

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No: FSD 47/2016

**IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS)
(CAYMAN ISLANDS) ORDER 1978**

**AND IN THE MATTER OF CIVIL PROCEEDING NOW PENDING BEFORE THE
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
ENTITLED AS FOLLOWS:**

No.1:10-cv-05760-SAS

BETWEEN:

**SECURITIES AND EXCHANGE
COMMISSION**

PLAINTIFF

AND:



**SAMUEL E. WYLY and DONALD MILLER
(in his capacity as independent Executor of the
Will and Estate of Charles J. Wyly Jr),
MICHAEL FRENCH, LOUIS J.
SCHAUFEELE III**

DEFENDANTS

AND:



**CHERYL WYLY, EVAN ACTON WYLY,
LAURIE WYLY MATTHEWS, DAVID
MATTHEWS, LISA WYLY, JOHN
GRAHAM, KELLY WYLY O'DONOVAN,
ANDREW WYLY, CHRISTINA WYLY,
CAROLINE D. WYLY, CHARLES J.
WYLY III, EMILY WYLY LINDSEY,
JENNIFER WYLY LINCOLN, JAMES W.
LINCOLN, and PERSONS, TRUSTS,
LIMITED PARTNERSHIPS AND OTHER
ENTITIES KNOWN AND UNKNOWN**

RELIEF DEFENDANTS

Appearances:

**Mr. Simon Dickson and Mr. Christopher
Levers of Mourant Ozannes for the Plaintiff**

**Mr. Nick Dunne of Walkers for Irish Trust
Company (Cayman) Limited**

**Mr. John Harris of Higgs & Johnson for
Michelle Boucher**

**Mr. Jeremy Durston of Campbells for
Queensgate Bank Limited and Queensgate
Trust Company Limited**

Before:

The Hon. Mr. Justice Charles Quin Q.C.

Heard:

28th July 2016

JUDGMENT



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INTRODUCTION

1. The hearing of the Plaintiff's Originating Summons issued on the 15th April 2016 was heard before this Court on the 28th July 2016. The Originating Summons asked for "such Orders or other directions as this Honourable Court deems fit to make pursuant to a Letter of Request issued by the Honourable Shira A. Scheindlin, United States District Judge for the Southern District of New York (the "Requesting Court") on the 14th March 2016."
2. The Plaintiff's application is made pursuant to s.1 of the Schedule to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the "EPOJ") read with Order 70 of the Rules of the Grand Court of the Cayman Islands ("GCR O.70"). The EPOJ extended to the Cayman Islands the provisions as adapted in the Evidence (Proceedings in Other Jurisdictions) Act 1975, which is a United Kingdom statute which incorporated into the United Kingdom Domestic Law, the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968 ("the **Hague Convention**"). Section 1 of the Schedule to the EPOJ sets out the jurisdiction of the Grand Court to grant such applications and reads:

"1 *Application to Grand Court for assistance in obtaining evidence for civil proceedings in other court*

Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, and the court is satisfied--

- (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in a country or territory outside the Cayman Islands; and*



(b) *that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,*
the Grand Court shall have the powers conferred on it by the following provisions of this Act.

3. Section 2 of the Schedule to the EPOJ sets out the powers of the Grand Court in relation to applications pursuant to a Request from a Foreign Court (the “**Requesting Court**”) and the relevant powers are set out in s.2 as follows:

“2 ***Power of Grand Court to give effect to application for assistance***

- (1) *Subject to the provisions of this section, the Grand Court shall have power, on any such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the Cayman Islands as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose.*
- (2) *Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, in particular, make provision--*
 (a) *for the examination of witnesses, either orally or in writing;*
 (b) *for the production of documents;”*
- (3) *An order under this section shall not require 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 court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.*



- (4) *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."*

4. Section 9 of the Schedule to the EPOJ reads:

- "9 *Interpretation*
- (1) *In this Act "civil proceedings", in relation to the requesting court, means proceedings in any civil or commercial matter;"*

5. All applications under the EPOJ must be read with GCR O.70 which sets out the procedure to be adopted pursuant to Letters of Request for Obtaining Evidence for Foreign Requesting Courts.
6. Although GCR O.70(2) states that such an application may be an *ex parte* application, the Plaintiff served Irish Trust Company (Cayman) Limited ("**ITC**"), Ms. Michelle Boucher ("**Ms. Boucher**"), Queensgate Bank Limited and Queensgate Trust Company Limited (together "**Queensgate**") with its Originating Summons in May 2016.
7. The Plaintiff's application is grounded by the First Affidavit of Gregory Nelson Miller ("**Mr. Miller**") sworn on the 30th June 2016 and by Mr. Miller's Second Affidavit sworn on the 28th July 2016.



8. On the 28th July 2016, ITC, Michelle Boucher, and Queensgate applied for an adjournment of this application to await a hearing for declaratory relief regarding the validity or otherwise of several Trusts – which was brought before the High Court of the Isle of Man. The application for an adjournment was grounded by the affidavit of Ms. Lindsey Bermingham (“Ms Bermingham”) sworn on the 26th of July 2016.
9. Having heard counsel for ITC and counsel for the Plaintiff and having read the affidavits of Mr Miller and Ms Bermingham, the Court rejected the application for the adjournment on the grounds, *inter alia*, that the outcome of the proceedings brought before the Isle of Man Court have no bearing on the Letter of Request to this Court and this Court decided that its duty was to hear the Plaintiff’s application and to make its determination based on the evidence filed and on any submissions made by counsel for the Plaintiff and counsel for ITC, Ms. Boucher and Queensgate.



