English High Court clarifies the position on English courts assisting in obtaining evidence for use in foreign court proceedings

Summary

In *Buzzfeed Inc and another (Appellants) v Aleksej Gubarev and others (First Respondents), Christopher Steele (Second Respondent)*[1] the English High Court recently clarified a number of legal principles relating to the powers of the English courts to assist in obtaining evidence for use in foreign proceedings, a matter of particular relevance with regard to third parties.

Obtaining evidence under the Hague Convention

Outside the EU framework for obtaining evidence, a number of states are contracting parties to the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters (the "**Hague Convention**"), including the United Kingdom and the United States.

The Hague Convention sets out a process by which letters of request for obtaining evidence can be issued by a requesting state to be executed by a receiving state, allowing for the cross-border transfer of evidence. The Evidence (Proceedings in other Jurisdictions) Act 1975 (the **"1975 Act**") is the means by which the United Kingdom gives effect to its obligations under the Hague Convention.

Background to the case

The First Respondents in this appeal, Mr Gubarev and two companies, had brought defamation proceedings in the United States against the Appellants in this appeal, Buzzfeed Inc and Ben Smith.

Mr Gubarev and the two companies, as the plaintiffs in the US proceedings, subsequently sought and successfully obtained the issue of a letter of request in August 2017 by the US court for assistance from the English courts. The letter of request required Mr Steele to give evidence by oral examination on 14 specified topics for the purposes of the US defamation proceedings. In November 2017 the English court made a without notice order on the basis sought, directed to the same 14 topics, for evidence to be so taken under the 1975 Act.

Mr Steele then applied in December 2017 to set aside, alternatively to vary, the without notice order, contending that the letter of request sought irrelevant evidence, was oppressive, amounted to a fishing expedition, and would compromise his source(s).

In her subsequent March 2018 judgment, the English Senior Master held that the requesting US court had not independently addressed the question of the relevance of the individual topics for examination of Mr Steele in connection with the pleaded issues. The Senior Master further held that the topics for questioning as originally drafted went beyond what was required in the US proceedings, amounted to a fishing expedition, and were oppressive. Having considered each of the 14 topics for questioning individually, the Senior Master made various amendments, introducing various deletions and conditions.

Buzzfeed Inc and Ben Smith in turn applied for and obtained permission to appeal the Senior Master's decision on the ground that the Senior Master had erred on the issue of relevance and oppression. In so doing, the Appellants sought to re-instate some of the original wording of the topics for questioning Mr Steele.

1 [2018] EWHC 1201 (QB)

Implications of the appellate court's decision

Mr Justice Jay dismissed the appeal in its entirety. He summarised that the starting-point in relation to letters of request issued by a foreign state to which the 1975 Act applies is that they should be given effect as far as possible in England.[2]

However, if the requesting court has not considered the question of relevance of the request to the issues before it on which the witness is in a position to give evidence, then it must fall on the receiving court to undertake that exercise.[3] It was also clear in Mr Justice Jay's opinion that the Senior Master took into account the view of Stanley Burnton J in *Gredd v Busson*[4] that "*orders for letters of request are normally made by the US judge without any real scrutiny*".

Further, there was limited scope for an English appellate court to interfere with a Senior Master's exercise of discretion in respect of orders made under the 1975 Act,[5] and it had to be shown that either:

a) the Senior Master had erred in principle in their approach; or

b) the Senior Master had left out of account or had taken into account some feature that they should, or should not, have considered; or

c) the Senior Master's decision was wholly wrong because the appellate court would be forced to come to the conclusion that the Senior Master had not balanced the various factors fairly in the scale.

Taking all of these factors into account, Mr Justice Jay found that the Senior Master was entitled to reach the conclusions she did with regard to the relevance of the individual topics for examination, and to adopt a merits-based approach.

As to the ground of appeal in relation to the issue of oppression, the judge held that this raised a point of discretion not of principle, and that the Appellants had failed to demonstrate that the Senior Master's exercise of discretion in relation to the issue of oppression was wrong.

Conclusion

This decision highlights the importance of taking into account the approach of the English courts in relation to letters of request at the outset of making an application in the foreign state. If the courts of the requesting state in practice tend to make orders for letters of request with limited scrutiny, this may leave greater scope for the English courts to examine questions of relevance and oppression later in the process, with the associated cost implications.

If you have any questions or comments in relation to the above, please contact Ian McDonald or Catherina Yurchyshyn, or your usual Mayer Brown contact.

Ian McDonald
Partner, London
imcdonald@mayerbrown.com
T: +44 20 3130 3856

Catherina Yurchyshyn
Associate, London
cyurchyshyn@mayerbrown.com
T: +44 20 3130 3962

2 *Rio Tinto Zinc Corporation v British Westinghouse Electric Corporation* [1978] AC 547
3 Simon J in *CH (Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 (QB)
4 [2003] EWHC 3001 (QB)
5 *MicroTechnologies LLC v Autonomy Inc* [2016] EWHC 3268 (QB)