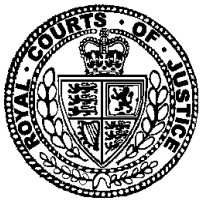

Neutral Citation Number: [2018] EWHC 307 (QB)

Case No: CR-207-452

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2018

Before :

MRS JUSTICE COCKERILL

- -

IN PROCEEDINGS BEFORE THE US DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, BETWEEN:

ALLERGAN, INC.
ALLERGAN USA, INC.

Plaintiffs

and

AMAZON MEDICA
DOES 1-10

Defendants

AND IN THE APPLICATION BEFORE THE HIGH COURT BETWEEN:

MR AMERJEET MUDAN
MRS TAJINDER MUDAN
MUDAN PHARMA LTD
ROSE HEALTHCARE LTD

Applicants

and

ALLERGAN, INC.
ALLERGAN USA, INC.

Respondents

- -
- -

TERESA ROSEN PEACOCKE (instructed by **HUGH CARTWRIGHT & AMIN**) for the **Applicant**
PAUL LUCKHURST (instructed by **MISHCON DE REYA LLP**) for the **Claimants**

Hearing dates: 12 February 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE COCKERILL

Mrs Justice Cockerill:

Background

1. This is the hearing of the application of Mr Mudan, Mrs Mudan, Mudan Pharma Ltd and Rose Healthcare Ltd ("the Mudan Entities") to set aside the order of Master Yoxall dated 3 August 2017 ("the Order") made under the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act") pursuant to a letter of request ("the Letter of Request") from the United States District Court Central District of California ("the US Court").

2. Allergan is an international pharmaceutical company which trades all over the world. It is responsible for well-known medical products, including BOTOX® (a prescription-only pharmaceutical whose use for cosmetic purposes is well known, but which is also used for treatment of serious medical conditions). In November 2016 Allergan brought a claim in the US Court against Amazon Medica, a website which it is not suggested has any connection to the global internet retailer, and to which I shall refer as "AM".

3. Allergan claims that AM is responsible for unlawfully importing and marketing Allergan-branded products to purchasers in the US. The evidence indicates that AM advertised itself as *"Great Britain's leading pharmaceutical and medical device facilitator"* and it claimed that it was selling Allergan products at lower prices than Allergan itself. Thus on the FAQ page: "*How can Amazon Medica offer authentic Allergan Botox at a lower price than Allergan itself? … Amazon Medica is Great Britain's #1 Parallel Importer and their affiliated pharmacies ... purchase directly from Allergan's UK licensed wholesalers at wholesale pricing. These savings are passed on …*".

4. The claim brought by Allergan against AM is for infringing intellectual property rights, false advertising, unfair competition, and intentional interference with prospective economic advantage. The relief sought is a permanent injunction to prevent AM and persons associated with that website from continuing the unlawful marketing and importation of Allergan's products. Allergan also reserves the right to claim damages, although it has not done so yet, has no current plans to do so and concedes that this is not its primary aim.

5. Allergan says that the imports are potentially a danger to patient safety, because the imported products do not carry the labelling required by the US Food and Drug Administration ("FDA"), may be shipped under inappropriate conditions (e.g. without the required refrigeration), and in some instances are not approved for sale in the US at all. Allergan's claim in the US Court is, it says, therefore to protect its legitimate commercial interests, its reputation, and patient safety.

6. No defendant in the US action has acknowledged service or otherwise responded to the claim. The AM website ceased trading in February 2017.

7. Mr Mudan is a pharmacist and owner, with his wife, of the Mudan Entities. He admits that he has been responsible for supplying Allergan-branded products on behalf of AM to purchasers in the US, through his UK-based companies. Mr Mudan has not revealed the full value of these sales. The Claimant, extrapolating from the value of two test purchases it made ("the Test Purchases") and the number of transactions Mr Mudan

has indicated he was involved in, suggests that they may well run into hundreds of thousands of pounds.

8. Those Test Purchases involved the purchase of certain products and showed not just the price of sale but also the time lag between sale and delivery, the packaging of the delivery, and the packaging and labelling of the products including lot numbers as well as invoices from the Mudan Entities.

9. In November 2016, following the Test Purchases, Allergan wrote to Mr Mudan in, it is fair to say, somewhat aggressive terms - suggesting that his actions might be illegal and imperil his registration status as a pharmacist. He responded in May 2017 – the letter having apparently not reached him before this time. Discussions proceeded for some time but no agreement was reached as to the provision by Mr Mudan and the Mudan Entities of evidence to Allergan.

10. On 14 June 2017, following an application made on paper, the judge in California issued the Letter of Request which is the basis for the dispute before me today. An application to this court for an order was made ex parte in early July and resubmitted in slightly different terms later in July. This led to the Order which is the subject of challenge. This ordered the provision of oral evidence by Mr and Mrs Mudan and provision of documents by the Mudan Entities.

11. Most recently, on 8 February 2018, the judge in California ordered Allergan to show cause before 21 February 2018 as to why the case should not be dismissed for failure to prosecute, or Allergan should take default judgment. This order stated:

> "Absent a showing of good cause, an action must be dismissed without prejudice if the summons and complaint are not served on a defendant within 90 days after the complaint is filed. Generally, defendant must answer the complaint within 21 days after service (60 days if the defendant is the United States.)
>
> In the present case, it appears that one or more of these time periods has not been met. Accordingly, the court, on its own motion, orders plaintiff(s) to show cause in writing on or before February 21, 2018 why this action should not be dismissed for lack of prosecution. As an alternative to a written response by plaintiff(s), the Court will consider the filing of one of the following, as an appropriate response to this Order: To Show Cause, on or before the above date, as evidence that the matter is being prosecuted diligently … Plaintiff's application for entry of default pursuant to Rule 55a of the Federal Rules of Civil Procedure…
>
> No oral argument of this matter will be heard unless ordered by the Court. The Order will stand submitted upon the filing of a responsive pleading or motion on or before the date upon which a response by plaintiff(s) is due. This action will be dismissed if the above mentioned documents are not filed by the date indicated above."

12. The Letter of Request and the Order seek both oral and documentary evidence. As explained further below some changes have been made to the categories set out in the original Letter of Request when drafting an Order for this Court.

13. In terms of oral evidence, the changes are fairly small, and the evidence sought, as set out in Schedule B to the Order is as follows:

> "(a) Communications with the Amazon Medica Entities advertising or selling Allergan-branded products within the United States;
>
> (b) Agreements with the Amazon Medica Entities;
>
> (c) The identities of persons associated with or operating the Amazon Medica Entities;
>
> (d) The methods of operation of the Amazon Medica Entities;
>
> (e) The sourcing and purchasing of Allergan-branded products;
>
> (f) The sale and shipment of Allergan-branded products into the United States, including the identification of all United States customers;
>
> (g) Methods and means used to pay suppliers of Allergan-branded products; and
>
> (h) Methods and means of payment used by the customers of the Mudan Entities, related to the sales of Allergan-branded products into the United States, including sales arranged or facilitated by the Amazon Medica Entities."

14. The Order as made by Master Yoxall also requires Mr Mudan and his companies to provide the documents specified in Schedule A. The draft Order which I am asked to make does likewise, but as amended by deletions to reflect information provided by Mr Mudan as to documents not within the Mudan Entities' possession custody or power. Schedule A is itself a tailored version of Attachment 1 to the Letter of Request. It proceeds under the same broad headings, but the individual paragraphs have been considerably altered and added to in order to make the requests more specific.

