Guide to Obtaining Evidence in England for use in Proceedings in the United States of America

1) INTRODUCTION

Steven Loble has acted in a large number of cases involving obtaining evidence in England for use in proceedings in the United States of America, as well as enforcement of judgments. He has undertaken cases in this area throughout his career. This experience provides first hand knowledge of how the law and procedure works in practice and enables us to meet clients' needs in securing testimony and documents for use at trial in foreign countries, particularly in the United States.

It also enables us to assist clients who have been served with an Order to give evidence for foreign pleadings, if it appears that the Order should not have been made or if the Order is too wide. In such cases, we can apply for the Order to be set aside or modified to deal with the client's concerns.

This paper explains the procedures for obtaining evidence from non-parties in England and Wales (referred to below as England for the sake of brevity) for use in legal proceedings in the United States of America. The United Kingdom is made up of a number of different jurisdictions – England, Scotland, Northern Ireland and the Channel Islands (each of which is a separate jurisdiction). The paper suggests the most appropriate procedures in particular cases for England only; it is not an exhaustive review of the law or procedure.

Evidence may be obtained in England for use in foreign proceedings without any formal order. In certain other countries the obtaining of evidence without the permission of the Court is a criminal offence but the English Courts will not interfere with any procedure by which witnesses appear voluntarily to give evidence or produce documents. Only in restricted circumstances may production of documents be contrary to English law (e.g. pursuant to the Protection of Trading Interests Act 1989).

The U.S. is a prolific source of requests for evidence and therefore the means of obtaining evidence outside the U.S. under U.S. Federal Law is also set out in this guide.

2) THE METHODS OF OBTAINING EVIDENCE IN ENGLAND AND WALES

Evidence may be collected in England for U.S. proceedings in the three ways described below:-

a) VOLUNTARILY

Depositions can be taken and documentary evidence collected from any persons willing to appear voluntarily. This must be done in a way acceptable to the U.S. Court and depositions are frequently taken before the U.S. Consul.

b) PURSUANT TO RULE 28(b) OF THE FEDERAL RULES

Evidence can be obtained in any of the three ways set out in Rule 28(b):-

1. On notice, before a person authorised to administer oaths in the place in which the examination is held, either by the law of that place or by U.S. law; or

2. Before a person commissioned by the English Court and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony; or

3. Pursuant to Letters Rogatory (known in England as "Letters of Request" and so referred to below).

Further, a U.S. national or U.S. resident present in England and Wales may be subpoenaed pursuant to 28 USC Para. 1783.

However, there may be a conflict between the obligation of a U.S. national or U.S. resident to comply with such a subpoena and local law - for example, in the case of a London branch of a U.S. bank when such a subpoena would not be effective. A London branch of a U.S. bank should require the protection of an English Court Order before divulging any documents or information. There is also a limit to the subject matter jurisdiction of foreign courts (see *MacKinnon v. Donaldson, Lufkin and Jennrette Securities Corporation* [1986] 2 WLR 453).

c) PURSUANT TO THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The Evidence (Proceedings in other Jurisdictions) Act 1975 was passed partly to give effect to the Hague Convention. The Act goes further than necessary for the purposes of the Convention and should be read in conjunction with Part 34 of the English Civil Procedure Rules (CPR) to ascertain the boundaries within which evidence can be obtained pursuant to the Convention, or for foreign proceedings generally, and the procedure for obtaining such evidence. The procedure under The Hague Convention is the same for any country which is a party to it and indeed for any country which requests judicial assistance from the English Court.

3) LETTERS OF REQUEST

Letters of Request may be submitted either (i) through diplomatic channels or (ii) directly byEnglish Solicitors.

If English Solicitors are not instructed by the party seeking an Order for depositions or the production of documents, the Treasury Solicitor (the government legal service) will make an application to the Court for an Order but it is more prudent to instruct English Solicitors in case the witnesses resist the Order. It is also quicker to instruct Solicitors and to send the Letters of Request directly to them - an Order can then be obtained within a week, whereas transmission through diplomatic channels takes considerably longer.

4) DISCOVERY AND FISHING EXPEDITIONS

Discovery in England and Wales (which is documentary only) is much narrower than the discovery which is allowed in the U.S.: English Courts will not countenance "fishing expeditions". The English Court is prohibited from making an order requiring any particular steps to be taken unless they are steps which could be taken to obtain evidence for the

purposes of civil proceedings in the English Court. The English rules distinguish between (i) evidence in the nature of proof to be used for the purposes of the trial and (ii) evidence in the nature of pre-trial discovery to be used for purposes of a train of enquiry which might produce evidence for trial. The English Court will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents and will not give effect to a request for those purposes.

