

# How do you solve a problem like disclosure? A cross-jurisdictional example

UPDATE

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This update discusses the cross-jurisdictional issues arising from an application to the Royal Court by liquidators for permission to disclose documentation that had been disclosed to them in Guernsey in related English proceedings and how the implied disclosure undertakings arising in Guernsey fettered their ability to comply with the disclosure orders in the English proceedings.

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## Introduction

The Tchenquiz litigation<sup>1</sup> has seen a multitude of hearings at all levels of the Guernsey judiciary over the years and, at the time of writing, the substantive proceedings (otherwise known as **Guernsey 1**) await a hearing date before Guernsey's highest appellate body, the Privy Council.

Such an enormous piece of litigation inevitably spawns a great deal of satellite disputes. One such example was a hearing before LB Hazel Marshall QC on 21 November 2016<sup>2</sup> when an application was brought by the Joint Liquidators for permission to disclose documents that had only come into their possession and control by virtue of their being previously disclosed to them in Guernsey 1. The permission to disclose was sought for the purposes of separate (albeit factually related) proceedings before the High Court of England & Wales (the **English Proceedings**).<sup>3</sup>

This update discusses the cross-jurisdictional issues arising from the Joint Liquidators' application and how the implied disclosure undertaking arising in Guernsey 1 fettered their ability to comply with disclosure orders in the English Proceedings.

## The implied undertaking: a Guernsey question

Despite the English connection, the question of whether the implied undertaking should be discharged in respect of documents already disclosed in Guernsey proceedings (the **Guernsey 1 Documents**) was first and foremost, according to Marshall LB, a question for the Royal Court of Guernsey.

Rule 79(1) of the Royal Court Civil Rules 2007 (**RCCR**) sets out the implied undertaking (its equivalent is Rule 31.22(1) of the English Civil Procedure Rules of 1998, the **CPR 1998**):

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<sup>1</sup> *Investec Trust (Guernsey) Ltd & Anr v Glenalla Properties Ltd & Others*.

<sup>2</sup> Mourant Ozannes represented ITG Limited & Bayeux Limited, the Former Trustees of the Tchenquiz Discretionary Trust (the **TDT**). The joint liquidators of various BVI registered companies connected with the underlying TDT structure (the **Joint Liquidators**), each being a party to Guernsey 1 (including Oscatello Investments Limited, also a party to the English Proceedings), were the applicants here. The current trustee of the TDT, Rawlinson & Hunter Trustees SA (**R&H**), indicated that it might object to disclosure of Guernsey 1 documents in the English proceedings, subject to having a further opportunity to review the material in question (it is understood for confidentiality reasons). The applicants, all the while in breach of Oscatello's disclosure obligations in the English Proceedings, were thus forced to act.

<sup>3</sup> *Murray Holdings Limited (formerly Isis Investments Limited) v Oscatello* (English High Court, Action 599, case no. HC-2009-000007).

'A party to whom a document has been disclosed may use the document **only for the purpose of the proceedings in which it is disclosed, except where** –

- (a) the document has been read to or by the Court, or referred to, at a hearing which has been held in public,
- (b) the Court gives leave, or
- (c) the party who disclosed the document and the person to whom the document belongs agree.'  
[emphasis added]

Many of the Guernsey 1 Documents would have been read to or by the Guernsey courts in the course of the many Guernsey 1 hearings whether during the three week trial or in subsequent appeal proceedings, but, given the enormous amount of documentation, how could the Joint Liquidators establish that the implied undertaking had fallen away under Rule 79(1)(a) in respect of specific documents, especially where the Guernsey courts may have considered them in camera?

Faced with this uncertainty, the Joint Liquidators sought the consent of the other parties under Rule 79(1)(c). That was refused, so the Joint Liquidators were left with only one option – to seek leave of the Royal Court under Rule 79(1)(b).

### **Impact on English disclosure**

Disclosure in its broadest sense involves two key stages, common to both Guernsey and English civil procedure; namely

1. disclosure by list;<sup>4</sup> and
2. physical production by way of inspection.<sup>5</sup>

Marshall LB highlighted the importance of the distinction between the two stages.

As the first stage (disclosure by list) merely requires the parties to identify and categorise documents without revealing their content or otherwise producing them, Marshall LB gave a firm indication that Rule 79(1) could **not** extend so far as to prevent the Joint Liquidators from listing (albeit in general terms) the Guernsey 1 Documents in the English Proceedings. Whilst, there was some discussion during the hearing, it was subsequently conceded by R&H's Advocate that they would not seek to argue otherwise.

Arguments as to the second stage focused upon practical issues and, in particular, how the Guernsey 1 Documents were to be reviewed and at whose cost. R&H were prepared to review the Guernsey 1 Documents but only if the Joint Liquidators paid their costs. The Joint Liquidators were not prepared to do this.

This aspect has yet to be determined.

### **Take aways**

This is a salutary reminder that disclosure is a two-stage process.

Normally, this has no particular consequences, privilege and the continuing existence of the documents apart. However, where there are connected proceedings afoot in two jurisdictions, there are real issues which require litigants to:

1. ensure that they do not 'co-mingle' documents – it will be important to monitor which documents came from which set of proceedings;
2. ensure someone is responsible for monitoring what documents are read out or referred to in court thereby causing the implied undertaking under Rule 79(1) (a) or its equivalent to fall away;

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<sup>4</sup> See Rule 69 of the RCCR (Guernsey) and Rule 31.10 of the CPR 1998 (England). The list must indicate those categories of documents in respect of which a party claims a right to withhold inspection (for instance, on account of privilege).

<sup>5</sup> See Rule 74 of the RCCR (Guernsey) and Rule 31.15 of the CPR 1998 (England). Subject, obviously, to claims of privilege or that disclosed documents no longer exist.

3. identify these issues early in the process of the second/related proceedings so that, if necessary, timely applications can be made to the first court (here, in Guernsey) under Rule 79(1)(b) RCCR or its equivalent.

Litigation is a global business and parties should be alive to the considerations of disclosure in multiple jurisdictions.

In this case, the mutual respect and similarity of legal systems and procedural rules between Guernsey and England & Wales assisted in resolving the issues. Where the legal systems are not so similar or familiar with each other the position will be more complicated and an approach along the above lines will be all the more critical.

## Contacts

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