15. It is common ground that (in broad terms) these documents exist and are in the possession of the Mudan Entities. Mr Mudan has produced, annexed to his witness statement, a schedule which acknowledges their existence, but makes various points as to the burden which would be placed on him in producing these documents. I will revert to these points under the topic of "Oppression" below.

16. In summary, Allergan says that it is clear that Mr Mudan is in a position to provide relevant oral evidence that will assist Allergan in proving key allegations in its US claim. Allergan therefore maintains its position as to his examination on the topics set

out in Schedule B to the Order. It also maintains its position as to the documents in Schedule A.

17. As for Mrs Mudan, it is now common ground that she should not be required to provide evidence, because Mr Mudan and his solicitor have each explained that she had nothing to do with the running of Mr Mudan's pharmaceutical business and that explanation has been accepted.

18. For their part, Mr Mudan and the Mudan Entities seek to set aside the Order in its entirety. The points raised may be summarised thus:

    i) Jurisdiction (general):

        a) Relevance: the relevance of the oral evidence and documents to the substantive issues in Allergan's US claim.

        b) Evidence for trial: the Mudan Entities' assertion that *"there would be no trial in any event"* in the US proceedings.

    ii) Jurisdiction (documents): whether the list of documents in Schedule A to the Order is sufficiently specific to comply with the challenging requirements of section 2(4) of the 1975 Act.

    iii) Discretion (amendment of documentary request): the Mudan Entities assert that Schedule A to the Order has been impermissibly re-written.

    iv) Other discretionary issues:

        a) Oppression: the Mudan Entities assert that the Order is oppressive.

        b) Self-incrimination: the self-incrimination issues raised by the Mudan Entities.

        c) Data protection: the Mudan Entities assert that the documents listed in Schedule A to the Order cannot be provided because of data protection concerns.

        d) Full and frank disclosure: the Mudan Entities suggest failures in this respect would be relevant to the exercise of discretion.

Jurisdiction

19. The Mudan Entities make several complaints that relate to the relevance of the evidence sought and the prescribed scope of the Court's power to assist foreign courts under the 1975 Act. In particular, in their application notice it is asserted that:

    i) The list of documents in Schedule A *"is investigatory in nature, for the purposes of pre-trial disclosure and not solely for evidence at trial"*.

    ii) The Court *"should not have been satisfied"* that Mr Mudan *"could give any relevant evidence…. which falls within the jurisdiction of the English Courts under the [1975 Act]"*.

iii) The list of topics for the oral examination of Mr Mudan in Schedule B to the Order is *"too wide and open-ended"*.

20. In support of these submissions the Mudan Entities draw my attention to the jurisdiction under the 1975 Act. In particular they point me to the central jurisdictional sections of the Act which state:

> "…the High Court … shall … have power, …by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction 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 any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose….
>
> 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); …."

21. They remind me that it is well established, inter alia by the authority of the House of Lords in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 that orders will not be made under this jurisdiction for pre-trial investigatory discovery and submit that the case stands as authority for the proposition that evidence may be obtained only for the purpose of proving (or disproving) a case at trial.

22. They say that the application falls foul of this on a number of heads. First they submit that it is not evidence for trial in the sense that there will be no trial in this action. Relying on *Westinghouse* and *Re International Power Industries NV* [1985] BCLC 128 they argue that where there are no proceedings which will result in a trial or proof of disputed facts or where what will take place is non-adversarial the Act is inapplicable.

23. In this connection, considerable stress was placed on the fact that the only pleaded claims are for an injunction and a declaration.

24. They also pray in aid the fact that Allergan is, as a matter of US procedural law, entitled to judgment in default and submit therefore this cannot be evidence for trial. In this connection they submit that the proceedings are in fact moribund and rely heavily on the recent Order of the California Court. Ms Rosen Peacocke for the Mudan Entities submitted that this was clearly a considered response by the US Court, that it indicates that the time for any purging of default by the Defendants is past and that the judge has on the true interpretation of this document ruled that this case will never require oral evidence. She submitted that this document indicates clearly that there will never be a trial in that the judge has stated that no oral hearing will be held. Thus, it is said, the judge has indicated that judgment in default will be given on the pleadings and that no further evidence is needed.

25. This, they say, is also consistent with the evidence as to US Law more generally in relation to the question of default judgment. It was submitted that the authorities show that the US Courts will grant a permanent injunction on the pleadings only where no appearance has been entered by the Defendant. I was referred first to *Amini Innovation Corp v KTY Int'l Mktg* 768 F. Supp. 2d 1049 where the Court stated: *"the Court must accept the well-pleaded allegations in the Complaint as true for the purposes of a default judgment"*. "Well-pleaded", it appears, means a pleading supported by sufficient facts that if the facts were taken as true the party would be entitled to the relief sought. That is in contradistinction to a pleading of legal conclusions or formulaic recitation of the elements of a cause of action: *Bell Atlantic Corp. v Twombley* 550 US 554, 570 (2007).

26. On this basis it is submitted for the Mudan Entities that even if (contrary to the court's order) a hearing might be required, since there is no suggestion the complaint in the California Proceedings is not "well-pleaded", it would only be as to whether the Complaint in the California Proceedings is sufficient and the court would very likely make its decision only on the submitted papers, as was done on Allergan's expedited discovery motion.

27. I was also referred to the case of *Juicy Couture Inc v Il Keun Oh* 2010 WL 11523637 in which the same judge who is docketed to the California Proceedings granted a permanent injunction by default in a similar case. It was submitted that while more might be required in a case where damages were sought in the Complaint, this is not a case where damages are pleaded – or are intimated to be included before default judgment is applied for.

28. The Mudan Entities second main submission is that this request, when analysed is not within the ambit of evidence for trial; they say it is in reality a fishing expedition, indeed one which is redolent of Waller LJ's famous dictum in *Refco Capital Markets v Credit Suisse (First Boston)* [2001] EWCA Civ 1733, [2002] CLC 301:

> "Once again time and money is being spent in the English courts over letters rogatory requesting the English court to order the production of documents and oral deposition from third parties to litigation in the USA. That time and money would be unnecessary, if those seeking the request from the US court appreciated the differences between the attitude of the US courts to the making of 'discovery' orders against non-parties, and the attitude of the English court to the making of such orders. The UK, when becoming parties to the Hague convention concluded in 1970, registered a reservation pursuant to art. 23 which became enshrined in the Evidence (Proceedings in Other Jurisdictions) Act 1975 making it clear that discovery against non-parties was something the English court would not provide because it simply was not part of its procedure. It is only that Act which gives the English court the jurisdiction to make orders to assist foreign courts. A number of authorities of the House of Lords since the coming into force of that Act have emphasized the position. But still much time is taken up in our courts trying to give effect to letters of request, problems in relation to which could have been avoided if proper steps had

> been taken to bring to the attention of the foreign court the constraints under which the English court operates."

29. In this respect they point to a number of features. They highlight the evidence given by Ms Simpson for Allergan in support of the Order which suggests that the evidence is needed to quantify loss – when in fact there is no claim for loss and quantification cannot be relevant to the injunction claim. They point to other parts of the evidence where Ms Simpson frankly explains that the evidence is sought to enable Allergan to identify other individuals as defendants to the claim.