The notes to the CPR state:

"**Distinction between evidence for trial or for pre-trial purposes**

Under s.2(3), the English Court is prohibited 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 purposes of civil proceedings in the English Court, whether or not they are proceedings of the same description as those to which the application for the order relates. This provision, which applies both to oral and documentary evidence 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 in the mind of the draftsman of the Act of 1975 and was made the subject of an express declaration by Her Majesty's Government when ratifying the Hague Convention that the United Kingdom would "not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents" (see Cmnd. 6727 (1976)).

Accordingly, the English Court could in the past refuse to make an order in aid of a foreign request for evidence if it appeared or to the extent to which it appeared that that evidence was required, not for the purpose of proof at the foreign trial, where it was admissible and relevant to the issues in those proceedings, but for the purpose of disclosure, something in the nature of a roving inquiry in which a party was seeking to "fish out" some material which might lead to obtaining admissible evidence at the trial, even though the procedure of the foreign Court permited such a practice, as, for example, r.26 of the U.S. Federal Rules of Civil Procedure and the rules of many State Courts in the U.S.A., and Rule 18 of the Nova Scotia Civil Procedure Rules." (see CPR 31.21.5)

5) PROCEEDINGS MUST HAVE BEEN INSTITUTED OR BE CONTEMPLATED

The English Court will not give effect to any request from a U.S. Court unless proceedings have actually been instituted or proceedings are contemplated. In this context "contemplated" means that proceedings are imminent or pending.

6) GENERAL PRINCIPLE

Subject to the above, the general principle followed by the English Court is that the English Court will ordinarily give effect to requests from foreign courts so far as is proper and practicable and to the extent that is permissible under English Law.

7) NO GENERAL INVESTIGATION

General investigation (e.g. in Chapter 11 Bankruptcy Proceedings) will not be allowed - *re. International Power Industries Inc.* [1984] (not officially reported). Documents sought must be specifically listed and not referred to by general descriptions.

As the English Court of Appeal stated in *State of Minnesota v Philip Morris Incorporated and Others,*

“The difficulty in the present case, as in previous cases, arises because of the difference in approach to discovery in this country and the United States. Their discovery procedures are not necessarily the same in all States. But in general in the United States there is a tradition of oral discovery which has never been developed in this country. Rightly or wrongly, we regard oral discovery as a form of discovery which generates unnecessary costs and complexity. There is another difference between the approach to discovery in this country and that in the United States. Generally, where it is possible to get much wider "non party" discovery. That is discovery against those who are not parties to the proceedings.” (per Lord Woolf MR).

In *Smith v Phillip Morris Companies Inc and others* [2006] EWHC 916 (QB) an Order made in England for evidence to be given in connection with a case in the United States was set aside. Andrew Smith J referred to the list of topics for examination attached to the letter of request and said,

“[6] There are 17 "topics for examination" listed in attachment A. The first nine topics are couched in similar terms, namely "All communications you have had with the following former or current employees of" a named company, one being BATCo: 30 individuals are identified as former or current employees. These nine topics are unlimited in terms of the period of time that they cover. Further, seven of the nine topics are not limited by reference to the subject matter of the communication, while the other two are limited to communications relating to "cigarette pricing"....”

...

[12] Secondly, neither the letter nor Mr Diel's affidavit states specifically that purpose of the Request is to obtain evidence which is to be used at the trial in Kansas, that the evidence would be likely to be relevant to issues in the proceedings or that it would be likely to be admissible at the trial. Ms Cockerill did not suggest that the reference to obtaining evidence "to be used in civil proceedings before this court" is so to be interpreted. She drew my attention to the statement in the request: "It is expected that the testimony will reveal that Mr Dunt facilitated the exchange of . . . information", but this must, as I understand it, be referring to the expectation of the Kansas Plaintiff (or those who represent him). In any case, it falls short of saying that the testimony is likely to be used at trial or that it is being sought for that purpose.”

...
[32] Thus the questions that arise in this case, it seems to me, are these:

i) Does the court have jurisdiction to make an order in response to the Letter of Request, and if not can this be overcome by making modifications to the order sought or imposing conditions when making it?

ii) Ought the order of Master Turner be set aside because it was sought for an impermissible purpose, specifically for an impermissible investigatory purpose? If so, can this objection to the order be met by making modifications to it or by imposing conditions?

iii) Ought the court set aside the order as a matter of discretion because it is unfairly oppressive to Mr Dunt? Can this objection be met by modifications or conditions?

