IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
**[2022] EWHC 718 (Comm)**

No. CL-2021-000612

Rolls Building
Fetter Lane
London
EC4A 1NL

Friday 18 February 2022

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

ALEXANDER NIX — Claimant

- and -

EMERDATA LIMITED — Defendant/Applicant

- and -

SCHULTE ROTH AND ZABEL LLP — Respondent

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THE CLAIMANT did not attend and was not represented.

MR J. ALDRIDGE QC and MR S. HACKETT (instructed by Griffin Law) appeared on behalf of the Defendant/Applicant.

THE RESPONDENT did not attend and was not represented.

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**J U D G M E N T**

**( v i a M i c r o s o f t T e a m s )**

MRS JUSTICE COCKERILL:

1 I am not going to give you permission to serve out. Nothing you have said this morning has begun to touch the views which I came to on paper.

2 This litigation relates to the collapse of the business known as "Cambridge Analytica", with which the parties are associated. The business of Cambridge Analytics was operated in the UK by six companies, all of which are now in liquidation. The Defendant is a company which bought the business of Cambridge Analytica. The Claimant ("Mr Nix") was at all material times the CEO of Cambridge Analytica until his suspension on or around 19 March 2018 and his subsequent resignation on or around 15 April 2021.

3 On 13 December 2021 the Defendant issued an application for third party disclosure against the Respondent (the "Substantive Application"). As the Respondent is a New York situated LLP, and is a firm of lawyers which was advising the Claimant at the time of key points in the events which give rise to the dispute between the parties. The reason for the application is that the Defendant wishes to see the Respondent's file to understand what communications passed between its representatives and Mr Nix.

4 On the same day the Defendant also issued an application seeking permission to serve the Respondent with the Substantive Application out of the jurisdiction (and by email) (the "Permission Application").

5 On 21 January I dismissed the Permission Application on paper with the following reasoning:

> "Application dismissed. The Court has no jurisdiction to make orders against third parties who are resident outside the jurisdiction. The appropriate route for obtaining evidence from a witness outside the jurisdiction is either via letter of request or via any jurisdiction which the local court may offer to grant disclosure in support of proceedings in this jurisdiction."

6 The Defendant requested me to restore the Permission Application at an oral hearing to hear further argument.

7 The respondent to this application is not the defendant and even within the jurisdiction, the CPR 31.17 jurisdiction has to be carefully considered before it is exercised. This is a case where the respondent is outside the jurisdiction. The general principle in relation to people who are outside the jurisdiction is that which is expressed in **Dicey, Morris and Collins on the Conflict of Laws** para.11-142:

> "The court ought to be cautious in allowing process to be served on a foreigner out of England. This has frequently been said to be because service out of the jurisdiction is an interference with the sovereignty of other countries. If there is doubt in the construction of any of the heads of jurisdiction, that doubt ought to be resolved in favour of the defendant... [and so on]. The court will refuse permission if the case is within the letter but outside the spirit of the rule."

8 The question which I have raised with Mr Aldridge QC today is: how does this court have jurisdiction over the third party from whom disclosure is sought - and why should a

partnership based in the US, which *ex hypothesi* is not capable of being made subject to the jurisdiction by virtue of residence here, be susceptible to this court's orders?

9 Mr Aldridge has raised two arguments. In paragraph 14 of his skeleton he points to CPR 6.39 and he submits that:

> "it is plain that CPR 6.39 can only be contemplating applications such as the present one:
>
> 14.1 Under CPR 6.38(1), the permission of the court would apparently be required to serve an application on a non-resident non-party where permission had been required to serve the claim form out of the jurisdiction. This is not such a case, however, because both the Claimant and the Defendant are resident in England ….
>
> 14.2 CPR 6.39 does not explicitly create an obligation to apply for permission to serve an application notice out of the jurisdiction on a non-resident non-party. However, it may, by selectively disapplying CPR 6.35 and parts of 6.37(5)(a), be implying that such permission is required. ….
>
> 14.4 Only one of the gateways – gateway 18 – appears specifically to contemplate what might be described as an application against a third party. Whilst still described as, "a claim", gateway 18 describes what would normally be called an application for a third party costs order. However, CPR 46.2(1)(a) provides that, when a court is considering whether to make a costs order against a non-party, that non-party will be added to proceedings. Therefore, CPR 6.39 cannot be referencing that gateway.
>
> 14.5 One possibility, therefore, is that no application against a non-resident non-party is capable of being brought within one of the gateways. Yet if this were correct CPR 6.39 would have no function.
>
> 14.6 The Defendant submits that the preferable interpretation is that gateway 20(a) is available for applications, such as the present, which are made under an enactment, but which do not require the issue of a claim form, but rather an application notice."