30. They point also to the width of the requests – in particular the requests for oral evidence which are unconstrained by any time period and in some cases contain no link to AM at all, on their face seeking to ascertain evidence of all purchases by the Mudan Entities of Allergan products, all shipments of Allergan products into the US, and details of payment in both directions for Allergan products.

31. The Mudan Entities point to the fact that there is no statement in the Letter of Request or evidence as to why the evidence sought is needed and contend that the evidence suggests that Allergan actually have (as well as the evidence from the Test Purchases) considerable evidential material the substance of which has not been disclosed to this Court; for example the evidence obtained via Letters of Request or subpoenas addressed to FedEx, American Express and Parcelforce. This they say must be relevant to the Court's exercise of discretion.

32. The Mudan Entities therefore submit that overall the evidence demonstrates that there is no real interest on the part of Allergan in amassing evidence against AM for proof of a case at trial, but rather what is sought is information to pressure Allergan suppliers and customers and control Allergan's products. This they say is next door to clear from the fact that identities of suppliers and customers are sought when there can be no need for this information for trial.

33. Allergan submits that these complaints are without merit and that the US Court and Master Yoxall were both rightly persuaded that the evidence sought by Allergan is relevant and will assist Allergan in proving key allegations in its US claim.

34. Allergan accepts that Section 2(3) of the 1975 Act in the words of Andrew Smith J in *Smith v Phillip Morris Companies* [2006] EWHC 916 (QB) at [30(ii)]:

> "restricts what orders the court may make to (so far as is relevant) steps that can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the English Court, and so 'prohibits the making of an order for the examination of a witness not party to the action for the purpose of seeking information which, though inadmissible at trial, appears to be reasonably calculated to lead to the discovery of admissible evidence'".

35. However it says it does not fall foul of this. It is looking for information to establish admissible allegations of fact. It says that so far as oral evidence goes, there are sufficient grounds for believing that Mr Mudan has relevant evidence to give on topics relevant to issues in Allergan's claim, and he cannot object to the order for oral examination on the grounds that it is a "fishing expedition". It points me to the judgment of the Court of Appeal in *First American Corp v Sheikh Zayed Al-Nahyan* [1999] 1 WLR 1154 at 1163H-1164A and 1164F-G:

> "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 advance what answers to the questions the witness can give. Nor can it be necessary that the answers will be determinative of one or other of the issues in the action… 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 the ground of fishing."

36. It submits that I should take the indication of relevance within the Letter of Request very seriously. It reminds me that it is well established so far as relevance is concerned, weight should be given to US Court's statements in the Letter of Request that the evidence sought is relevant to the substantive issues in Allergan's claim. It cites *CH (Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 at [14]:

> "in the ordinary way and in the absence of evidence to the contrary the English court should be prepared to accept the statement of the requesting court that such is the purpose for which it is required… if the letter of request states that a particular person is a necessary witness then the English court should not itself embark on an investigation as to whether the requesting court is correct for the purpose of determining in advance whether the evidence is relevant and admissible"

37. While it accepts that I am not bound by such statements and that the Court is nonetheless entitled to satisfy itself that these statements in the Letter of Request are well founded it says that I have a good steer, to which I should pay mind, in the Letter of Request which records that Allergan had *"advised the [US Court] that the documents and information sought are relevant and necessary for the due determination of matters in dispute between Plaintiffs and Defendant Amazon Medica"*.

38. The Letter of Request also states that *"Allergan plans to use the requested evidence in the United States District Court to permanently enjoin Amazon Medica's illegal operations, as well as third-party support of such illegal operations"* and that the

Mudan Entities are *"in current possession of some of the best evidence to prove the nature, purpose, and extent of Amazon Medica's illegal activity as well as its physical location and the identities of those associated with Amazon Medica"* and that they are *"in possession of highly relevant evidence, which Allergan intends to present to the United States District Court"*.

39. Allergan says that if I am minded to go beyond the statement in the Letter of Request in any event, the requested evidence is plainly for the purpose of proving allegations of fact relevant to Allergan's substantive claim. In particular, it was argued in the skeleton and orally before me that the evidence is relevant to a number of allegations of fact, in particular that:

    i) There has been targeting of medical practitioners and placement of products for sale within the California Central District. It is said that the documents, and Mr Mudan's oral evidence, will demonstrate location of purchases.

    ii) AM has set up a scheme to source Allergan-branded pharmaceutical products from the UK and to market those products to US medical practitioners on the false basis that they can be lawfully distributed and administered to patients in the US. It is said that Mr Mudan will be able to provide oral evidence on the existence of the scheme and in particular as to his agreement with AM and its operation, supported by the documents held by Mr Mudan's companies, in particular orders, invoices and receipts, and certain shipping records.

    iii) The imported Allergan-branded products did not carry FDA labelling and that BOTOX® packaging in the UK does not include the FDA's key "black box" warning. It is said that Mr Mudan will be able to provide evidence as to whether the products he supplied carried FDA labelling (or, if not, what labelling they would have carried).

    iv) The Allergan-branded products marketed by AM included specific products, some of which were not approved for sale and use in the US. It is said that Mr Mudan will be able to provide evidence as to precisely which Allergan-branded products he supplied.

    v) The conditions in which Allergan-branded products were shipped to US purchasers were not necessarily appropriate and claims that products are shipped at the proper temperature cannot be trusted. It is said that Mr Mudan will be able to provide evidence as to the conditions and time period in which he shipped Allergan-branded products to the US.

    vi) AM does not provide return packaging or other means for customers to return medicinal products. Mr Mudan will be able to explain whether this is true, at least in relation to the products that he supplied.

    vii) AM purports to have office locations that are non-existent, that it has taken steps to mask its digital/IP location, and that it is believed that the individuals behind AM include David Wagenleiter. It is said that Mr Mudan will be in a position to state whether Mr Wagenleiter is behind AM and to identify any further individuals behind that business and that this will also be evident from the electronic communications and business telephone records sought by Allergan.

viii) It has suffered harm to its reputation, business, and goodwill. It is said that many of the documents sought are relevant to these two points:

a) Mr Mudan accepts that he is in possession of orders, invoices, and receipts in respect of *"several hundred orders"* for Allergan-branded products.

b) Mr Mudan accepts that he has access to bank statements and to credit/debit card records detailing payments to/from AM or in respect of sales of Allergan-branded products on behalf of AM.

c) Mr Mudan has invoices from the suppliers to the Mudan Entities which, in combination with the other documents, will enable Allergan to prove that Allergan-branded products have been purchased by the Mudan Entities at prices that are lower than the prices that would have been paid by US purchasers for products approved for use in the US market.

40. Finally, it is said that this detailed evidence as to the nature and scale of AM's operation is relevant to the appropriateness of granting a permanent injunction, which is a discretionary remedy.

41. Allergan submits in this connection that the English Court should not micro-manage the topics identified by the US Court in the Letter of Request. It draws my attention to the dictum of Sir Richard Scott V-C in *Zayed* at 1165B-D, citing *In re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331 at 339:

> "The question as to what evidence would and what evidence would not be relevant to an issue in the foreign action is primarily a matter for the foreign court… an English court must look at the issue of the relevance of the requested testimony, if it is raised, in broad terms, leaving to the foreign court, in all but the clearest cases, the decision as to whether particular answers, or answers on particular topics, would constitute relevant admissible evidence.".