[33] The first submission made on behalf of Mr Dunt about the court's jurisdiction raises the questions whether oral evidence is being sought for use at the trial of the Kansas proceedings and whether "there is good reason to believe that [Mr Dunt] has knowledge of matters in issue at the trial so as to be likely to be able to give evidence relevant to those issues": see *First American Corporation v Zayed* [1998] 4 All ER 439, [1999] 1 WLR 1154 at p 1163G per Sir Richard Scott V-C. It is well recognised that:

"In face of a statement in letters rogatory that a certain person is a necessary witness for the Applicant . . . the court of request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person is relevant and admissible"

- see the *Westinghouse* case (cit sup) at p 654G per Lord Fraser. (As Moore-Bick J pointed out in *United States of America v Philip Morris Inc* (unrep) 10 December 2003 at para 76, this observation appears to be directed to whether the court should enquire for itself whether the witness can give relevant and admissible evidence.) However, in this case the Kansas court issuing the request did not itself state that the examination is likely to produce or is directed to producing such evidence. Ms Cockerill submits, and I readily accept, that this does not mean that the Request is in any way defective. Moreover, I am unable to accept Mr Hunter's submission that requests from foreign courts "normally" include such a statement: I simply do not know whether or not that normally is the case, but even if it were, I would not therefore attach particular significance to the absence of such a statement in the Letter of Request from the Kansas court. However, this does mean that this court may and must consider without the assistance of such a statement whether the request is within the statutory limits.

[34] I have referred to Mr Owens' evidence that the Kansas Plaintiff is seeking the deposition of Mr Dunt and others "for use at trial in the Kansas action", but this assertion in itself does not, in my judgment, provide convincing support for the request as it was made by the Kansas court, still less convincing support for the contention of the Kansas Plaintiff that Mr Dunt's evidence is not a matter of background significance, but "crucial" or "critical" to the litigation. Moreover, Mr Owens does not appear to acknowledge, or appear to recognise, the nature and ambit of the request made: for example, that all the documents to which Mr Diel referred were dated before the start of the pleaded conspiracy, and that the topics for examination are far wider than London meetings of the kind that Mr Owens describes that Mr Dunt is said to have had as Regional Director.

...

[36] However, the approach of the English court upon this initial question of jurisdiction is, as Lord Woolf MR emphasised in *The State of Minnesota* case (loc cit) at para 40, "if there is doubt on this matter, I should give the benefit of that doubt to the Plaintiffs". I can see that Mr Dunt might well have some knowledge of some matters which the Kansas Plaintiff asserts

in the proceedings and which might, for all I know, be denied by one or more of the Defendants. Although the evidence is far from satisfactory and making properly generous allowance for the approach that Lord Woolf describes, I have concluded that I should not set aside the order of Master Turner on the grounds of jurisdiction. It is therefore not necessary for me to consider whether, had the original request been defective in this respect, it could be saved by restrictions such as the Kansas Plaintiff now proposes or by the sort of condition or undertaking put forward by Ms Cockerill and referred to in *Golden Eagle Refinery Co Inc v Associated International Insurance Co* (unrep) 19 February 1998 (for example, that Mr Dunt would be examined as if he were giving evidence in chief at the trial or that his examination should be for the purpose only of eliciting and recording testimony appropriate to be given at trial).

[37] It does not follow from this conclusion, however, that the order is sought for a permissible purpose and is not sought mainly for an investigatory purpose. Here it is proper to bear in mind the stage in the Kansas proceedings at which the order is sought: as Lord Fraser said in the *Westinghouse* case (at [1978] AC 547, 643G):

"the mere fact that letters rogatory have been issued at the pre-trial discovery stage does not mean that they are not seeking for evidence in the sense of s 1 of the Act of 1975 but it does, so to speak, put one on one's guard."

See too Buxton LJ in the *Golden Eagle Refinery* case (loc cit).

[38] The Letter of Request was couched in strikingly wide terms. Mr Hunter cites the

judgment of Peter Gibson LJ in the *State of Minnesota* case at para 64:

"As was held in *Re Norway's Application No 1,* [at [1987] QB 433] where the matters on which examination is requested by the Letter of Request to proceed, are too widely drawn, it will lead to the inference that the Letter of Request was designed to elicit information which might lead to the obtaining of evidence rather than to establish allegations of fact, and that would amount to an impermissible fishing expedition."

Of course sometimes, as Sir Richard Scott V-C said in the *First American Corporation* case at p 1166, "the width of a request may be an inevitable consequence of the complexities of the issues and of the witnesses involvement in them", but I cannot accept that in this case the very wide ambit of the Letter of Request can be so explained.

[39] Moreover, the evidence of Mr Owens about the relevance of Mr Dunt's testimony confirms my view that the Letter of Request was directed to questioning mainly of an investigatory nature. The request ranges far wider than Mr Owens' explanation about the significance of Mr Dunt's testimony could possibly justify.

[40] I conclude that the Letter of Request seeks an impermissible investigation and for that reason this court should not accede to it.

[41] Before I consider whether the request should be allowed in a modified and limited form (either as proposed by Mr Owens in his witness statement or as Ms Cockerill suggested in her submissions or otherwise), I shall consider Mr Dunt's further argument that in any event the

order made by Master Turner is oppressive. As Lord Woolf MR said in the *State of Minnesota* case (loc cit) at para 18, there is a need to hold a balance the English court's general wish to assist the court making the request and the proper interests of the potential witness. The witness is entitled to know within reasonable limits the matters about which he is to be examined, and there comes a point at which a Letter of Request may be so vague that it will not be permitted. The wide-ranging list of topics attached to the Letter of Request, and the fact that many of them were unrestricted in terms of subject-matter or date lead me to conclude that for this reason too the examination sought in the Letter of Request is not one to which the court should order and that the order made by Master Turner should be set aside."