LETTER OF REQUEST

10. The Letter of Request for International Judicial Assistance, pursuant to the Hague Convention was issued by the Honourable Shira A. Scheindlin, United States District Judge for the Southern District of New York on the 14th March 2016. It states:

“The United States District Court for the Southern District of New York presents its compliments to the Chief Justice of the Cayman Islands, and requests international judicial assistance to obtain evidence to be used in civil proceedings pending before this court in the above-captioned matter.

This request is made pursuant to, and in conformity with, Article 1 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“the Convention”), to which both the United States and the Cayman Islands are parties.

The Court has determined it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties that you compel the non-party witnesses identified herein, who are residents of, or ordinarily resident in, your jurisdiction, to be examined under oath as to their knowledge of the facts relevant to the issues in this case, and for certain entities identified herein to produce documents and certify their authenticity.”

11. The Plaintiff’s allegations are set out in the Letter of Request at paragraph 6a on page 7 and state:



“The Fourteenth Claim in the Amended Complaint filed in this action alleges that the Relief Defendants were unjustly enriched through their receipt of the ill-gotten gains of the Wyllys’ securities fraud and other violations, and they do not have any lawful right, title, or interest in or to the funds, securities, real property and interests in real property, personal property and interests in personal property, and other assets of the Sam and Charles Wyly, which are the ill-gotten gains, or are traceable to the ill-gotten gains, derived from Sam and Charles Wyllys’ fraudulent conduct.

*Evidence has been produced in this litigation to establish a prima facie case that the Relief Defendants are or were beneficiaries of Wyly-created Isle of Man and Cayman Islands trusts and trust-owned entities, and that the trusts distributed ill-gotten gains to the Relief Defendants. However, while the Relief Defendants agree to produce documents in their possession related to the trusts, they deny control of any such documents held by others. Although the Relief Defendants agree to production of documents held by US-based hedge funds concerning the Relief Defendants’ investments in those funds, the Relief Defendants contend they cannot require the Wyly offshore trustees to consent to the production by those same hedge funds of documents **related (sic) (to)** the trustees’ investments in those funds...”*

12. Paragraph 6b on page 7 of the Letter of Request states:

“The Fourteenth Claim of the Amended Complaint is a separate cause of action, not an action to enforce the Final Judgment entered against Sam and Charles Wyly. Pursuant to common law equitable principles and Section 21(d)(5) of the Exchange Act [15 U.S.C. & 78u(d)(5)], the SEC seeks disgorgement by the Relief Defendants of funds, securities, real property and interests in real property, personal property and interests in personal property, and other assets of Sam and Charles Wyly, which are the ill-gotten gains, or are traceable to the ill-gotten gains, derived from Sam and Charles Wyllys’ fraudulent conduct.”



13. Paragraph 7 of the Letter of Request sets out the evidence the United States District Court for the Southern District of New York would like to obtain namely:

“7a. The Court requests that the SEC be permitted to obtain testimony from Michelle Boucher, 74 Antoinette Avenue, Webster Estates, South Sound, Grand Cayman, Cayman Islands, who is or was provided administrative services, including record-keeping for trust management companies that served as trustees of the Wylys’ offshore trusts, and as directors of the trusts’ subsidiary companies, regarding any distribution of, transfer of, grant of right to use, and/or loan of, any trust or trust-owned asset to any Relief Defendant between January 1, 1992 to the present date.”

14. Paragraph 7b sets out the documents which the Letter of Request seeks to obtain as follows:

“(1) The Court respectfully requests that the SEC be permitted to seek production of documents by the Irish Trust Company (Cayman) Ltd. ...; and Queensgate Bank Limited or Queensgate Trust Company Limited ...according to the request for production of documents, which is attached hereto as Attachment 2.” (Please see Appendix 2 of this Judgment).



THE POSITION OF ITC, MS. BOUCHER AND QUEENSGATE

15. ITC, Ms. Boucher and Queensgate do not challenge the Court's jurisdiction to accede to the Plaintiff's application pursuant to the EPOJ but do submit that whilst not wishing to be obstructive, they have two concerns:

(i) The Grand Court must be satisfied that the request seeks evidence which is to be used for the purposes of civil proceedings; the civil proceedings in this case being the Fourteenth Claim; and

(ii) The documents set out in the Letter of Request do not provide sufficient particularity.

16. Counsel on behalf of Ms. Boucher and counsel on behalf of Queensgate have confirmed that they adopt and support the position taken by ITC.



FIRST ISSUE: CIVIL PROCEEDINGS

17. ITC's counsel Mr Dunne submits that, although the Letter of Request is framed in terms of requiring evidence for the purposes of the Fourteenth Claim of the Amended Complaint, there are inconsistencies which the Grand Court should examine with some care.
18. For example ITC refer to Attachment 2 which itself refers to the use of documents produced by "the SEC, Sam Wyly, Caroline D. Wyly and their counsel in their bankruptcy cases". By way of a second example Mr Dunne submits that the Fourteenth Claim is predicated on the premise that the Relief Defendants should be required to disgorge assets representing "ill-gotten" gains which have been transferred to them. ITC's Counsel poses the question as to why information on current trust assets (Attachment 2 Request G), which by definition have not been transferred to them, is relevant, and further submits that such information would appear to be relevant to the claim against the Wylys and not the Relief Defendants.
19. Accordingly Counsel for ITC submits that the relevance of the material set out in paragraph 18 above is not obvious and thereby questions whether the Grand Court has the jurisdiction to provide the assistance requested by the Requesting Court. Furthermore Counsel for ITC submits that in circumstances where there is no obvious link between the claim brought in the Requesting Court and the information sought and where, he submits, the Letter of Request is drawn in extremely wide terms rather than requests for specific documents identified and deemed relevant by the Requesting Court, the position is not clear.



