have developed from the English courts' consideration of letters of request, before examining the recent application of those principles in the *Philip Morris* case.

Powers of the English High Court

The power of the English High Court to order the taking of evidence in England at the request of a foreign court or tribunal derives from the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("1975 Act") which must be read in conjunction with Part 34 of the Civil Procedure Rules ("Part 34"). Together the 1975 Act and Part 34 provide a comprehensive, self contained code for obtaining evidence for use in foreign proceedings. The English court must be convinced that the application is made in pursuance of a request issued by or on behalf of a foreign court or tribunal. The court must also be satisfied that the evidence is to be obtained for the purposes of "civil proceedings" which have been instituted (or are contemplated) before the requesting court. For the purposes of English law, the term

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“proceedings in any civil matter” means all proceedings other than criminal proceedings.

Pursuant to section 2(2) of the 1975 Act, the English High Court is given extensive powers to make orders for obtaining the requested evidence in England. For example, the court may order:

- a) the examination of witnesses, either orally or in writing;
- b) the production of documents; and/or
- c) the inspection, photocopying, preservation, custody or detention of any property.

Evidence not Discovery

If the applicant adheres to the provisions of the statute and Part 34 there should be little difficulty in the High Court acceding to the request. In this regard, the English High Court will be minded to give effect to a letter of request which demonstrates that the oral or documentary evidence sought by the applicant is to be used for evidence at trial and is not oppressively broad.

What will not be available under the 1975 Act is US style discovery or depositions. Section 2(3) of the 1975 Act prohibits the English Court from making an order requiring any particular steps to be taken, unless they are steps which can be required to be taken by way of obtaining evidence for the purpose of civil proceedings in an English court. Section 2(3) applies both to oral and documentary evidence and recognises and gives effect to the distinction between evidence in the nature of proof to be used for the purposes of the trial and evidence in the nature of pre-trial disclosure to be used for the purposes of leading to a train of inquiry which might produce direct evidence for the trial.

This distinction was explained by Walker LJ in *Generia Trade and Finance Inc v CS First Boston and Standard Bank (London) Ltd* where the Court of Appeal upheld the orders for the examination of witness on terms that the examination “shall be for the purpose only of eliciting and recording testimony appropriate to be given at trial” and that “no question may be asked of the witness which in the opinion of the examiner is not a question of the nature that could properly be asked by Counsel examining the witness in chief at trial before the High Court of England”.

In this regard, an English court will not accede to a request which is in the nature of a wide ranging “investigatory” examination or deposition: *Philip Morris*.

The High Court will not accept as conclusive a statement by the foreign court as to the purpose of the request. The High Court will assess for itself whether the request actually constitutes “a roving inquiry... which is

not designed to establish by means of their evidence allegations of fact which have been raised *bona fide* with adequate particulars, but to obtain information which may lead to obtaining evidence in general support of a party’s case”: see *In Re State of Norway’s Application (“In Re Norway”)*.

Although as a general rule English courts will refuse a request which amounts to a “roving enquiry”, it is recognised in England and the United States that discovery can have a dual purpose. In this regard, the English courts have held that where the request is not too vague, and the court is satisfied that the evidence sought is required both for trial purposes and discovery purposes, it has jurisdiction to order examination limited to obtaining evidence for use at trial: see *Golden Eagle Refinery Co Ltd v Associated International Insurance Co (“Golden Eagle”)*. However, it is clear that applicants should proceed with caution where their letter serves a dual purpose. The courts have made clear that even if the dual purpose is discerned, if the task of salvaging the legitimate trial evidence function entails a “redrafting” of the letter, that task will not be undertaken by the English courts: see *In Re State of Norway’s Application, State of Minnesota, First American Corporation, Philip Morris*.

The English court is prohibited from making an order against a third-party to the proceedings requiring him to make general discovery of documents relevant to the proceedings. Such an order would be in the nature of a “fishing expedition” which the English courts would not allow: see s 2(4)(a) of the 1975 Act. Rather, a third-party can only be required to produce “particular documents specified in the order as being documents appearing to the court making the order to be, or likely to be, in his possession, custody or power”: see s 2(4)(b) of the 1975 Act. It was emphasised by Lord Wilberforce in *Westinghouse* that “a strict attitude is to be taken by the English courts in giving effect to foreign requests for the production of documents by non-party witnesses”.

Examination Procedure

The oral examination of a witness may be ordered to be taken before any “fit and proper” person nominated by the person applying for the order, or before an examiner of the court, or before such other qualified person as the court thinks fit.