14 I am afraid I do not accept that submission. For example, the kinds of cases where CPR 6.38 appears to be contemplated are the kind of thing one sees in *C Inc PLC v L & Anor* [2001] 1 All ER (Comm) 446 where Aikens J held that the court had power to grant a claimant permission to serve a freezing order against a non-party out of the jurisdiction where the claimant sought an order against the judgment debtor for the appointment of the receiver, and it was anticipated that the receiver would claim an indemnity against that person and there was a risk of dissipation. In those circumstances, Aikens J found that the "*necessary and proper party*" gateway was engaged. So in circumstances where, for example, there is an application which engages a third party such as an anti-suit on notice, or in the context of a letter of request outwards to enable a potential respondent abroad to appear if it so wished at that stage, those are the kinds of contexts in which one might expect an application notice to be needed to be served out of the jurisdiction.

15 The applicant's approach, in my judgment, involves an obvious logical fallacy. It really hinges on the proposition that 6.39 is there, therefore it must be used - and therefore this is what it is

there for. That is obviously wrong. It is not a provision which has been used in this respect before. Nobody, I think, has suggested that it has been used in this respect before.

16 Mr Aldridge relies on *ED&F Man Capital Markets LLP v Obex Securities LLC* [2017] EWHC 2965 (Ch) in which Catherine Newman QC, sitting as a Deputy Judge of the Chancery Division, allowed an application for the pre-action disclosure under CPR 31.16 to be served out using gateway 20(a). She decided that such an application was within the scope of the gateway at paragraph 20(a) of Practice Direction 6B, on the basis that such an application was a "proceeding", and as it was brought under s.33 Senior Court Act 1981 it was accordingly a proceeding "under an enactment".

17 Of course, that was a different case and a different rule. It has been doubted by strong commentators. I agree with Mr Hollander in his book. At paragraph 1-10 where he suggests that "proceedings" should be given the same meaning in Practice Direction 6B. I certainly do not regard *ED&F Man* as being any sound basis for saying that 20(a) provides a gateway for applications such as this. The argument that that would mean there is no use for 6.39 is, it seems to me, wrong. One can contemplate, as I have indicated, plenty of other uses for 6.39 which would not involve necessarily using 20(a). In addition, there may be other enactments such as Insolvency Act proceedings where that is a gateway which is contemplated. An example of the kind of case I have in mind can be seen in *Re Mid East Trading Ltd* [1998] BCC 726

18 So far as sovereignty is concerned, again it seems to me that the fundamental point is that one has to respect sovereignty. Mr Aldridge has relied on *MacKinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] Ch 482; [1986] 2 W.L.R. 453. He notes that in that case the plaintiff had secured a Bankers Books Evidence Act order and had issued a subpoena in support of compelling certain documents from a New York-based bank (with an English branch office). The documents in question were account statements in respect of an account maintained by a Bahamian company in the bank's New York branch.

19 Hoffmann J, as he was, reasoned as follows at page 493:

> "The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, and, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction."

20 Mr Aldridge relies on the fact that Hoffmann J's reasoning was not that the court had no jurisdiction to compel documents from a non-party foreign resident person. It was rather that the court would generally not exercise that discretion against a non-party foreigner, "*in respect of their conduct outside the jurisdiction*". He notes also that in *MacKinnon* the court was dealing with a banking relationship between a New York bank and a Bahamian depositor – there was accordingly no conduct within England.