SECOND ISSUE: INSUFFICIENT PARTICULARITY

20. Counsel for ITC submits that, assuming the Requested Court i.e. the Grand Court has the jurisdiction to accede to the Letter of Request, that the words contained in s.2(4)(b) of the EPOJ that a person “*shall not be required to produce any documents other than particular documents specified in the Order*” set out in paragraph 3 above must be strictly construed.
21. Mr. Dunne submits that the Request for the Production of Documents found at Attachment 2 does not always satisfy that test for particular documents. In particular ITC take exception to A “all financial statements and related work papers”, B “all tax returns (in any jurisdiction) and related work papers” and G “documents regarding any insurance or annuity policy maintained by any Isle of Man Entity or Cayman Entity in which any beneficiary is a beneficiary or the insured item is in the possession of a Beneficiary” and submits that these documents at A,B and G do not meet the test for particularity as required by s.2(4)(b) of the EPOJ. ITC, Ms. Boucher and Queensgate maintain that these are generic classes within which no particular document is identified or identifiable.
22. ITC, Ms. Boucher and Queensgate contend that the documents requested are conjectural. Counsel for ITC submits these documents are thought to exist by the SEC but the generality of the Letter of Request read with the Attachment demonstrates that this is a matter of conjecture. Furthermore Counsel for ITC submits that the Letter of Request from the Requesting Court is not a request for particular documents and, as they are what Counsel describes as “conjectural documents”, they are outside the scope of a proper Letter of Request pursuant to the EPOJ.



23. All three parties object to what Mr Dunne describes as the “speculative” nature of the documents requested by the Requesting Court. They complain that because of the use of the words “any” or “all”, there is a lack of detail contained in the Letter of Request and it draws on a wide class of documents which are presumed or suspected to exist.

Consequently this will force ITC, Ms. Boucher and Queensgate to “trawl the files of the company and consider each document in them against the criteria in Attachment 2 of the Letter of Request.” Counsel for ITC submits that they are inherently uncertain and further submits in relation to A, B and G that terms such as “related work papers” and “documents regarding any chattel” do not lend themselves to precision and are of insufficient particularity. Accordingly Counsel for ITC, supported by Counsel for Ms. Boucher and Queensgate submit that the Letter of Request from the Requesting Court is too general and broadly drafted and in its present form is not permissible.

24. Counsel for ITC argues that s.2(4) of the EPOJ makes it clear that a person cannot be required to state what documents are in their possession relevant to the proceedings or to produce anything other than particular documents specified in the order. This, Counsel for ITC submits, discloses a clear intention underpinning the EPOJ to bar third party discovery applications.

25. In support of this submission, Counsel for ITC submits that there is nothing in Mr Miller’s two affidavits which suggest that any specific transfers were made to the Relief Defendants and further that the allegation at its highest is that the SEC “came to believe” that such transfers were made. Counsel for ITC refers specifically to paragraph 7(a) and the proposed testimony sought from Ms. Boucher.



Ms. Boucher was the senior officer of ITC, and from November 2004, became the sole Protector of the trusts based in the Isle of Man and the Cayman Islands described as the Offshore System controlled by Sam Wyly and the late Charles Wyly. Mr Dunne objects to the wording at paragraph 7 of the Letter of Request which reads, *“Distribution of, grant of, transfer of, right to use and/or loan of any trust or trust-owned asset”*. ITC submits that this demonstrates that at its heart the Letter of Request is investigatory in nature as opposed to a specific request for information. If it is investigatory, then ITC submits it is simply a request for third party discovery which is not permitted under s.2(4) of the EPOJ.

26. Furthermore ITC submits that the generality of the documents sought in the Letter of Request discloses their investigatory nature. Counsel for ITC submits that matters have been drawn so widely with a view to obtaining the greatest quantity of documentation which is indicative of third party disclosure as opposed to the more focused nature of requests permissible under the EPOJ. Accordingly ITC, Ms. Boucher and Queensgate submit that the Grand Court should consider the lack of sufficient particularity and perhaps adopt a “blue pencil” approach to remove the material sought by the Requesting Court which is investigatory in nature and not sufficiently particular.



ANALYSIS

27. I am grateful to both Mr. Dickson, Counsel for the SEC, and to Mr. Dunne, Counsel for ITC for their helpful and comprehensive review of the relevant authorities in relation to this application.

CIVIL PROCEEDINGS

28. Although ITC, Ms. Boucher and Queensgate do not challenge that this Court has jurisdiction pursuant to s.1 of the Schedule to the EPOJ, they do raise what might be described as less than vigorous concerns, as set out in paragraphs 17, 18 and 19 above, in relation to the question of whether the proceedings before the Requesting Court are civil proceedings.

29. Paragraph 1 of the Letter of Request from the Requesting Court states quite unequivocally that it requests “international judicial assistance to be used in civil proceedings” before the Requesting Court. There is no evidence before me to challenge this statement from the Requesting Court. As Lord Diplock stated in the House of Lords in *Rio, Tinto Zinc Corporation and Others v. Westinghouse Electric Corporation*¹, when stating that the Court receiving the Request:

“...must be satisfied that the evidence is required for the purpose of civil proceedings in the Requesting Court but in the ordinary way in the absence of evidence to the contrary, it should in my view, be prepared to accept the statement by the Requesting Court that such is the purpose for which the evidence is required.”