We should be asked to advise on the form of the document request before the request is submitted to the U.S. Court. This will certainly save time in the long run: if this procedure is not followed there may be contested hearings in England and, as can be seen above, possibly part or all of the request may be struck out.

8) NO DISCOVERY ORDER AGAINST NON-PARTIES

Section 2(4)(a) of the 1975 Act prohibits the English Court from making an order against a stranger to the proceedings requiring him to make general discovery of documents. Such an order would be in the nature of a "fishing expedition" which is never allowed in the English Court. The request for witnesses to be heard or documents to be produced must specify which evidence witnesses can give or the actual documents which are to be produced.

Section 2(4) of the 1975 Act states:

"An Order under this Section shall not require a person

(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 likely to be, in his possession custody or power."

The Court must be satisfied that the documents in question are in the possession, custody or power of the person against whom the Order is made. The burden of proving this fact is on the applicant.

9) ORDERS AVAILABLE FROM THE ENGLISH COURT The English Court has power to make orders for:-

i) oral or written examinations of witnesses;

ii) the production of documents;

iii) inspecting, photographing or preserving property;

iv) taking samples of property;

v) conducting experiments on property;

vi) medical examination of persons;

vii) taking blood samples.

Once an Order has been made by the English Court depositions are taken in "the English manner" (Order 39 RSC) before an Examiner appointed by the Court. The Examiner will be an English barrister. In order to facilitate the taking of depositions at a time convenient to the party requesting the Order it is normally better to have an Examiner of the party's choice appointed rather than one of the Court Examiners who may not be available at the required time. This can only be done if the application for the Order is made by solicitors who will also make the appropriate arrangements for the examination - including providing a Court reporter if required.

10) VIDEOTAPING

Examinations may also be videotaped. An application to set aside an Order for videotaping the taking of evidence was unsuccessful - (J. *Barber & Sons v. Lloyd's Underwriters* [1986] 2 All ER 845.

In that case Evans J. said,

"Two things are clear. (i) A video recording of evidence given in English Courts is not permitted. There is statutory recognition of tape recordings: photographs in Court are banned. In my judgment videotaping is not allowed. (ii) At the other extreme, evidence in the form of tape recordings and video recordings is capable of admission in English Courts, just as photographs are commonly admitted.

Here we have an intermediate situation. What is sought is videotaping outside the Court, and it is proposed that the videotaping should be available to the Court itself. That is parallel to the taking of tape recordings outside Court of a shorthand transcript outside Court. It is clearly something different from recording proceedings in the Court itself.... Proceedings involving examination of witnesses outside Court are not necessarily limited to the permitted methods of recording proceedings in Court. It seems to me that the request by the Californian Court is not inconsistent with the English mode".

11) EXTRATERRITORIALITY

It is noteworthy that many of the leading cases on extraterritoriality are concerned with whether or not evidence should be produced for foreign proceedings.

In *R. v. Grossman* [1973] Cr. App. R. 302 the Court of Appeal declined to make an order for disclosure of information held by a branch of Barclays Bank in the Isle of Man under Section 7 of the Bankers' Books Evidence Act 1879. Lord Denning M.R. said,

"I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American Bank or any other Bank in the Isle of Man which is not subject to our jurisdiction.... It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man Government. It has customers there who are subject to Manx law. It seems to me that the Court here ought not in its discretion to make an Order against the Head Office here in request of the books of the branch in the Isle of Man in regards to the customers of that branch. It would not be right to compel the branch - or its customers - to open their books or to reveal their confidences in support of legal proceedings in Wales".

The case of *MacKinnon* (above) concerned an Order made against an American bank, which was not a party to the main action, requiring it to produce books and papers held at its Head Office in New York. These related to an account of one of the Defendants, a Bahamian company which had, since the issue of the Writ, been struck off the Register of Companies, and a subsequent subpoena duces tecum which was served on an Officer of the Bank at its London Office. Hoffman J. held that the Order and subpoena, taking effect in New York, were an infringement of the sovereignty of the United States and therefore the English Courts should not require a foreign bank which owed a duty of confidence to its customers to produce documents outside the jurisdiction of the English Courts. The fact that the bank was regulated by the law of the country where the customer's account was kept (in this case the United States) and concerned business transactions outside the jurisdiction was material.

He said,

"the need to exercise the Court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks.... If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in an unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure".

He also referred to the decision of the New York Federal District Court in *Laker Airways v. Pan American World Airways* [1985] 607 F.Supp.324 where subpoenas served on English banks at their New York offices requiring them to produce documents relating to transactions in England were quashed and stated that,

".... this decision shows a welcome revival in a United States Court of sensitivity to foreign sovereign interests".