42. These authorities, it says, establish that if there is a doubt, the benefit of that doubt should be given to the requesting party. In any event, it says that there are safeguards against excessive width in the Order which expressly prohibit any impermissible fishing expedition, that further safeguards can if necessary be inserted and the Court can rely on the Examiner to ensure that bounds are not overstepped.

43. So far as the "no trial in any event" argument is concerned Allergan says the Mudan Entities' argument is misconceived – there is no magic in the question of whether there will in fact be a trial and this Court cannot be expected to crystal gaze. The key issue is whether the Letter of Request and the order of the English Court seek relevant evidence; here the evidence sought is relevant to the issues in Allergan's substantive claim and would be admissible at trial in respect of those issues.

44. Allergan says this is a very different sort of case to those involving certain types of proceedings which by their very nature are investigatory and will never involve a trial

(such as those in *Re International Power Industries*, which dealt with the powers of a US liquidator); Allergan's claim is an ordinary civil claim brought by way of a Complaint (i.e. a Particulars of Claim) and seeking final relief of the type that is typically granted following a trial.

45. It says that the text of the Act supports this approach. Section 1(b) of the 1975 Act permits the English Court to order the production of evidence in support of civil proceedings "*whose institution before that [foreign] court is contemplated*". If civil proceedings are merely "*contemplated*", it cannot be known whether a trial is bound to take place. This indicates that section 2(3) of the Act requires the Court to ask itself whether the evidence would be admissible at trial <u>if</u> a trial were to take place. The applicant does not have to surmount the further hurdle of persuading the Court that a trial is bound to take place. Otherwise, potential witnesses could seek to resist orders made under the Act by arguing that a settlement of the claim was probable or that the claim was so weak (or so strong) as to be suitable for summary judgment.

46. It also argues that the 1975 Act expressly contemplates that the evidence obtained might be deployed at hearings that are not a trial. Section 1(b) requires the court to be "*satisfied*" that the evidence "*is to be obtained for the purposes of civil proceedings*". These are defined in section 9(1) as "*proceedings in any civil or commercial matter*". This, it is well established, is a wide term, and not restricted to the actual trial or hearing of a civil action; thus a party might properly seek to deploy evidence obtained via a letter of request in support of an application for summary judgment.

47. It also submits that it is likely in the present case that the evidence obtained from the Mudan Entities will be deployed at a substantive hearing. A trial remains possible (if new defendants are added and respond). In this regard, it submits that the Mudan Entities' position is circular: by refusing to provide evidence that is part of making out a case against the wrongdoers they are seeking to perpetuate a situation in which Allergan is struggling to bring the individual wrongdoers before the court.

48. But in any event, Allergan says, there will at the least be a hearing before the US Court at which Allergan deploys the evidence from the Mudan Entities in support of an application for final injunctive relief.

49. In this connection Allergan takes issue with the Mudan Entities' case as to the future prognosis for the California Proceedings. Allergan says that the recent Order cannot sensibly be read as was suggested; the judge's communication is simply an administrative process prompted by lapse of time, and that the notation as to oral hearing pertains only to the current step (showing cause or applying for default judgment). Allergan says that the grant of a permanent injunction is not a mere formality that can be obtained by filing an administrative request for default judgment; the remedy is a discretionary one and the US Court will need to be satisfied that relief is appropriate in all the circumstances.

50. On the authorities Allergan says that they do not support the Mudan Entities' case. *Amini*, it says, demonstrates that further materials may well be needed and relied on. It points to a distinction between the test for default judgment per se and the test for the granting of injunctive relief which requires the proof of irreparable harm, which can be supported by "substantiated evidence". They also point to the fact that the case specifically states that damages must even at the default stage be "proved up" – a process which may include witness testimony and other admissible evidence. In this

regard, the position is not dissimilar to the position under English procedure, where proof of a claim for relief will be required.

51. So far as the *Juicy Couture* case is concerned it says that this supports this analysis; that was a case where liability was admitted, but evidence was still required to prove damage. Allergan also directs my attention to the recent case of *Wooten v McDonald Transit Associates Incorporated* 788 F.3d 490 (5th Cir. 2015) which held that it was permissible for a court hearing a default judgment application to consider evidence when considering whether to exercise its discretion to grant default judgment.

52. Allergan says that the oral and documentary evidence from the Mudan Entities will therefore be placed before the US Court to prove that there is a substantive basis for obtaining the injunctive relief sought, that Allergan has been suffering significant damage due to the actions of AM, and that there will be significant harm in the absence of injunctive relief. The evidence may also inform the terms of the order that the US Court is willing to grant.

Conclusions

53. The first step in considering a contentious letter of request involves keeping an eye on the underpinning jurisdiction. That is a jurisdiction which is limited to *"steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings"* in this Court. In other words, when talking of compelling oral evidence the comparator is with when a witness summons would be available in proceedings in the English Court.

54. It is that fundamental building block on which the correct approach, as set out in the authorities is based. This emphasises repeatedly the centrality of relevance for trial. Thus what may be termed the modern touchstone: the two stage test in *Zayed* at 1165D-E which has been repeatedly invoked in subsequent authorities:

> "an English 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 …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."

55. Therefore in the final analysis the questions of relevance and intention to use at trial are the key points. In this connection I should note that in some respects Allergan therefore cast their net too wide when they speak about admissibility. Admissibility may well be considered in the context of a witness summons; but it is rarely of relevance in the context of a letter of request. Defining the permissible ambit of enquiry by reference to admissibility would lead to enquiries far beyond what is relevant and useful at trial; and policing by reference to admissibility in the context of letters of request is dangerous when foreign courts have different views as to what evidence is admissible.

56. Turning then to the question of relevance, here it is true that the court will not be too astute to go behind the indications in a letter of request as to relevance for trial (Lord Keith in *RTZ* at p. 654F-G). However the court is by no means prevented from looking at what is said and giving appropriate weight to that, and the Court will have regard to the wording of the letter of request in each case – and where that information is available as to the circumstances in which the letter was obtained – in order to evaluate how much weight should be given to such wordings as are often relied upon by parties seeking to uphold a letter of request. Thus in *RTZ* itself the court noted not just the wording used by the US Court, but also the fact that it was the result of advice from English Leading Counsel and the process by which the letter of request had been obtained.

57. So it must be borne in mind that, just like many applicants for letters of request, US Courts do not necessarily comprehend - unless it is explained to them - the basis upon which this jurisdiction operates and in particular its limitations. So when a US Court has heard argument on the issuance of a letter of request, and has had the English Court's approach explained to it, and sets that out in the letter of request and says something along the lines of: *"I understand the basis on which the English Court operates may be rather more restrictive than that with which I am familiar, but even so I can say that the evidence sought is relevant to issues for trial"* (as was ultimately done regarding the oral evidence in *RTZ*) it will be almost unimaginable for the court to look behind that statement.

58. However a letter of request not issued on that basis will be more open to scrutiny where the terms of the letter suggest that the intention behind it is not to obtain evidence for trial. It is not the same thing at all (as noted in *CH (Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626) when a court issues a letter of request without the defendant being heard, or when the Court itself says nothing about relevance but simply records the submission of the applicant.