¹ [1978] AC 547 at page 634 letters A & B

30. This particular statement by Lord Diplock in the House of Lords was cited and applied by our own Chief Justice Anthony Smellie Q.C. in *Gray I CPB, LLC v. Gulfstream Finance et al*² in his unreported judgment dated the 22nd May 2012.
31. Aside from the clear, unchallenged statement in paragraph 1 of the Letter of Request, this Court has already accepted that the proceedings taking place before the Requesting Court are properly described or characterized as “civil proceedings”. On the 2nd August 2012 Henderson J. acceded to a Letter of Request from the same Judge, the Honourable Shira A. Scheindlin, and from the same Requesting Court, which Letter of Request was dated the 24th May 2012.
32. Furthermore this second Letter of Request from the Requesting Court comes within the definition of “civil proceedings” found at s.9 of the Schedule to the EPOJ set out in paragraph 4 above.
33. Accordingly, I am satisfied that the evidence to which this second Letter of Request relates is sought for the purposes of civil proceedings as required by s.1(b) of the EPOJ.



² FSD 10/2012

INSUFFICIENT PARTICULARITY

34. Having satisfied myself that the Letter of Request relates to civil proceedings, I now turn to the second issue of insufficient Particularity and as to how this court should exercise its discretion in relation to the Plaintiff's application and the Letter of Request exhibited to Mr. Miller's First Affidavit.
35. I can do no better than begin with and follow the guidance of our learned Chief Justice at paragraphs 11, 12 and 13 of his Judgment in *Gray*, which I adopt for the purposes of this ruling.
36. The learned Chief Justice stated:

*"The guidance as to the starting point for the exercise of this court's discretion is also contained in the House of Lords decision of **Rio TintoZinc Corporation v Westinghouse Electric Corporation (1978)AC 547**. At page 634 lines B-E Lord Diplock stated:*

"The court should hesitate long in terms of exercising its discretion in refusing to make an Order unless it is satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the Court."

In the same case at page 612, Lord Wilberforce stated

"I am of the opinion that following the spirit of the Act, which is to enable judicial assistance to be given to foreign courts, the Letters Rogatory ought to be given effect so far as possible; ..."

At page 618 paragraph E, Viscount Dilhorne stated:

"In the interest of comity, it is, and I trust will continue to be, as Lord Denning M.R. said in this Court of Appeal (ante p.560), "it is our duty and our pleasure to do all that we can to assist" the requesting court."



This dictum was recently endorsed by Quin J sitting in this Court In the Matter of Lancelot Investors Ltd³:

*“The Cayman Islands has enjoyed international standing as a major financial centre for almost forty years and the Grand Court of the Cayman Islands has actively assisted foreign courts to give effect to the **Hague Convention On The Taking of Evidence Abroad in Civil or Commercial Matters** 1968 (Cmnd. 3991 of 1969).*

*Indeed, the Grand Court of the Cayman Islands has, on many occasions, assisted American courts and, to adopt the classic language of Lord Denning sitting in the House of Lords in **Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation**⁴*

It is the duty and the pleasure of the English Court to do all it can to assist the foreign Court, just as the English Court would expect the foreign Court to help in like circumstances.”

In that particular case, the House of Lords ruled that the High Court in England should assist in a letters rogatory application issued by the Virginia District Court of the United States.”

37. Mr. Dunne on behalf of ITC and Counsel for Ms. Boucher and Queensgate are not submitting that the evidence sought by the Requesting Court is not necessary for the US civil proceedings or for the trial of that action. ITC, Ms. Boucher and Queensgate are not arguing that the application brought by the Plaintiff in this Court should be regarded as frivolous, vexatious or an abuse of the process. They are not arguing that the intended witnesses do not have any knowledge of the matters relevant to the Requesting Court’s civil proceedings and trial of the US action. Finally, and most significantly, Counsel on behalf of ITC, Ms. Boucher and Queensgate are not contending that the documents sought in the Letter of Request do not exist nor that they are not likely to be in the possession, custody or power of the intended witnesses, Ms. Boucher and the authorized officers of ITC and Queensgate.



³ [2009] CILR 7 page 24 – paragraphs 69 and 70

⁴ 1978 A.C. 547 560,

38. However, for sake of completeness, I accept the statement contained in the Letter of Request that the evidence sought is necessary for the trial before the Requesting Court. Furthermore, I find, absent any evidence to the contrary, that the documents set out at Attachment 2 to the Letter of Request would appear to be in the possession, custody and power of the proposed witnesses.
39. The Compliant against the Wyllys is that they engaged in a fraudulent scheme from 1992 to 2005 to hold and trade millions of dollars of securities of public companies whilst they were members of the Boards of *those* companies, without disclosing their ownership and their trading of those securities. In paragraph 10 of Mr. Miller's First Affidavit he avers



"the apparatus was an elaborate system of Trusts based in the Isle of Man and subsidiary companies based in the Isle of Man and in the Cayman Islands (the "offshore system") created and controlled at the direction of the Wyllys."

Furthermore, Mr. Miller's affidavit discloses that ITC was created by Sam and the late Charles Wyly in or about 1995 to provide administrative and other services to both the Offshore System and to the Wyllys directly.

40. At paragraph 11 of Mr. Miller's first affidavit he states that Ms. Boucher was the senior officer in ITC and then in November 2004 became Protector of many if not all of the trusts in the Offshore System. This statement by Mr. Miller has not been challenged.