It is generally desirable that an English lawyer be appointed as examiner. The examination itself may not resemble a “United States style examination”. Even though an intended witness may, from the applicant’s standpoint be hostile, the applicant is not entitled to cross-examine the witness because cross-examination by the party calling the witness would be inconsistent with the English trial procedure: see *Golden Eagle*. The other party to the United States proceedings may, however, cross-examine the intended witness.

Other grounds for refusing the request

In addition to the “general discovery” ground, the English court may reject the request of the foreign court, in the following circumstances:

- a) where it is considered that the request or any part of it is excessive as regards witnesses or as regards documents;
- b) where there exists a ground of privilege for a witness recognised under the law of England or the law of the requesting court against giving evidence or producing documents; and
- c) where the request would breach UK sovereignty.

The preservation in the 1975 Act of the recognised grounds of privilege in England is intended to safeguard and protect the position of a person from giving evidence in aid of foreign proceedings which according to the policy of English procedural law, he ought not be compelled to give. The reliance on English rules of legal professional privilege was the principal defence used by BAT’s English solicitor in *Philip Morris* to attempt to persuade the court not to accede to the United States letter of request.

The principles in practice: *Philip Morris*

18. In *Philip Morris* the United States applied for an order compelling two witnesses to be examined for the purposes of proceedings pending in the United States pursuant to a request issued by the United States District Court of Columbia. One of the witnesses was BAT’s English solicitor and the other was the chairman of BAT plc.

Application in relation to the solicitor

The evidence sought from the solicitor related to advice given in relation to the creation and implementation of BAT’s document management policies. The application was resisted primarily on the grounds of privilege. The solicitor argued that all communications which passed between him and his clients (BAT) were covered by legal advice or litigation privilege. Accordingly, it was contended that he could not be compelled to give evidence on any matter relevant to the United States proceedings, and it would therefore be pointless to make the order sought compelling him to give evidence.

At first instance, Moore-Bick J granted the United States’ application. Although he acknowledged that an application for evidence against an opposing party’s solicitor was virtually unprecedented, in light of recent English authority, it was no longer sufficient to assume that all communications by and to a lawyer and all information obtained by a lawyer for his client were

privileged. Moore-Bick J accepted that the court could justifiably refuse to allow the questioning of an individual if it were satisfied that privilege existed to such an extent that the entire exercise would be futile. However, His Lordship held that claims for privilege should generally be asserted in response to specific questions rather than as a blanket defence against giving evidence at all.

As a second ground of challenge, the solicitor claimed that the request would place an excessive burden on him and in the circumstances would be oppressive. This was particularly so in circumstances where the United States had failed to provide the solicitor with a list of questions which would enable him to prepare for the examination. Moore-Bick J said that “although the court will wish to provide all such assistance as it legitimately can in response to a request from a foreign court, it has a duty to ensure that the request does not become an instrument of oppression.” However, in the circumstances of the case before him, Moore-Bick J felt that the process of examining the solicitor could be managed by the court giving the appropriate directions, so as to avoid it being oppressive.

The Court of Appeal agreed with Moore-Bick J in all respects and dismissed the appeal.

Application in relation to the chairman

The letter requesting the examination of the BAT plc chairman sought his evidence in two broad areas:

- (i) the relationship between certain BAT companies; and
- (ii) the corporate reorganisation of the BAT Group. Whilst the chairman acknowledged that he had knowledge of these matters, it was submitted that the order should not be made for his examination because the real object of the United States was to carry out “an impermissible investigatory exercise”. It was also submitted that the subjects upon which the chairman was to be examined were so vaguely defined that it would be unfair for the chairman to be examined on them.

After surveying the authorities Moore-Bick J stated “the court should not make an order for examination of a witness if it is satisfied that the letter of request is mainly of an investigatory character, even though it is satisfied that the witness may be able to give some relevant and admissible evidence, unless it is possible to exclude certain areas of the request without undue difficulty.”

In the circumstances of the case Moore-Bick J concluded that the United States was really seeking to carry out a wide ranging investigation of an impermissible kind and to accede to such a request would be oppressive. Furthermore, the defects in the

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request were such that it was not possible for the court to redraft it and as a result the court refused to order the examination of BAT plc's chairman.

Keys to success

If an applicant wishes to succeed in having a letter of request recognised and given effect to by the English court, it will be necessary to devote careful attention to framing the letter in a way that will meet the English "evidence" test. As was illustrated in *Philip Morris* with respect to the letter of request directed to the chairman of BAT, requests generally fail because inadequate attention is given to the framing of the original letter of request and courts will not order an examination where the request is too broad and will be oppressive to the witness.