Perhaps the best known case on the subject of such requests is *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547. In this case the House of Lords reversed a decision of the Court of Appeal which had upheld the implementation of Letters of Request issued by a Court in Virginia.

Viscount Dilhorne said,

".... for many years now, the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that Country. This is not in accordance with international law and has led to legislation on the part of other States designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty".

12) PRIVILEGE AND DUTY OF CONFIDENTIALITY a) PRIVILEGE

The *Westinghouse* case also comments in detail on claims to privilege against production of documents sought under Letters of Request and differentiates between documents required for the purposes of civil proceedings and documents sought for the purpose of a Grand Jury investigation which might lead to criminal proceedings. Lord Wilberforce said,

"Now Section 5 of the 1975 Act provides for the obtaining of evidence for criminal proceedings but expressly the section only applies to proceedings which have been instituted

(none have been instituted) and, impliedly, to a request by the Court in which the proceedings have been instituted. The case is therefore not within Section 5, and the procedure is an attempt to get the evidence in spite of that fact".

A party wishing to obtain evidence for use in foreign proceedings should institute proceedings, or at least produce some evidence that proceedings are about to be commenced, before any application is made to the Court for an order.

There is also the question of attorney-client privilege which in England is either legal advice privilege or litigation privilege.

In *United States of America v. Philip Morris and Others* the government was suing a number of tobacco companies for $280 billion, alleging that they misled the public about the risks of smoking.

Steven Loble acted for the United States of America in that case.

In December 2003, after a 3-day hearing, the Commercial Court in London made an order that Andrew Foyle, a partner in City solicitors firm Lovells, be examined about the document destruction policies of a company called BATCo, despite protestations that such evidence could not be obtained as a result of legal professional privilege.

The decision was appealed to the Court of Appeal. The appeal was unsuccessful. In England there are two types of privilege – legal advice privilege and litigation privilege.

The judge set out the test for legal advice privilege in paragraph 39 of his judgment ([2003] EWHC 3028 (Comm)),

“In my view it follows from these decisions that before legal advice privilege can be claimed in respect of any communication three conditions must be satisfied: (i) the communication must pass between the lawyer and his client; (ii) it must be confidential; and (iii) it must be for the dominant purpose of obtaining or giving legal advice, that is, advice about the client’s rights and obligations. Moreover, the Court of Appeal has made it clear that the solicitor’s own assertion that the dominant purpose of a particular communication was the obtaining of legal advice is not conclusive; it is a matter for the court to determine on the basis of the whole of the evidence before it...”

The judge went on in paragraph 40 to set out the test for litigation privilege,

“In this case two requirements must be satisfied: (i) the communication must be confidential; and (ii) it must have been made for the dominant purpose of conducting or giving advice in relation to litigation, either pending or in contemplation.”

The judge went on to find that no privilege, neither litigation privilege nor legal advice privilege, attached to communications between the intended witness and BAT, and ordered Mr Foyle, a partner in a large London law firm to give evidence for use at trial in the US proceedings.

Both BAT and Mr Foyle appealed the decision. The appeals were unsuccessful.

The Court of Appeal found that the judge was correct in his analysis of whether litigation privilege attached to communications between BAT and Mr Foyle,

“68. In the present case it is quite clear that the judge correctly considered that a "mere possibility" of litigation did not suffice. He was also correct to conclude that the fact that there was "a distinct possibility that sooner or later someone might make a claim" was insufficient. So was "a general apprehension of future litigation". He repeated three times that the appropriate test was that litigation must have been reasonably in prospect. The expression "real likelihood" seems to have been used as a counterpoise to "a mere possibility", and I do not consider that any more can properly be read into this phrase. The judge was certainly not saying that there must have been a greater than 50% chance of litigation.

69. In any event, I consider that it would be impossible to conclude that litigation against BATCo itself was reasonably in prospect when that company engaged Mr Foyle’s services to advise it. The last time anyone had sued that company had been as long ago as 1969, and there had been no letters before action or other precursors of contentious litigation when Mr Foyle was advising it between 1986 and 1994. In his third witness statement the most that Mr Gilbey could say was that "it would be reasonable for BATCo to have anticipated that it might be made a defendant to litigation in the United States or elsewhere".”

Moving on to deal with legal advice privilege, Brook LJ said,
“74. It is convenient to begin with an extract from the speech of Lord Nicholls in *R v DerbyMagistrates’ Court ex p B* [1996] AC 487, 510:

"Legal professional privilege is concerned with the interaction between two aspects of the public interest in the administration of justice. The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited. But, in practice, candour cannot be expected if disclosure of the contents of communications between client and lawyer may be compelled, to a client’s prejudice and contrary to his wishes. That is one aspect of the public interest. It takes the form of according to the client a right, or privilege as it is unhelpfully called, to withhold disclosure of the contents of client-lawyer communications. In the ordinary course the client has an interest in asserting this right, in so far as disclosure would or might prejudice him.