59. This distinction is relevant here. This is exactly a case of a letter of request being issued following an unopposed paper application, in exactly the form sought by the applicant. That application did not flag up the basis on which this court approaches requests for evidence from third parties. It is also a case of the letter simply recording the applicant's contentions as to relevance. I do not therefore consider myself constrained from looking at the substance of what is sought.

60. Nor do I think that there is a short cut through this via the "no trial in this case" submission. On this I am to some extent with Allergan. It is plainly right that the existence of an ultimate trial is not key, and that this court cannot be expected to decide the question of relevance by reference to such an uncertain question. Similarly I accept the submission that this case, which is on its face a normal civil suit, would not be analogous to the kinds of the situations contemplated in *Re International Power Industries*. I do not accept the submission advanced for the Mudan Entities that that authority stands for the proposition that the Act is inapplicable to all cases where the process is non-adversarial; that seems to me to mischaracterise the position in that case. There a compromise terminated the adversarial part of proceedings so what remained was an issue about whether bankruptcy proceedings of an investigatory nature were covered by the Act (which Woolf J held they were not).

61. This case then could not be analogous to the situation envisaged in *Re International Power* unless it were established to be the case that no consideration of the merits

could ever eventuate (for example if the judge had ruled that the matter would proceed on the documents submitted to date). I am quite clear that that is not the situation and that the judge has to date done no more than indicate that there are three options: apply for default judgment, give a good reason why you are not applying for default judgment, or see your case struck out.

62. It cannot therefore be said that the question of relevance cannot arise. However the nature of the case as it currently stands and the likely future course of the litigation is in my judgment relevant background to the assessment of the question of relevance.

63. I do not say that it is inevitable that a letter of request issued at this stage cannot meet the test – that would, as Allergan submitted, be to fly in the face of the wording of the Act which contemplates the making of an Order as early as a time when proceedings are contemplated. However the timeline certainly gives pause for thought and requires this court to ask the questions as to relevance and intention. Lord Fraser said in *RTZ* (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 section 1 of the Act of 1975 but it does, so to speak, put one on one's guard"*. See too Buxton LJ in *Golden Eagle Refinery v Associated International Insurance* [1998] EWCA Civ 293: *"We should proceed with care before assuming that an application made at the pre-trial discovery stage that certainly does not in terms confine itself to trial testimony is so confined."*

64. Normally in looking at relevance this Court is somewhat further along the timeline. Although the discovery stage of US litigation is, as the authorities indicate, seen as an early stage for witness evidence by English standards, one is there looking at a case which is considerably further developed than the one in this case. In particular what there will be is a pleading from each side, which will define the issues - properly so called - in the sense of the contentious factual matters relevant to establishing the constituent parts of the cause of action or defence.

65. Here we are looking at a stage even before the pre-trial discovery stage. There are as yet no defined issues; because there is no pleading from the Defendant. Allergan says all sorts of things in its Complaint, but there is no comeback on any of them. Some of those allegations are ones which would need to be established at trial to succeed; some are immaterial for the purposes of relief. This Letter of Request appears to have been issued as part of a preliminary pre-pleading discovery round, a major focus of which is to establish against whom claims can be brought. It is plain on the evidence – and is not in issue - that one of the purposes of this Letter of Request is to glean material for this purpose. Thus it is clear that a part of the purpose of this Letter of Request is investigatory and therefore impermissible.

66. The question is whether, taken as a whole, that is its nature - making it outwith this Court's jurisdiction; or whether it can fairly be regarded as a "dual purpose" letter of request, the legitimate portion of which can be saved by appropriate pruning and safeguards.

67. Looking first at the Letter of Request itself, particularly as regards oral evidence, which faces the lowest threshold: the starting point is the list of requested testimony. There is no doubt that the topics are cast in very wide terms. None are given any time limitation - even on amendment for submission to this Court or re-amendment for the purposes of this hearing. One of them (the identities question) can only be made with

an impermissible purpose. The last four (again even post amendments) are not confined to matters concerning AM.

68. Such width is a key indicator of an impermissible purpose. It is not determinative; as Sir Richard Scott noted in *Zayed "the width of a request may be an inevitable consequence of the complexities of the issues and of the witness's involvement in them".* However there is nothing in the evidence which suggests that there is a reason for the width of the topics. On the contrary, as I shall explain below, the evidence is frank about the fact that investigations are ongoing and this process is part of it.

69. Thus after review of the Letter itself one needs to look at the evidence under cover of which the application to this court was made; it is here that one expects to find this court's concerns as to whether what is sought is evidence for trial addressed. The key assertions appear to be:

    i) *"At the present time Allergan has insufficient evidence as to the extent of [AM]'s wrongdoing, to enable it to properly quantify and prove several of its claims .. particularly its claims pursuant to the California Common Law Tort of intentional interference with prospective economic advantage in that Allergan seeks to show that business was diverted from it and pursuant to California Competition Law – showing the Allergan suffered economic injury"*;

    ii) *"The Mudan Entities will have knowledge as to where the Allergan branded products were obtained from, who they were sold to, how much was sold by them, that they made payments to [AM] and received payments from [AM] …"*;

    iii) *"Allergan believes that the information being sought from the Mudan Entities in this application will likely identify the physical location of [AM] and the identities of those associated with it or any third parties which enable its operations."*;

    iv) *"Allergan plans to use the evidence obtained in the US Courts to bring the individuals who are behind [AM] into the current US court proceedings and then successfully obtain at trial final orders that permanently stop [AM]'s operations … In addition, the information uncovered will enable Allergan to better quantify and prove several of its claims against [AM]."*

70. There is no specific discussion of the relevance of the oral evidence requests. In paragraph 63 of the witness statement Ms Simpson breaks down the documentary requests, which do overlap with the oral requests. Each of the categories sought is justified either by being referable to quantification of claims or identification of individuals (or on occasion, both).

71. So far as quantum is concerned, I accept the submission that this cannot, as matters stand, constitute a legitimate purpose for the Letter of Request. There is no case which requires proof of quantum of loss nor indication of intention to pursue such a case. There is, as Mr Luckhurst pointed out, a need to show that economic loss was suffered. However there is no assertion that this is a point which Allergan cannot prove, nor is there an assertion in the evidence that this is one of the reasons why the evidence is sought.

72. The high point of the evidence is the assertion that documents are needed "to quantify and prove several" of the claims (intentional interference being the only one mentioned). Yet while the relevance of such documents to quantification is plain, their relevance to proof (given the existence of some evidence via the website material and the Test Purchases as to diversion of business and undercutting) is not; and nowhere is this point clarified.

73. Consequently, there is no statement at any point as to what evidence is required for the substantive proof of the existing pleaded claims. Aside from the broad assertion as to insufficiency of evidence which leads into the "quantify and prove" wording, there is no explanation of what legitimate reason lies behind this request. There are however repeated assertions of purposes which are illegitimate; and these assertions dovetail with the indications given by the timeline, and the breadth of the oral requests.

74. This, it seems to me, gives a very powerful indication that this is a request whose purpose is not seeking evidence for trial, and that on that basis the order sought cannot be made. It would probably be permissible for me to stop here, and say that the case on jurisdiction fails.