The best approach is to set out the matters on which evidence is sought in as detailed a way as possible, with

express cross-references to the issues as pleaded, and with suitable language from the United States judge that in his or her opinion the answers to the questions posed are required as evidence at trial. When the request relates to oral examinations the areas of questioning should be identified with sufficient specificity to establish that the request is not a "roving enquiry". Furthermore, a discovery purpose should be expressly disclaimed in the letter. If this approach is followed, it is likely that the request will succeed.

In all instances, the prudent step is to take English law advice on the scope and framing of the letter of request, since that may avoid considerable expense and delay later in the proceedings. Despite the fact that United States attorneys will be denied the luxury of "United States style discovery", the evidence gathering exercise in England may still produce useful evidence for the United States proceedings.

Constitutional reform in the UK: time for a US style supreme court?

Following months of consultation the Constitutional Reform Bill was introduced to the legislature in 2004. The aim of the Bill is to create greater transparency and openness in the United Kingdom's constitution, leading to greater public confidence in its institutions. One of the principal reforms introduced by the Bill is a Supreme Court to replace the existing House of Lords as the final and ultimate appellate court.

At present the Appellate Committee of the House of Lords receives appeals from the courts in England and Wales and Northern Ireland, and in civil cases from Scotland. The push for reform stems from the dual role that the House of Lords serves as both the highest court of appeal and also the second chamber of the legislature. This has left the House of Lords open to criticism on the grounds that there is a failure to separate powers, and that there is therefore a potential conflict between Law Lords acting in their judicial and legislative capacities.

To this end, the Bill seeks to make a distinct constitutional separation between the legislature and the judiciary which, the government argues, will create greater transparency and openness in the system.

This separation of powers will be familiar to a US audience. The UK Supreme Court will, however, still differ substantially from its US counterpart as it will not have the power to strike down and annul legislation and its judges will not be subject to confirmation hearings before either of the Houses of Parliament. Some features of the proposed reforms include:

- a) There will be 12 judges of the Supreme Court who will be referred to as "Justices of the Supreme Court".
- b) The Justices will no longer be allowed to sit as members of the legislative chamber of the House of Lords.
- c) Initially during the transitional phase the current Law Lords (who currently constitute the Appellate Committee of the House of Lords) will become the first 12 Justices of the Supreme Court. Thereafter the Supreme Court will have its own independent appointments system.
- d) The Supreme Court will have its own budget, its own administrative staff and eventually its own building.

The significant constitutional changes proposed by the current government's Bill, including the introduction of the Supreme Court, remain controversial. Indeed the Bill has already undergone significant amendment during its passage through the House of Lords. Whether the government can successfully introduce the reforms and ensure the Bill is passed remains to be seen.

Shell market abuse fines: FSA and SEC issue decision notices

Shell's reporting of oil reserves between 1998 and 2003 was recently the focus of investigation by the United Kingdom's Financial Services Authority ("FSA") and the United States' Securities and Exchange Commission ("SEC"). Shell's activities and reporting obligations were subject to investigation and review by both regulators as it is a multinational company with shares listed and traded on both the London and NY Stock Exchange.

On 24 August 2004 the FSA and SEC issued their respective decisions in relation to Shell's reporting of oil reserves.

The FSA and SEC found that statements released by Shell between 1998 and 2003 as to the extent of, and its ability to replace, its proved oil reserves were false or misleading as they overstated actual proved reserves by up to 25%. Both the FSA and SEC criticised statements and announcements released to the market from 1998 to 2003 by Shell, as well as its failure to correct the misleading statements when it should have become apparent that they were unsustainable. Both regulators also criticised Shell's failure to maintain adequate systems or controls over its reserves estimating and reporting processes, which the regulators claimed would have prevented misleading announcements being made. Shell has neither admitted nor denied the findings.

The FSA concluded that Shell had breached the market abuse provisions of the Financial Services and Markets Act 2000, and as a consequence fined Shell £17 million. The SEC determined that Shell had breached the reporting obligations set down by the Securities and Exchange Act 1934 and fined Shell \$120 million.

Comment

Reporting obligations in multiple jurisdictions

In determining that Shell had engaged in market abuse the FSA relied on the failure of Shell to present proved reserves in accordance with US rules contained in the Securities Exchange Act 1934. The FSA's reliance on US rules serves as a reminder for listed companies to ensure that they establish and maintain adequate

procedures, systems and controls to comply with their disclosure obligations in all jurisdictions where their shares are listed and traded.

Co-operation between regulators

The similar language used by the FSA and SEC in handing down their respective decisions, together with the fact that the decisions were released on the same day, indicates that there was a significant degree of collaboration between the two regulators. This was acknowledged in the SEC's press release issued on 24 August 2004, when Mr Stephen Cutler, the SEC's Director of the Commission's Division of Enforcement was reported as saying:

"The degree of international and inter-agency cooperation in this case has been extraordinary and sets an important precedent for investors that regulatory efforts to police the financial markets will transcend national borders".