41. Finally, at paragraph 13 of Mr. Miller's first affidavit, he states that Queensgate controls a number of bank accounts associated with the components of the Offshore System. Again, this statement by Mr. Miller has not been challenged.
42. As stated above, on the 2nd August 2012, this Court acceded to an earlier Letter of Request from the same Requesting Court, which Letter of Request was dated the 24th May 2012 and signed by the same Judge, the Honourable Judge Shira A. Scheindlin in the same proceedings. Henderson J ordered the examination of Ms. Boucher and the duly authorized officers of ITC and Queensgate and the production of documents from Ms. Boucher and the duly authorized officers of ITC and Queensgate. Henderson J's Order of the 2nd August 2012 is found at **Appendix 1** to this ruling.
43. Accordingly, I accept the Plaintiff's submission that in the circumstances where each of the categories of documents requested in the Letter of Request relate to the Offshore System it would appear, and further, there is no reason to doubt, that the documents requested would be in the possession, custody and power of ITC, Ms. Boucher and Queensgate.
44. As set out above, ITC, Ms. Boucher and Queensgate complain that the documents sought in the Letter of Request do not have adequate specificity and particularity and they are in fact in many instances conjectural and speculative. They contend that the letter of Request is drawn in extremely wide terms rather than requests for specific documents. Added to their lack of specificity, they also complain that the net is cast so widely which means that the Letter of Request is not seeking particular documents but is investigatory in nature.



45. In *Voluntary Purchasing Group Incorporated v. Insurco International Limited*⁵

Smellie J, as he then was, examined the test for particularity as set out in s.2(4)(b) of the EPOJ which states that there must be “particular documents specified in the Order as being documents appearing to the Court making the Order to be documents or to be likely to be, in the possession, custody or power” of the parties identified. At line 22 on page 90 Smellie J stated:

“A further statement of general application is that the foreign request must be examined to ensure its compliance with the 1978 Order, in particular as to documents requested. The classes of documents must be clearly defined with particularization of the actual documents and it must be shown that there is good reason to believe that the documents actually exist (see Re Asbestos Ins. Coverage Cases (1) (1985) 1 All E. R. at 721). In applying these standards it must be borne in mind that the witness will be responding to a subpoena duces tecum with the attendant penal sanctions which could flow from non-compliance. A person placed in that position should not be required to cast about for documents which might or might not meet the subpoena but instead should be left in no doubt as to what is required of him (Re Westinghouse Elec. Corp. Uranium Contract (9), per Lord Denning, M.R. (1973) 3 All E.R. at 710)).

46. Smellie J went on to state at page 97 line 37:

“In order to preclude fishing expeditions” the words “particular documents specified in the order” as they appear in s.2(4)(b) of the EPOJ Order are to be strictly construed. The test to be applied in relation to the production of documents is whether “particular documents” were specified, that is, individual documents separately described, although it is permissible to have a compendious description of several documents provided that evidence of the actual documents is produced to satisfy me that they do exist or at least have existed (see Re Asbestos Ins. Coverage Cases (1) (1985) 1 All E. R. at 721).



⁵ [1994-1995] CILR 84

47. It is clear from the Letter of Request that the Plaintiff namely the SEC, has carried out extensive investigations and has satisfied the Requesting Court that the Isle of Man and Cayman trusts and subsidiary companies set out in Attachment 2 at Appendix 2 are located in the Cayman Islands.

48. I agree with Mr Dickson's submission that as a result of extensive investigation, the SEC have already adduced substantial evidence before the Requesting Court that the Relief Defendants were recipients of monies and other assets from these trusts. This second Letter of Request seeks further testimony and documents from the Grand Court for the purposes of the Civil Proceedings in the Requesting Court and for the forthcoming trial. Accordingly, I reject ITC's contention that the Letter of Request is investigatory and find that it is a specific request for evidence and documentation pursuant to the EPOJ and in the spirit of the Hague Convention.

49. In 1982 the Cayman Islands Court of Appeal were considering the validity of a letter of request from the US District Court for the District of Columbia. In *United States v Carver et al*⁶ Rowe J.A. considered the importance of the identity of the intended witness and the context in which the evidence and documents are sought:

"... the traditional description of bankers' books used by bankers in the ordinary course of business has been "ledgers, day books and account books." When therefore these terms are used in a statute or in business correspondence they must be taken to relate to the actual books used by the particular bank in the keeping of its accounts. An outsider would be at a disadvantage if he were compelled the precise and particular documents in which the bank's accounting records are kept".



⁶ CILR 297 at page 319

50. In this case the Letter of Request is directed to Ms. Boucher who is described at paragraph 7a in the Letter of Request as having “provided administrative services, including record-keeping for trust management companies that served as trustees of the Wyllys’ offshore trusts, and as directors of the trusts’ subsidiary companies, regarding any distribution of, transfer of, grant of right to use, and/or loan of, any trust or trust-owned asset to any Relief Defendant between January 1,1992 continuing to the present day”. At paragraph 11 of Mr Miller’s first affidavit he says,

“The purpose of the Irish Trust (“ITC”) was to provide administrative and other services to both the Offshore System and the Wyllys directly.”

The statement in the Letter of Request and Mr Miller’s averment as to Ms. Boucher’s position within ITC has not been challenged. Accordingly, from the material put before this Court, I find that Ms. Boucher has played a central role in providing administrative services including record keeping within ITC for the Offshore System and the Wyllys and could never be described as an “outsider” who is unfamiliar with trust and company documentation.



CONCLUSION

51. In light of Ms. Boucher's prior position as senior officer and now protector within ITC, she should be intimately familiar with the files relating to the Isle of Man and Cayman entities listed in Attachment 2 to the Letter Request (now found at Appendix 2 to this Judgment). I also find that the authorized officers within both ITC and Queensgate could not properly be described as "outsiders" but are professional staff who would be familiar with trust and company documentation.
52. To put it another way, and, applying the clear guidelines from *Smellie J* in *VPG* and from Lord Denning in *Rio Tinto*, neither Ms. Boucher nor the authorized officers of ITC and Queensgate will have to cast about for documents which might or might not meet the second Letter of Request but instead should be left in no doubt as to what is required of them.
53. As set out above, ITC (and Ms. Boucher and Queensgate) take exception to "all financial statements and related work papers", "all tax returns and related work papers" and "documents regarding any insurance or annuity policy." In my view financial statements, tax returns, insurance policies and annuities in relation to the specific trusts and companies at Appendix 2 are clearly described and easily identified by Ms. Boucher and the authorized officers of ITC and Queensgate. I agree with Mr Dickson's submission that "related work papers" is a term of description easily understood by professionals working in the financial services industry in the Cayman Islands.