75. However, given this court's desire to assist a foreign court wherever possible I will also examine the rearguard action fought on this issue by Mr Luckhurst both in his excellent skeleton and his clear and forceful submissions, in order to see whether a case can nonetheless be discerned for the requisite intention to be in existence.

76. In one sense of course the fact that these points were only made so late in the day is itself a point which indicates that the purpose of the Letter of Request was something different; had the intention been to obtain evidence for trial that would have appeared earlier. But even putting this point aside it seemed to me that all the points went either to:

    i) Investigatory matters (location and identities of the Defendants);

    ii) Quantification of loss;

    iii) Establishing what might be termed factual background (scheme and scale, arrangement for returns etc);

    iv) Providing more evidence of matters which Allergan already have via the Test Purchases or their other subpoenas and letters of request. These include such matters as evidence of absence of FDA labelling, sale of the non-FDA approved product, conditions of shipping, targeting of medical practitioners. Also within this head is the question of proof of damage (necessary for the intentional interference tort and also for the hurdle of irreparable harm in relation to the injunction).

77. At the end of the day, on the basis of what I have seen and heard, the matter appears to stand thus. If there is no default judgment, there is no clear sense of what evidence will be wanted, or intention to obtain it. Of course it is not requisite for evidence to be necessary or even probative; given a proper basis for the request, evidence will usually be ordered to be given on the basis of relevance. Thus a letter of request seeking only material obviously relevant to issues for trial on a "belt and braces" basis would probably be upheld (subject possibly to questions of oppression, particularly as regards

documents): see *State of Norway's Case* at p 496E. But in the context of a letter of request where part at least is clearly impermissible, such slim pickings as to relevance do nothing to counterbalance the weight of indications in this case that this is fundamentally a request other than for trial evidence and therefore one which this court has no jurisdiction to grant.

78. If a default judgment is sought, again there is no clear picture as to what evidence will be used and for what. Even at the hearing it was not possible for Mr Luckhurst to point to evidence which would be needed if the matter were to proceed to a default judgment application. In reality, the case went no higher than to say if the matter went to default judgment some of this evidence might well be helpful in a "belt and braces" sense. There was no evidence as to how such an application would be prepared and what it would include.

79. This harmonises with the fact that as a matter of law it appears that there is nothing standing in the way of Allergan obtaining the final relief they seek on the materials they already have – albeit on the slightly hollow basis of being against a defunct company and ten unidentified John Does. The likelihood is a formal proving of an unopposed case. On the basis of the authorities I do accept that this is not quite a rubber stamp, but absent opposition it seems unlikely that the court will require more evidence for the injunctive relief than that which is presently available. As I have noted, that does not appear to be suggested; there is no suggestion of a "black hole" which may lead to final relief not being granted.

80. I am therefore not satisfied that in this case the relevant test is met. Invoking the *Zayed* test: can the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned? A very broad relevance may be established, but this is not to any issues or to any points where evidence is lacking for the relief sought and therefore it has no probative value. Is the intention underlying the formulation of the topics an intention to obtain evidence for use at the trial? It seems quite plain that it is not – at least so far as regards the case currently pleaded.

81. Applying a backup test which invokes the underlying jurisdiction: would an English Court issue an outwards letter of request in such circumstances, or a witness summons? The answer to this, it seems to me, is plainly no.

82. In all those circumstances I conclude that the Court has no jurisdiction to make the Order and the Order made should be set aside.

83. I would add that I reach this conclusion with reluctance; this Court always prefers to assist foreign courts in such matters where it is possible to do so. No discourtesy is intended to the California Court. In this case I have concluded that it is simply not open to me to uphold the Order.

84. I would add that had I been minded to conclude that jurisdiction did exist I would have held that the Letter of Request was at best what is termed a "dual purpose" request but with a mainly investigatory character. In such a case there is authority that the Court will generally not exercise its discretion to make an order even though it is satisfied that the witness may be able to give some relevant and admissible evidence: *United States of America v Philip Morris Inc*, (unrep) 10 December 2003 at [76] per Moore-Bick J:

> "… the court should not make an order for the examination of a witness if it is satisfied that the letter of request is mainly of an investigatory character, even though it is satisfied that the witness may be able to give some relevant and admissible evidence, unless it is possible to exclude certain areas of the request without undue difficulty."

85. Looking at the matters which would then have come into play, I conclude that (again with reluctance) I would not have considered this a case in which it was appropriate to diverge from this guidance.

86. So far as the oral evidence request is concerned, on any view, once the areas where trial relevance might be discerned were identified, it was plain that this was a letter of request which required very considerable rewriting.

87. It is not feasible or appropriate to let a letter of request which is partly legitimate and partly illegitimate proceed without taking steps to remove so far as possible the illegitimate portion. This is because of the rules as to what is permissible and because of this Court's important role in protecting witnesses. The bottom line is that a witness based in this jurisdiction is entitled not to be questioned beyond what would be permissible in proceedings in Court here. The Court cannot directly control this, and (contrary to Allergan's submission) the Court cannot safely assume that the examination process offers equivalent safeguards.

88. In particular, an examiner has no power to rule (save possibly in extreme cases of witness oppression): *R v Rathbone ex parte Dikko* [1985] QB 630. Further the examiner will often not be provided with sufficient materials to make himself/herself really familiar with the issues so as to be able to rule as would a trial judge. It is these issues which give rise to the dictum of Lord Woolf at [18] of *State of Minnesota v Philip Morris* [1998] ILPr 170:

> "Because of the general approach, …, when the court has to choose between either giving effect to a Letter of Request or refusing to do so, it will take into account any limitations, corrections or conditions which the party seeking the order is willing for the court to take into account. It will, if appropriate, be prepared to give the request an amended effect. However, notwithstanding that, it is important to bear in mind that fishing still cannot be permitted as part of a request. Furthermore, because of the need to hold the balance between the requesting court and the witnesses who are to be examined, if the request is given effect, the court will not allow uncertain, vague or other objectionable requests to be implemented. A witness is entitled to know within reasonable limits the matters about which he or she is to be examined. Although there is the possibility, to which I have already referred, of matters coming back to the court for further rulings, in general the court has to take into account that once it makes an order it ceases to have any control of the examination."

(and see to similar effect the remainder of [76] of Moore-Bick J's judgment in *USA v. Philip Morris*).

89. Accordingly a court in dealing with a "dual purpose" request will have to, with the parties' assistance, grapple with the process of excision and editing to arrive at what a legitimate letter of request might have looked like.

90. In this case this was simply not an issue. No amendments were offered in relation to oral evidence to deal with issues of relevance. Allergan said that (subject to possibly confining the last requests to transactions relevant to AM – an offer made in oral reply) the requests stood or fell as they were drafted. Thus no grant could have followed. I should say that it may well be that no amendments were offered here precisely because to do so would have been to re-write the Letter of Request and while limitations are possible, rewriting is not permitted; as explained in *State of Norway No 1* [1987] 433, 484: *"amendments … may even be substantial but [there is] no authority for the proposition that the court should, in effect, redraft a request in different terms… I would not know how to set about doing this."* (and to similar effect *RTZ* at p 654).

91. While (as discussed in more detail below) amendments were offered in relation to the documentary request, those were essentially amendments which went to the technical issue of specificity. They were not geared to trimming the Order to address itself only to non-investigatory topics and thus to topics relevant to issues for trial.