The other aspect of the public interest is that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might prejudice him.

All this is familiar ground, well traversed in many authorities over several centuries." He concluded the judgment by saying,

“88. There are likely to be areas which are quite plainly covered by legal advice privilege. There will be other areas which quite plainly are not. In the debatable areas the judge, at the restored directions hearing, and the judge-examiner will both have to proceed with care. But this is no good reason why the whole enterprise should be called off now. It must be remembered that it is the duty and pleasure of the English court to respond positively to a

letter of request if it can. It is also in the public interest that a court (on either side of the Atlantic) should have all relevant material available to it when it decides a case, let alone a case as important as this one, unless it is clear even at this early stage that the overwhelming majority of relevant questions will be successfully resisted on the grounds of legal advice privilege. This, in my judgment, cannot be said in this case."

An unusual feature of the case was the United States of America applied for a High Court Judge to sit as Examiner to resolve any questions of privilege as they arose. It is believed that this was the first time that such an Order had ever been made.

b) DUTY OF CONFIDENTIALITY

X A.G. v. A Bank [1983] 2 All ER 464 discussed the question of disclosure of documents in breach of the duty of confidentiality owed by a bank to its customers. Leggatt J. referred to the case of *British Nylon Spinners Limited v. Imperial Chemical Industries Limited* [1952] 2 All ER 780 and quoted the passage.

"The Courts of this Country will, in the natural course, pay great respect and attention to the Superior Court of the United States of America, but I conceive that it is nonetheless the proper province of English Courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty so to do for the protection of rights which are peculiarly subject to their protection. In so saying, I do not conceive that I am offending in any way against the principles of comity .....".

The Judge also referred to the comment of Denning L.J.,

"The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here."

X A.G. v. A Bank was a case involving injunctions preventing a Bank from complying with subpoenas issued by an American Court in three actions. Although the proceedings were in chambers, judgment was given in open court. Leggatt J. summarised as follows:-

"On the one hand, there is involved in the continuation of the injunction impeding the exercise by the United States Court in London of powers which, by English standards, would be regarded as excessive, without in so doing causing detriment to the Bank; on the other hand, the refusal of injunctions, or the non-continuation of them, would cause potentially very considerable commercial harm to the plaintiffs, which cannot be disputed, by suffering the Bank to act for its own purposes in breach of the duty of confidentiality admittedly owed to its customers...

Any sanction imposed now on the Bank would look like pressure on this Court, whereas as it seems to me, it is for the New York Court to relieve against the dilemma, in which it turns out to have placed its own national, by refraining from holding it in contempt proceedings are issued".

Accordingly, it was ordered that the injunctions should continue.

In *In Re the State of Norway (No. 1 and No. 2)* - Judgment 9th February 1989 (see paragraph 13 below for further details) Lord Goff upheld the decision of the Judge of the first instance that "witnesses should not be required to reveal the identity of a settlor in breach of a banker's

duty of confidentiality unless the witness should have evidence that the settlor was acting as the nominee or agent of the tax payer".

13) CIVIL OR COMMERCIAL MATTER

There was also much discussion of the practice relating to Letters of Request, possible infringement of UK sovereignty and extra-territoriality in the case of *In Re. the State of Norway (No.1), In Re. the State of Norway (No. 2)* House of Lords (Judgment 9th February 1989).

There had previously been two cases in the Court of Appeal which to some extent resulted in conflicting decisions. The main issue was whether an action in the Sandefjord City Court in Norway to set aside an assessment of tax was a "civil or commercial matter". The Court of Appeal in Norway (No. 1) had decided that this should be decided pursuant to the laws of the requesting Court and not the recipient Court of the Letters Rogatory. In Norway (No. 2) the Court decided that it should be resolved pursuant to the law of the Court receiving the request.

The main speech in The House of Lords was given by Lord Goff who said:-

"The words (civil or commercial matter) should be given their ordinary meaning, so that proceedings in any civil matter should include all proceedings other than criminal proceedings, and proceedings in any commercial matter should be treated as falling within proceedings in civil matters. On this simple approach, I do not see why the expression should be read as excluding proceedings in a fiscal matter ....".

14) COMITY

It will be seen from the above cases that the English Courts are keen, in accordance with the principle of comity of nations, to give effect to requests for evidence from foreign courts. The English Courts are, however, jealous in protecting the sovereignty of the U.K. and the border separating the willingness to assist foreign courts and the protection of sovereignty is not always clearly defined.

15) PRACTICAL GUIDANCE FROM REPORTED CASES

Another recent case, *Janice Windh and Another v. Land Rover North America Inc., and Others* [2005] EWHC 432 (QB), involved an application to set aside an order for two witnesses to give evidence for proceedings in California. Steven Loble acted for the successful applicant in that case. The application to set aside the order was made by the defendant and not the witnesses. This is only the second reported case in which an application has not been made by the proposed witness.