The “related work papers” for the “financial statements and tax returns” are the supporting documents and schedules used by the trust officers and company administrators in order to produce the financial statements and tax returns for the different entities set out at Attachment 2.

54. The Letter of Request will necessarily require a review of the respective files relating to the listed trusts, companies and entities at Appendix 2 but this will be no different than any proper production exercise and I agree with the Plaintiff’s Counsel’s submission that, in view of Ms. Boucher’s central role and ITC’s narrow client base, such review is neither unreasonable nor oppressive. Accordingly I find that “ all financial statements and all tax returns and their related work papers” and “ all insurance policies and annuities” are a “compendious description of several documents” which Ms. Boucher, the proposed witnesses and authorized officers will have no difficulty in identifying and producing.

55. I also find that all the documents set out at C, D, E, F and H of the Attachment to the Letter of Request are a “compendious description of several documents.”

56. The documents attached to the Letter of Request at Appendix 2 will necessarily require a review of the files of the said listed entities. But this is no different from any proper production and obtaining of evidence which is contemplated by The Hague Convention, provided for in the EPOJ, and is in accordance with the law for providing International Judicial Assistance for the Obtaining of Evidence. The Court agrees with the Plaintiff’s Counsel that, in view of the relatively narrow base of ITC’s clientele, such a review could not be described as unreasonable or oppressive.



57. For the reasons stated above, I reject ITC's, Ms. Boucher's and Queensgate's contention that the documents contained in the Requesting Court's Letter of Request are conjectural or speculative or insufficiently particular and find that the requested documents are particular documents specified in the Requesting Court's Letter of Request and which are in, or likely to be in, the possession, custody and power of ITC, Ms. Boucher and Queensgate.

58. Furthermore, for the reasons set out above, I find that the documents requested in the Letter of Request are particular documents that ITC, Ms. Boucher and Queensgate should have no difficulty in producing. Accordingly, I exercise my discretion and hereby grant the relief sought by the Plaintiff in the terms set out in the Draft Order. I, however, grant liberty to apply for directions as to the implementation of this Order and for further directions if necessary.

Dated this the 29th August 2016



**Honourable Mr. Justice Charles Quin Q.C.
Judge of the Grand Court**



APPENDIX #1

MOURANT
OZANNES

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD 99 OF 2012 - AGH

(FORMERLY CAUSE NO. 267 OF 2012)

THE HON. MR. JUSTICE HENDERSON IN CHAMBERS

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER
JURISDICTIONS) (CAYMAN ISLANDS) ORDER 1978

AND IN THE MATTER OF A CIVIL PROCEEDING NOW PENDING BEFORE
THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW
YORK ENTITLED AS FOLLOWS:

BETWEEN

SECURITIES AND EXCHANGE COMMISSION

PLAINTIFF

V

SAMUEL R. WYLY, DONALD R. MILLER, JR., IN HIS CAPACITY AS THE
INDEPENDENT EXECUTOR OF THE WILL AND ESTATE OF CHARLES
J. WYLY, JR., MICHAEL C. FRENCH AND LOUIS J. SCHAUFELI III

DEFENDANTS

ORDER

UPON the summons of the Witnesses as defined herein coming on for hearing.

AND UPON hearing counsel for the Witnesses, Samuel Wyly and the Securities and
Exchange Commission;

AND UPON reading the affidavit of Martin Zerwitz sworn on 15 June 2012 and the
Letter of Request of Judge Shira A. Scheindlin of the U.S. District Court for the
Southern District of New York dated 24 May 2012 (the "Letter of Request") exhibited
thereto and the affidavit of Alistair John Walters dated 24 July 2012 and the exhibits
attached thereto;

AND being satisfied that proceedings are pending in the United States District Court
for the Southern District of New York, United States Courthouse, 500 Pearl St. New
York, New York 1007-1312, U.S.A. and that such court wishes to obtain the testimony

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of Michelle Boucher and the Duly Authorized Officers of Irish Trust Company (Cayman) Ltd ("Irish Trust"), Queensgate Bank Limited and Queensgate Trust Company Limited (together "Queensgate") together with the production of certain documents, as specified in the Letter of Request;

IT IS HEREBY ORDERED that:

1. The ex parte Order dated 19 July 2012 be set aside and replaced with this order.
2. William Helfrecht be appointed Examiner for the purpose of taking the evidence of the witnesses listed in the schedule attached hereto (the "Witnesses").
3. Each of the Witnesses be required to attend at a time and place to be notified to them by Counsel for the Plaintiff (with notice to Counsel for the Defendants) for the purpose of providing sworn testimony for use in proceedings in the above captioned proceedings in the United States District Court, Southern District of New York.
4. Counsel for the Parties and Counsel for the Witnesses do agree to a schedule for the examination of the Witnesses, such schedule to fall within the period 1 to 19 October 2012.
5. For the avoidance of doubt, the schedule referred to at paragraph 4 above should provide a time for the examination of Ms Boucher in accordance with paragraph 6 of the Letter of Request and, if necessary, a time for the examination of the Duly Authorized Officers of Irish Trust and Queensgate, pursuant to paragraph 8 of the Letter of Request.