92. Indeed because of the lack of focus on this in the Letter of Request and the evidence in support of the granting of the Order, it is hard to see how the Court, even with the parties' assistance in the detailed redrafting exercise, could have hoped to produce a result which might be said to reflect topics on which the aim was trial testimony.

93. I would therefore even on this basis have concluded that the correct course was to grant the application and set aside the Order.

Jurisdiction (documents) and amendments to the schedule of documents

94. I will however deal briefly with the remaining issues, not least because the position in relation to the documentary request would have been extremely interesting, if the court had otherwise had jurisdiction.

95. This is because when it comes to the documentary request there has been a fairly thorough attempt to recast the schedule of requested documents as regards specificity; doubtless because it was appreciated that it was absolutely clear that the original Letter of Request formulation, replete with "anys" and "alls" and cast in the broadest terms, could not stand in the light of the statutory requirement.

96. That requirement is the one set out in section 2(4)(b) of the Act:

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

97. That requirement reflects (again) the underlying jurisdictional position at the time of the Act, that a third party could only be compelled to produce documents under a subpoena duces tecum. It therefore reflects the subpoena jurisdiction which required specific description of documents, rather than any form of disclosure jurisdiction.

98. There is, as Allergan rightly say, no question as to existence of the documents. Mr Mudan accepts he has all of these documents or has control over them. The question is broadly the usual one in the documentary context, specificity. But there are interesting offshoots from this.

99. The Mudan Entities submit that the reformulation is impermissible, and that the request is still too wide. They say this principally because some of the requests are by reference to categories and they contend fall foul of the guidance in *Re Asbestos Insurance Cases* and also because they say the reformulation amounts to an impermissible rewriting of the categories. Little weight was initially placed on the need in this context for amendments to be "blue pencil" deletions only, though the point was ultimately pursued to some extent orally.

100. Allergan says insofar as the complaint is directed toward the fact that some documents are listed in Schedule A by means of a description of a group of documents, this is permissible in that the section *"has been construed so as to allow documents to be compendiously described but only so long as the exact documents were clearly indicated, and the documents were shown to exist or to have existed, rather than being conjectural documents"*: *Refco* at 310F-G. The touchstone is that there should be *"no real doubt in the mind of the person to whom the summons is addressed about what he is required to do"*: *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] 1 WLR 767, CA at [28]). That standard, they say, is clearly met in this case, not least because Mr Mudan has produced a schedule identifying and describing all of the documents that remain in issue.

101. Allergan also says that the "improper substitution" argument is a false point. It says Topics (a) to (h) for oral examination in Schedule B are the same as topics (a) to (h) in "Attachment 2" to the Letter of Request. The documents specified in Schedule A are the same categories of documents identified in "Attachment 1" to the Letter of Request. There has been a deletion of certain items and a narrowing of the description of the remaining items, to provide clarity to the subjects of the Order and to comply with the requirements of the 1975 Act.

102. This, it submits, is in line with the authorities in the context of oral evidence that some editing is permissible: see for example, Lord Woolf in *Minnesota v Philip Morris Inc* [1998] ILPr 170 at [17-18].

103. As to the blue pencil it was submitted that what had been done could have been (and could be if the court was so minded) done by blue pencil only – the result would be uglier and less user friendly but there would be no difference in substance. In those circumstances it would not be appropriate to strike down those categories. Allergan also notes that the refinement of Schedule A involved a dialogue with the Court: Allergan initially submitted a draft order that was closer to the wording of Attachment 1 to the Letter of Request and was directed by Master Yoxall to re-submit the draft order in a form that provided a tighter description of the documents sought. Having done that, the revised order was duly granted. It was submitted that I should therefore

bear in mind the implicit view of the experienced master that such editing was permissible.

104. In this context I was also urged to bear in mind that under the parallel domestic procedure the Court has considered that it has the power to amend the terms of the summons. Thus in *The Lorenzo Halcoussi* [1988] 1 Lloyd's Rep 180 at 184-5 Steyn J rejected an argument that he could only effect deletions, saying: *"In my judgment, one must regard the subpœna duces tecum as the servant of the administration of justice, and a Court has an inherent power to amend it in whatever form may appear necessary and just."*. Similarly in *Omar v Omar* (11 Oct 1996) CA, unreported, Peter Gibson LJ stated: *"the proposition put forward elegantly by Steyn J, which I have cited, is correct. The court ought to consider whether an amendment, particularly one which reduces the scope of the subpoena or identifies the documents more precisely, should be allowed."*

105. It was argued that these authorities demonstrate that, in an appropriate case, the Court is not subject to a "straightjacket" whereby a list of documents in a letter of request can only be refined by way of deletion and that, were that so, it would effectively run contrary to both the wording of the Act which enables the Court to grant any relief it could in domestic proceedings and to the principle that the court strives to give effect wherever possible to letters of request.

Conclusions

106. So far as concerns the question of whether, leaving aside the blue pencil issues, the schedule as amended complies with the requirements of the authorities, I see the force in Ms Rosen Peacocke's submission that categories such as "The Mudan Entities' monthly business telephone billing records for the period 1 January 2015 to 30 June 2017" might be said to fall foul of the line indicated by Lord Fraser's famous example in *Re Asbestos Insurance Cases.*

107. In the event I would not have held this to be a bar on this category had the question of relevance been made out because I regard the authorities taken globally to date to be as summarised in *Tajik Aluminium*. What matters is whether one can spell out of the compendious description a list of individual documents separately described and whether the witness is left in no real doubt as to what he is being asked to bring (this, in fact, is a line which pre-dates *Asbestos Insurance Cases* and can be discerned in *RTZ* itself).

108. Where the witness has made no response the line may be very difficult. Where he has responded, as Mr Mudan has done, the latter question is effectively answered. In such cases this effectively applies a "proof of the pudding" cross check which is consistent with the older authorities (such as *Lee v Angas* (1866) LR 2 Eq 59) which suggest that if a witness is served with an objectionably broad witness summons but admits that he has the documents referred to in his possession he cannot later object to the breadth of the request.

109. What is more interesting is the question of to what extent any reformulation beyond blue pencil deletions would have been permissible. This point arises because what had been done was not in my judgment actually equivalent to deletions. In particular, some additions had been made to the wording, but with the intent of narrowing the scope of what was sought. On this question I would make the following observations:

i) The authorities of *Lorenzo Halcoussi* and *Omar v Omar* cannot trump the dicta of the House of Lords in *RTZ*, or indeed the dicta of the Court of Appeal in *Refco* which referred at [32] specifically to deletions being the only permissible route. This is the more so as it is apparent that the courts in the domestic cases did not have *RTZ* cited to them, and so were perhaps unaware of how the position stood on authority.

ii) However *RTZ* is perhaps not such a blanket prohibition as sometimes appears. What was in issue there was (to some extent) recasting of the substance of categories. This can be seen from the passage in Lord Wilberforce's judgment where he says at pp 610-11: *"The Court of Appeal, as regards the scheduled documents, applied a "blue pencil," i.e., it deleted (as under section 2 of the Act of 1975 it is entitled to do) a number of items, and (more doubtfully) substituted for the words "relating thereto" the words "referred to therein." For my part I would have applied the blue pencil still more vigorously, so as to leave in the schedule only "particular documents specified" together with replies to letters where replies must have been sent"*. The change between "relating thereto" and "referred to therein" is not a simple narrowing, but could conceivably produce new results (see also Lord Diplock's judgment at p 635G-H). The Court was not looking at the kinds of minor drafting which is necessary to circumscribe a request without altering its essential nature, or to give the final touches to the necessary degree of specificity; to the extent it was the indication of an addition of "replies" indicates that the court was not opposed to such a change. Likewise I find it hard to believe that the court would have objected to additions to add a date range, thereby bringing down the burden on the witness.

iii) This approach would bring the line to be adopted in relation to documents much closer to that applied for oral evidence. It would also harmonise the approach slightly more closely with CPR 31.17; the fact that the court can offer this somewhat broader relief in domestic proceedings, and not in assistance of foreign ones, is an anomaly which sits ill with the wording of s. 2(1) of the Act.