21 But as I have pointed out in the course of argument that was a very different case. Jurisdiction was established via the agency gateway; and the self-denying ordinance was there in the context of jurisdiction having been established but the documents being abroad. So the position in reality is that even in circumstances where there was jurisdiction against the party because they had a branch resident in the jurisdiction the court should not order disclosure of

the documents abroad. It seems to me that that points very clearly against the argument which is raised here.

22 So too does the approach of the *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43; [2010] 1 AC 90. In that case the House of Lords was considering the scope to serve an order for the examination of a corporate judgment debtor's officer under CPR 71 on such an officer out of the jurisdiction. *MacKinnon* was cited in argument and was relied on by the Court of Appeal in support of the "*presumption against extra-territoriality*" (see e.g. paragraph 15 of Sir Anthony Clarke MR's judgment on page 106). The House of Lords found, reversing the Court of Appeal, that the application to examine an officer of a corporate judgment debtor could not be served out of the jurisdiction.

23 I should make abundantly clear also that even if, contrary to the views which I have just expressed, there were jurisdiction to make an order for service out contemplating an application against a foreign non-party for disclosure, I would not be minded to order it in circumstances where, for example, one is plainly trespassing on the letter of request regime. In that context there is ample high authority which indicates that the court will only exercise its discretion to order a letter of request outwards in circumstances which parallel the letter of request inwards. For example in *Charman v Charman* [2006] 1 WLR 1053 Wilson LJ stated:

> "It would be unconscionable for the English court to make an outgoing request in circumstances in which, had it been incoming, it would not give effect to it; nor could the foreign court reasonably be expected to give effect to the English court's request in such circumstances. "Do unto others as you would be done by", as Lord Denning MR reminded us [in Westinghouse]".

24 To similar effect in *Sony v Panayiotou* [1994] Ch 142, 152, Nicholls VC held:

> "In my view there is only one standard, applicable alike to subpoenas to produce documents, outgoing letters of request and incoming letters of request. In principle there ought to be only one standard".

25 As is equally well known and even more authoritatively stated this court will not permit letters of request inwards for disclosure - but only for what used to be a *subpoena duces tecum* (now a witness summons to compel documents). Section 2(4) of the Evidence (Proceedings in other Jurisdictions) Act states:

> "An order under this section shall not require a person - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

26 That means that any foreign court seeking documents from somebody resident within this jurisdiction must only ask for *"individual documents separately described"* (a phrase dating back to Lord Diplock in *RTZ v Westinghouse*); and the court has repeatedly emphasised that the same principles should apply inwards and outwards.

27 This application is in essence (and acknowledged to be) a way around the letter of request regime. The letter of request regime is the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party. It is a very sensitive topic in many jurisdictions; one can see this in relation to disclosure via the many, many reservations to

disclosure which are appended to the Hague Convention. Many countries take a still more cautious line as to disclosure generally and third-party disclosure in particular than this jurisdiction does. In those circumstances it would be invidious for this court to attempt to impose its standards on a third party based in another jurisdiction by an assertion of direct jurisdiction over them.

28 The letter of request jurisdiction is one which engages the jurisdiction of the court to which the respondent is properly subject. This is a case where it is validly accepted that the specificity requirements of the witness summons to compel documents could not be satisfied. It is also said that pursuing a letter of request would inevitably be slower. I have to say that I rather doubt that submission, given the novelty of the application and the radical nature of the proposition. Were this application to be pursued, I think one could confidently expect any order granting such relief to be appealed.

29 I would also say that a matter which would come into consideration as regards the exercise of any jurisdiction is the fact that the US actually has its own jurisdiction which enables people to apply for disclosure of this sort in assistance of foreign tribunals. It is in Title 28 United States Code 1782 which allows the US Court to grant assistance to foreign tribunals – and litigants before such tribunals. It is granted really quite generously.

30 In this case, there seems for some reason to have been a decision either not to engage with that jurisdiction or a decision that it is not available. In either circumstance, that would be a matter which would militate against the exercise of the disclosure.

31 I would add that the idea of seeking disclosure to plead the defence is, in itself, somewhat unorthodox and in circumstances where even if the application were to be permitted it would involve a very long extension of time, it seems rather remarkable proceeding.

32 For the reasons which I have given, I am not going to grant your application, Mr Aldridge.

(See separate transcript for proceedings after judgment)

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.