Production of Documents

6. Subject to paragraphs 7-9 below, the Duly Authorized Officer of Irish Trust shall, not later than 21 days prior to the date of the first examination, produce to the Parties all documents requested at 7(a) of the Letter of Request and withheld by Irish Trust from CIMA on the grounds of legal professional

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privilege. Such production is limited to documents withheld from production to CIMA solely on the basis of a legal professional privilege asserted by or on behalf of defendants Sam Wyly and/or Charles Wyly that may no longer be asserted based upon the order dated 1 April 2011 appended at Attachment 5 to the Letter of Request. To the extent that any documents listed at Attachment 4 of the Letter of Request, do not fall within paragraph 7(a) of the Letter of Request (exclusive of footnote 7), such documents will not be produced.



7. Where the Duly Authorized Officer of Irish Trust seeks to withhold the production of any of the documents requested at paragraph 6 above on the basis of an assertion of privilege by the Defendants pursuant to s.3(1)(a) of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978, Counsel for the Duly Authorized Officer of the Irish Trust and/or Counsel for any of the Defendants shall (i) notify the Court and Counsel for the Plaintiff of their intention to do so by 2 August 2012; and (ii) submit such evidence and skeleton arguments in support of their position, as well as produce the relevant documents to the Court, on or before 17 August 2012 or such other date as the parties may agree.
8. Where Counsel for the Duly Authorized Officer of Irish Trust and/or Counsel for any of the Defendants has given notice of an intention to withhold any of the documents requested at paragraph 6 above, and has submitted such evidence and skeleton arguments pursuant to paragraph 7 above, Counsel for the Plaintiff shall submit any evidence and skeleton arguments in support of its position, as it deems necessary, on or before 31 August 2012 or such other date as the parties may agree.
9. The Court shall determine any claims made pursuant to s.3(1)(a) of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 by means of an inter partes hearing on the first date thereafter and in any event not less than 21 days prior to the first scheduled depositions.



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10. Subject to paragraphs 7-9 and 11, the documents referred to at paragraph 6 shall be produced by way of affidavit, together with such written authentications and certifications as are required by the Parties pursuant to the United States Federal Rules of Evidence.
11. Subject to paragraphs 7-9, where the Duly Authorized Officer of Irish Trust does not produce either (a) the documents requested at paragraph 6 or (b) the written authentications and certification requested, that Duly Authorized Officer shall, not later than 21 days prior to the date of the first examination, provide an explanation, by way of affidavit, as to why such production has not been provided and/or an explanation as to why any written authentications and certifications have not been provided.
12. Subject to paragraph 13 the Duly Authorized Officers of Irish Trust and Queensgate shall, not later than 21 days prior to the date of the first examination, provide by way of affidavit such written authentications and certifications as are requested by the Parties pursuant to the United States Federal Rules of Evidence in respect of documents produced to CIMA pursuant to its directions dated 6 January 2006, 12 July 2006 and 16 October 2007 (the "CIMA Documents").
13. Where the Duly Authorized Officer of Irish Trust does not produce the written authentications and certification requested at paragraph 12, the Duly Authorized Officer shall, not later than 21 days prior to the date of the first examination, provide an explanation, by way of affidavit, as to why such written authentications and certifications have not been provided.
14. Counsel for the Plaintiff shall disclose any affidavits and exhibits produced pursuant to paragraphs 10-13 to Counsel for the Defendants within 1 business day of receiving the same.
15. Counsel for the Plaintiff (with notice to all Defendants) and Counsel for the Defendants (on notice to the Plaintiff) shall, within 14 days of receipt of any affidavits produced pursuant to paragraphs 10-13, advise the Duly Authorized Officers of Irish Trust and Queensgate whether they are required



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to attend to provide sworn testimony for use in proceedings in the above captioned proceedings.

Special Directions

16. The Examiner shall cause the evidence of Ms Boucher and the Duly Authorized Officers to be recorded *verbatim* by a certified court reporter and videotaped.
17. The oral evidence of both Ms Boucher and the oral evidence of the Duly Authorized Officers (taken in accordance with paragraph 6 of the Letter of Request) shall be taken in accordance with Rule 30 of the United States Federal Rules of Civil Procedure save where such rules are contrary to the laws of the Cayman Islands including, for the avoidance of doubt, Order 70 of the Grand Court Rules.
18. Counsel for the Plaintiff and Defendants in the US Proceedings shall conduct the examination and cross-examination of each Witness before the Examiner.
19. Ms Boucher and the Duly Authorized Officers shall sign the transcript of his or her testimony in the Examiner's presence and the Examiner shall cause the signed transcripts when completed to be sent, together with this order and the Letter of Request issued by the United States District Court Southern District of New York, to the Clerk of the Court to be sealed and for transmission to the Clerk of the United States District Court for the Southern District of New York, United States Courthouse, 500 Pearl St New York, New York 1007-1312, U.S.A.

CRPL Application

20. Any application pursuant to section 4 of the Confidential Relationships (Preservation) Law (2009 Revision) for directions as to the manner of giving evidence shall be made by Ms Boucher and the Duly Authorized Officers within 14 days of the filing of this order. The Defendants shall provide, or use all reasonable efforts to obtain, any consents to disclosure of confidential information necessary to either avoid, or minimize, the scope of a section 4



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application. Such consents to disclosure shall be provided to Ms Boucher or the Duly Authorized officers within 7 days of the filing of this order.

Costs

21. No order shall be made as to costs.

Dated this 2nd day of August 2012,
Filed this 18th day of August 2012.