110. The good sense of such an approach is vouched for by the fact that in this case the Mudan Entities were not really pressing objections to the reformulations except as outlined above. They did not see the addition of limiting words (such as date ranges) as objectionable.

111. Accordingly had relevance been made out I would have permitted such of the redrafted documentary requests as went to areas where trial evidence was sought.

Discretionary issues

Oppression

112. The Mudan Entities complain that providing copies of the documents listed in Schedule A will be unduly burdensome because of the need to redact documents. They also say that there is a concern that Mr Mudan or his companies might be sued by Allergan after they have provided the relevant evidence and documents.

113. On the first ground Mr Mudan has produced a schedule setting out in relation to each category of documents why he says the request is oppressive. In essence he says that these categories of documents are voluminous and would need to be individually

reviewed and redacted to remove irrelevant and personal data such as client names addresses and credit card numbers.

114. Allergan disputes that this is a good objection in the light of the facts that Mr Mudan need not do this himself and Allergan is required to pay the Mudan Entities' reasonable costs of producing the documents and there is no need or justification for redaction particularly where the AM site was directed to healthcare providers and no personal patient information would be in question. It also points out that in concrete terms the number of documents sought is not particularly large.

115. This, it seems to me, is a perfectly good answer – particularly as to the absence of justification for redaction and costs. I would not have upheld an oppression argument on this ground on the facts of this case.

116. As to the Mudan Entities' concerns about their own potential liability this is based on what is described as an ominous shift in stance by Allergan, from describing the Mudan Entities as third parties who were able to give important evidence, to describing them as "linked with" or "closely connected to" AM and trailing possibly arguments as to criminal infringements by the Mudan Entities. They refer me to the *Zayed* case at 1168C-1169G and contend that the position is analogous to that discussed there.

117. Allergan contends that there is nothing in this oppression argument either in that Allergan has made it clear that it currently has no intention of suing Mr Mudan or his companies and a concern about being sued is not a sufficient reason for not providing evidence. As explained by Moore-Bick J in *Commerce and Industry Insurance Co v Lloyds Underwriters* [2002] 1 WLR 1323 at 1331: *"In the ordinary way, unless he can invoke one of the recognised grounds of privilege, a person cannot object to giving evidence on the grounds that what he says may be used to support subsequent proceedings either against himself or his employer. This principle applies equally in cases where evidence is sought to be used in foreign proceedings"*.

118. Again, had it been relevant, I would have accepted Allergan's submissions on this point. The case is not analogous to the position in *Zayed* which was an extreme case where there was an explicit reservation of the position as to whether the proposed witnesses would be joined as defendants to a fraud action.

Self-Incrimination

119. The Mudan Entities objected to the order on this ground, but at the oral hearing this point was rightly taken very lightly by Ms Rosen Peacocke. The bottom line is that although it is correct that the availability of such a privilege under US Law should probably have been noted in the Letter of Request, the absence of such a notation is hardly significant in circumstances where (i) there is a similar privilege under English Law, (ii) there is an established procedure for dealing with US Privilege objections, which there was no suggestion could not be incorporated into the Order if maintained and (iii) no objection was taken to Mr Mudan being represented at the examination by a lawyer able to advise him on such issues.

Data Protection

120. The Mudan Entities complained that the Order would override the EU restrictions on transfer of personal data from the EU to the USA, and would expose the Mudan

Entities to potential penalty. They also asserted in their witness evidence that the US Health Insurance Portability and Accountability Act of 1996 ("HIPAA") might present an obstacle to disclosure.

121. Again in oral submissions this was touched on fairly lightly, and can be addressed briefly here.

122. This also would not provide any basis for refusal of an otherwise legitimate letter of request on oppression grounds. The short points are that:

i) The relevant data protection measure is the Data Protection Act 1998, section 35 of which exempts "*Disclosures required by law or made in connection with legal proceedings etc*". This would be such a disclosure.

ii) The authorities are clear that data protection concerns do not provide an exemption from disclosure: *Dunn v Durham CC* [2013] 1 WLR 2305, [21] Maurice Kay LJ, *Rugby Football Union v Consolidated Information Services (formerly Viagogo Ltd)* [2012] 2 CMLR 3, [27] Longmore LJ.

iii) There is no evidence that the Mudan Entities are subject to HIPAA. On the face of it, they are not.

iv) On the evidence before me it would seem highly implausible that the information sought falls within the definition of "Private Health Information" within that Act, given that AM targeted healthcare providers, not individuals.

Full and Frank Disclosure

123. The Mudan Entities do not seek to set aside the Order on freestanding "full and frank" grounds. They do however say that Allergan was not at all full or frank in making its application and that much of the information which has emerged in response to the application to set aside should have been presented in the first place. They also say that even now the position has not been adequately explained to the Court.

124. In particular they say that Allergan's application should have explained what material had already been gathered via subpoenas and early discovery and that any other course is fundamentally unfair. They also contend that the state of negotiations between Allergan and the Mudan Entities should have been made plain. Further they contend that the procedural status of the California action, in particular the fact that there is no issue in dispute, should have been explained.

125. Allergan, while accepting the burden of full and frank disclosure did rest on it in making a without notice application submits that there is no substance in any of the complaints. It says that it did make clear on the evidence that subpoenas had been executed in the US and that Master Yoxall had the other English letters of request before him at the same time.

126. It says that the lack of issue in the California Proceedings was also apparent on the face of the evidence, in explaining that the Defendant had not responded and that identification of the real people behind AM was key. So far as the negotiations are concerned, it says that they were without prejudice and could not be referred to.

127. Overall, I broadly concur with Allergan's submissions here on the specific points. However, I would say that I do not consider that the obligations of full and frank disclosure were met quite as well as they perhaps should have been. I have in mind here issues such as the overall state of the evidence already gleaned, and the possible uses of the evidence obtained. It is incumbent on an application for an order giving effect to a letter of request to address the matters which go to the existence of the jurisdiction and the exercise of the Court's discretion and to actively draw the attention of the Court to all relevant matters.

128. However in a sense such failures bring their own punishment; as I have noted above, an absence of explanation of relevance will in practical terms tend to hamper the applicant where any question later arises. In circumstances where a case is marginal a failure to provide a full and frank presentation may in evidentiary terms even make the difference between the exercise of the Court's discretion and its refusal. Of course this is not the case here, given my conclusion as to the overall intention underlying the request. But it is apparent from the questions which arise at a discretionary stage that a full and frank presentation of the initial application might otherwise have some impact.