The Senior Master rejected the application to set aside the Order. By consent, the application for permission to appeal was heard with the application to appeal. Treacy J said,

“11. The Defendants’ initial contention before me is that Master Turner’s ruling is fatally flawed because he did not ask himself the right questions in coming to a decision. I have been referred to *First American Corporation and Others v Zayed and Others* [1999] 1 WLR 1154 at p1 165D where Sir Richard Scott Vice Chancellor said:

"In summary, in considering the letters of request in this case the court should, in my opinion, ask first whether the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned in the amended schedule of requested testimony, and second whether the intention underlying the formulation of those topics is an intention to obtain evidence for use at the trial or is some other investigatory, and therefore impermissible intention."

It was contended by Mr Onions QC that in his judgment Master Turner addressed himself only to the first of these two questions.

1) Both questions need to be asked because of the terms of s.2(3) and 2(4) of the 1975 Act which in effect provide that the Court's discretionary power under s2 of the Act to make provision for the obtaining of evidence for use in proceedings in another jurisdiction is subject to jurisdictional limitations directed against "fishing" applications both in relation to oral testimony as well as documents.

2) I cannot accept Mr Onions' submission that Master Turner did not address himself to both questions. His judgment is brief but it reveals that Master Turner was

   i) Alive to the tendency for US-based applications to seek impermissibly wide disclosure,

   ii) Had in mind the Defendants' case that these requests were in the nature of pre- trial discovery orientated requests which have on occasions been designated "fishing" requests in the reported cases,

   iii) Appreciated that the intention behind the seeking of evidence has to be the obtaining of material to be used at the trial of the proceedings, as opposed to obtaining material for the impermissible purpose of a "fishing" or investigatory exercise.

   Further, he had struck out parts of the requests which he viewed as "directed towards obtaining general discovery".

14. Having approached the matter in that way, he stated:

"Having read the request, the pleadings and the witness statements of Mr Loble [The Plaintiffs' solicitor], I have no doubt that this evidence is needed at trial. There is nothing in the papers before me to suggest that this is not the case."

I am satisfied that taken in the context of his judgment as a whole, and having regard to the strenuous representations before the Master both on the papers and orally through Mr Onions QC, there can be no question of Master Turner having failed to apply his mind to both questions as indicated by Sir Richard Scott V-C.

"20. In his witness statement Mr Loble has set out at Paragraphs 24 and 33 illustrations of specific questions said to be covered by the topics set out in the letters of request. Their content has been criticised by Mr Onions as demonstrating that in reality this is a process of impermissible discovery rather than the acquisition of evidence to be given at trial. The Master plainly did not accept those criticisms although he had them in mind as page 3 of his judgment shows. I am not persuaded to take a different view or to hold that the Master was wrong. It seems to me that Mr Rubin QC's submission that the criticised proposed questions are illustrative of the Claimants assertion to obtain evidence for use at trial is well founded.

Mr Rubin was with some force able to point out that in relation to each of those witnesses, (although, of course, the Claimants could not know what answer they would give to specific questions on specific topics), the evidence filed on their behalf showed that Claimants had carried out sufficient preliminary investigations in relation to each of the two proposed witnesses to be able to identify them as persons having relevant evidence to give on the issues identified. Sir Richard Scott commented in First American in passages between p1 163G and p1 164F:

"If oral evidence is being sought for the purpose of use at trial and if there is good reason to believe that the intended witness has knowledge of matters in issue at the trial so as to be likely to be able to give evidence relevant to those issues, I do not understand how an application to have the intended witness orally examined can be described as "fishing". It cannot be necessary that it be known in evidence what answers to the questions the witness can give"

"In the case of a witness who there is reason to believe has relevant evidence to give, a subpoena served on the witness in order to obtain his evidence for trial could not be set aside on the ground that it was "fishing". In a comparable case, a court would not be deprived by s.2(2) of power to accede to a letter of request. The question of whether, as a matter of discretion, the court would be prepared to make an order pursuant to the letter of request ... .would be another matter"

"Moreover, it is not always possible to draw a sharp distinction between, on the one hand, questions "designed to establish ... allegations of fact" and, on the other hand questions designed to extract "information which may lead to obtaining evidence in support of a party's case"

"In framing questions to ask a witness from whom no proof has been taken, the questions can be expected to ask a number of preliminary questions to feel his way in. This is not fishing. It is a normal technique of examination. A topic for legitimate questioning may have merely background significance. I repeat that, in my opinion, if there is sufficient ground for believing that an intended witness may have relevant evidence to give on topics which are relevant to the issues in the action, a letter of request seeking an order for the oral examination of the witness on those topics cannot be denied on grounds of fishing."

After almost two full days of argument, the judge reserved judgment and then refused permission to appeal.