A. G. Henderson

The Honourable Mr Justice Henderson
Judge of the Grand Court



SCHEDULE

Witnesses	Individual Name of Counsel	Counsel's Firm
Michelle Boucher	Alistair Walters / James Austin-Smith	Campbells
Irish Trust Company (Cayman) Ltd Witness	Alistair Walters / James Austin-Smith	Campbells
Queensgate Bank Ltd. and Queensgate Trust Company Ltd.	Alistair Walters / James Austin-Smith	Campbells



THIS ORDER was filed by Moncint Oramas, Attorney-at-Law for the Plaintiff, whose address for service is 94 Solace Avenue, Camana Bay, PO Box 1348, Grand Cayman KY1-1108, Cayman Islands.

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APPENDIX #2

REQUEST FOR DOCUMENTS TO THE CAYMAN ISLAND CUSTODIANS

For purposes of these requests only, the definitions of the terms Beneficiaries, Isle of Man Entities, Cayman Island Entities, and Cayman Island Custodians refer to the attached lists of names.

The Securities and Exchange Commission (SEC) makes this request to the Trustees, agents and Principals of the Cayman Islands Custodians listed below to produce the following documents in their possession, custody or control:

- A. Produce all financial statements and related work papers for any Isle of Man Entity or Cayman Island Entity from January 1, 2005 to the present.
- B. Produce all tax returns (in any jurisdiction) and related work papers or any Isle of Man Entity or Cayman Island Entity, and all reports filed with any regulator, including but not limited to any periodic reports, filed by any Isle of Man Entity or Cayman Island Entity from for any Isle of Man Entity or Cayman Island Entity from January 1, 2005 to the present.
- C. All contracts or agreements between or including any Beneficiary and any Isle of Man Entity or a Cayman Island Entity from January 1, 2005 to the present.
- D. Documents regarding each distribution, loan, payment, repayment, and/or asset transfer of any kind ("Transfer") between any Isle of Man Entity or Cayman Island Entity and any Beneficiary made or received after January 1, 2000.
- E. Documents regarding the dissolution and/or liquidation of any Isle of Man Entity or Cayman Island Entity from January 1, 2005 to the present.
- F. Documents regarding all annuity payments made or owed by any Isle of Man Entity or Cayman Island Entity to any Beneficiary or designee of a Beneficiary from January 1, 2005 to the present.



G. From January 1, 2005 to the present, documents regarding any insurance or annuity policy maintained by any Isle of Man Entity or Cayman Island Entity in which any Beneficiary is a beneficiary or the insured item is in the possession of a Beneficiary.

H. From January 1, 2005 to the present, documents regarding any real estate or chattel (including but not limited to art, antiques, collectibles, furniture, automobiles, trucks, farm equipment, books, jewelry or furs) in which an Isle of Man Entity or any Cayman Island Entity has a direct or indirect economic interest.

The Trustees and Principals of the Isle of Man Entities understand and consent, to the use of the documents produced under this request by the SEC, Samuel E. Wyly, Caroline D. Wyly, and their counsel in their bankruptcy cases.

BENEFICIARIES

This list shall be treated as including any employees, representatives and/or agents of the listed individuals. This list shall also be treated as including any trusts or other entities in which the listed individuals have an ownership or leadership position.

Samuel E. Wyly,
Cheryl Wyly,
Evan Acton Wyly,
Laurie Wyly Matthews,





Tensas Limited,
West Carroll Limited,
Morehouse Limited,
Sarnia Investments Limited,
Greenbrier Limited,
Audubon Assets Limited f/k/a Fugue Limited,
Yurta Paf Limited,
Cottonwood I Limited,
Cottonwood II Limited,
Mi Casa Limited,
Newgale Limited,
Rosemary's Circle R Ranch Limited (f/k/a Two Mile Ranch Limited and Woody Creek Ranch Limited),
Spitting Lion Limited,
Devotion Limited,
Relish Enterprises Limited,
Little Woody Limited,
Rugosa Limited,
Roaring Creek Limited,
Roaring Fork Limited,
Quayle Limited,
Elysium Limited,
Gorsemoor Limited,
Jordan Way Limited,
Little Woody Creek Road Limited,
Soulisana Limited,
Stargate Farms Limited,
Elegance Limited.

CAYMAN ISLAND ENTITIES

This list shall be treated as including all of the representatives, officers, directors, agents or employees of the underlying companies identified below.

Irish Trust Company Limited,
Security Capital Limited,
Kinetic Partners,
Balch LLC, Bubba LLC, Flo Flo LLC, Katy LLC, Orange LLC, Pops LLC.

CAYMAN ISLAND CUSTODIANS

Irish Trust Company Limited,
Balch LLC, Bubba LLC, Flo Flo LLC, Katy LLC, Orange LLC, Pops LLC.

David Matthews,
Lisa Wyly Graham,
John Graham,
Kelly Wyly O'Donovan,
Andrew Wyly,
Christiana Wyly,

Charles J. Wyly, Jr.,
Caroline D. Wyly,
Martha Wyly Miller,
Donald R. Miller, Jr.,
Charles J. Wyly III,
Emily Wyly Lindsey,
Jennifer Wyly Lincoln, and
James W. Lincoln.

ISLE OF MAN ENTITIES

This list shall be treated as including all of the trustee companies for each of the trusts identified below, as well as all the employees of any such trustee companies, regardless of whether they served as directors of the underlying companies identified below.

Tallulah International Trust,
Bulldog Non-Grantor Trust,
Lake Providence International Trust,
Delhi International Trust,
Bessie Trust,
Plaquemines Trust,
La Fourche Trust,
Crazy Horse Trust,
Arlington Trust,
Sitting Bull Trust,
Woody International Trust,
Pitkin Non-Grantor Trust,
Castle Creek International Trust,
Tyler Trust,
Red Mountain Trust,
Maroon Creek Trust,
Lincoln Creek Trust,

East Baton Rouge Limited,
East Carroll Limited,
Locke Limited,
Moberly Limited,
Richland Limited,