The practices and procedures of regulators in different jurisdictions often vary in material respects. It follows that where a multinational company is faced with a collaborative regulatory investigation in multiple jurisdictions, there is a clear need for the company to instruct lawyers in jurisdictions familiar with the practices and procedures of the local regulators, in order that the company can be well advised when co-ordinating its response.

Contacts

For further information on any matters in this briefing, please contact:

Ted Greeno
+44 (0)20 7466 2245
ted.greeno@herbertsmith.com

David Sulan
+44 (0)20 7466 2779
david.sulan@herbertsmith.com

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Herbert Smith

Amsterdam

Stibbe
Stibbetoren
Strawinskylaan 2001
PO Box 75640
1070 AP Amsterdam
T +31 20 546 06 06
F +31 20 546 01 23

Bangkok

Herbert Smith (Thailand) Limited
1403 Abdulrahim Place
990 Rama IV Road
Bangkok 10500
T +66 (0)2 657 3888
F +66 (0)2 636 0657

Beijing

Herbert Smith
1410-1415 China World Tower 1
1 Jianguomenwai Avenue
Beijing 100004
T +86 (0)10 6505 6512
F +86 (0)10 6505 6516

Berlin

Gleiss Lutz
Friedrichstadt-Passagen
Friedrichstraße 71
D-10117 Berlin
T +49 30 2094-6400
F +49 30 2094-6444

Brussels

Herbert Smith
15 Rue Guimard
1040 Brussels
T +32 (0)2 511 7450
F +32 (0)2 511 7772

Gleiss Lutz
Rue Guimard 7
B-1040 Brussels
T +32 2 551-10200
F +32 2 5121568

Stibbe
Rue Henri Wafelaertsstraat 47-51
1060 Brussels
T +32 2 533 52 11
F +32 2 533 52 12

Budapest

Gleiss Lutz
Associated office
Bán, S. Szabó & Partners
József nádor tér 5-6
1051 Budapest
T +36 1 266-3522
F +36 1 266-3523

Frankfurt

Gleiss Lutz
Mendelssohnstraße 87
D-60325 Frankfurt
T +49 69 95514-0
F +49 69 95514-198

Hong Kong

Herbert Smith
23rd Floor Gloucester Tower
11 Pedder Street
Hong Kong
T +852 2845 6639
F +852 2845 9099

Jakarta

Associated firm
Hiswara Bunjamin and Tandjung
23rd Floor, Gedung BRI II
Jl. Jend. Sudirman Kav. 44-46
Jakarta, 10210
T +62(0)21 574 4010
F +62(0)21 574 4670

London

Herbert Smith
Exchange House
Primrose Street
London EC2A 2HS
T +44 (0)20 7374 8000
F +44 (0)20 7374 0888

Stibbe
Exchange House
Primrose Street
London EC2A 2ST
T +44 20 7466 6300
F +44 20 7466 6311

Moscow

Herbert Smith CIS Legal Services
4th Floor
Korobeinikov Pereulok 24
Moscow 119034
T +7 095 363 6500
F +7 095 363 6501

Munich

Gleiss Lutz
Prinzregentenstraße 50
D-80538 München
T +49 89 21667-0
F +49 89 21667-111

New York

Stibbe
350 Park Avenue, 28th Floor
New York, NY 10022
T +1 (2)12 972 4000
F +1 (2)12 972 4929

Paris

Herbert Smith
20 Rue Quentin Bauchart
75008 Paris
T +33 (0)1 53 57 70 70
F +33 (0)1 53 57 70 80

Prague

Gleiss Lutz
Jugoslávská 29
CZ-12000 Prague 2
T +420 224 007-500
F +420 224 007-555

Shanghai

Herbert Smith
38th Floor, Bund Center
222 Yan An Road East
Shanghai 200002
T +86 21 6335 1144
F +86 21 6335 1145

Singapore

Herbert Smith
#09-02 Caltex House
30 Raffles Place
Singapore 048622
T +65 6868 8000
F +65 6868 8001

Stuttgart

Gleiss Lutz
Maybachstraße 6
D-70469 Stuttgart
T +49 711 8997-0
F +49 711 855096

Tokyo

Herbert Smith
Toranomon 2-Chome Tower
2-3-17 Toranomon
Minato-ku
Tokyo 105-0001
T +81 3 3508 4508
F +81 3 3508 4509

Warsaw

Gleiss Lutz
ul. Sienna 39
PL-00-121 Warsaw
T +48 22 52655-00
F +48 22 52655-55

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