In *Honda Motor Co Ltd and another v Neesam and Others* [2007] EWHC 581 (Ch), the English Court had to decide whether an order for the issue of a letter of request to an Australian court should be granted. The judge decided that,

"[21] In the light of the parties' respective arguments, I have reached the following conclusions. Firstly, I see no answer to Mr Mellor's point on the request for disclosure of documents by Mr Beckert. The three categories of document listed in the draft letter of request, which I have read out, plainly do not identify particular documents, even in a compendious way. In truth the three categories amount to no more than a wish list of documents which the Fourth Defendant hopes may exist. Secondly, I accept Mr Mellor's submission that the request in respect of the oral testimony of Mr Beckert and Mr Juster falls within the description of "fishing" in the *State of Norway* and *Minnesota* cases.

[22] I have been referred to the Fourth Defendant's statement of case in the Lime Exports claim. It contains no particularised allegation that Mr Beckert or Mr Juster were parties to any relevant conversation or communication regarding Honda (Australia)'s consent to the parallel imports. That entails no criticism whatsoever of the Fourth Defendant's legal team. It simply reflects the reality that they do not know what Mr Beckert or Mr Juster can say. Accordingly, it seems to me that examination of those witnesses would not be designed to establish allegations of fact which have been raised bona fide with adequate particulars, but would constitute a roving enquiry. Thirdly, I am satisfied that the issue of a letter of request as asked would be very likely to derail the trial due to commence on 26 March and may also result in the incurring of disproportionate extra expense. Given the speculative nature of the Fourth Defendant's application it would, in my judgment, be wrong to jeopardise the trial date which has been fixed for the best part of a year in order to accommodate what the Fourth Defendant is trying to achieve."

16) PRACTICAL MATTERS

Before embarking on any exercise to obtain evidence (take depositions) in England, please call us to discuss the matter.

Similarly, if you or your clients are the recipient of an Order, we can advise on whether there are realistic prospects of challenging the Order or modifying it to deal with concerns raised by the Order. There is a 7 day time limit from date of service for applying to set aside such an Order, so it is important that you contact us immediately if you wish to consider applying to set aside or modify the Order.

We will work with US attorneys to ensure that the Letter of Request, or Letters Rogatory, will comply with the requirements of English law and procedure, to ensure that the substance of the request is acceptable to the English Court and that the request as a whole, and particularly document requests, is in a form, that does not infringe any of the requirements set out above.

We will work within whatever time constraints there are, but it is advisable, when seeking to take depositions or obtain documents from witnesses in England, to allow a reasonable amount of time to draft the request, ensure that it comports with the English requirements, obtain an Order from the English Court, serve the Order personally on the witnesses (and, if necessary, deal with any request to set aside the Order).

With the right preparation and advice, the whole process should be smoother than rushing at the last minute to beat a deadline and ensuring that the request is made in a manner which is acceptable to the requesting court (in the United States) and the English Court, which will endeavour to assist the US Court if it possibly can.

"It must be remembered that it is the duty and pleasure of the English Court to respond positively to a letter of request if it can. It is also in the public interest that a court (on either side of the Atlantic) should have all relevant material available to it when it decides a case." *United States of America v. Philip Morris and Others.*

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Steven has been in practice as a solicitor in London for 28 years.

Chambers' Global Directory 2012 states:

“Steven Loble offers a wide-ranging international dispute resolution practice. He speaks German, French and Italian, as well as *"offering extraordinary expertise in the intersection of US and UK law."* In addition, he is *"a hard-working and accessible individual, and as clients we are very happy with the results that he has achieved."”*

Steven is described in the 2010 edition of **Legal 500** as "*extremely knowledgeable and efficient."*

He has acted in over 50 reported cases and has wide experience of international and commercial litigation. He has been involved in a number of the leading cases on enforcing foreign judgments, obtaining evidence for foreign proceedings, privilege, interest rate swaps, legal costs, and financial disputes.

Many of Steven's clients are based outside the United Kingdom. With years of experience acting for foreign clients, he has substantial expertise in dealing with the issues which arise in cross-border litigation - choice of law, jurisdictional disputes, enforcement of judgments, obtaining evidence, dealing with questions of foreign law and sovereign immunity.

He frequently advises in relation to public and private international law and represents the government of a friendly foreign state in litigation in England on a regular basis.

Steven has expertise in the use of the latest technology, to manage cases with large numbers of documents both efficiently and cost-effectively.

Steven uses alternative dispute resolution where appropriate.

Recent work includes:

- advising Citigroup in obtaining vital evidence in England in connection with an $8 billion claim against it by Guy Hands' Terra Firma private equity group arising out its purchase of EMI music
- a case which clarified the rules on Part 36 offers to settle
- obtaining evidence in a number of cases brought against banks in the United States for facilitating terrorism by maintaining accounts for terrorist organisations
- advising a foreign regulator in relation to a case against an English company which is alleged to be in breach of the regulations of the foreign country
- acting for an investment bank in relation to the Lehman Brothers’ bankruptcy
- other credit-crunch related litigation.

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