Neutral Citation Number: [2018] EWHC 2366 (QB)

Claim No: CR-2018-600

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) ACT 1975

AND IN THE MATTER OF THE HAGUE CONVENTION OF 18TH MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

AND IN THE MATTER OF A CIVIL PROCEEDING NOW PENDING IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, CENTRAL DIVISION

Royal Courts of Justice
Strand,
London WC2A 2LL
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Before:
MR. JUSTICE MORRIS

DAVID J. GALAS **(Representative Shareholder, on Behalf of All Former Securityholders and Noteholders of Ionian Technologies Inc.)**	**Claimant/ Respondent**
- and -	
ALERE INC. **(a company incorporated under the laws of the State of Delaware, USA)**	**Defendant**
And	
DR JEROME MCALEER	**Third Party/ Applicant**

MR. PHILIP RICHES appeared for the **Claimant**
The **Defendant** did not appear and was not represented
MR. QUENTIN CREGAN appeared for the **Third Party** (not present on 31/8/18)

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Approved Judgment

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MR. JUSTICE MORRIS:

(1) Introduction

1. This is an application by Dr. Jerome McAleer ("Dr. McAleer") to set aside in part and to vary in part the terms of an order made by Master Eastman on 26th July 2018 ("the Order"). The Order, made pursuant to section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"), gave effect to a letter of request issued by the Superior Court of the State of California, County of San Diego Central Division, issued on 3 July 2018 ("the LOR").

2. The LOR request's the assistance of the English court, under the Hague Convention of 18 March 1970 or the Taking of Evidence Abroad in Civil and Commercial Matters ("the Hague Convention") for the obtaining of evidence from Dr. McAleer, resident in England, in relation to proceedings in the US court. In those US proceedings David J. Galas is the plaintiff and Alere Inc. is the defendant. In this judgment I refer to Mr. Galas as "the Claimant" and to Alere Inc. as "the Defendant". The LOR was made pursuant to an application to the US court by the Claimant, to which the Defendant responded. The Order was made pursuant to a without notice application by the Claimant.

(2) The background: The US proceedings

3. The proceedings in California are brought by the Claimant (as a representative shareholder on behalf of all former security holders and noteholders of Ionian Technologies Inc) against the Defendant. Ionian is a biotechnology firm. The Defendant acquired Ionian in June 2010, through a merger agreement, subsequently amended in 2014 and 2015. The Claimant is suing the Defendant for breach of the merger agreement in not paying two post-merger milestone payments and in making late payment in respect of one post-merger milestone achievement.

4. Dr. McAleer was the vice president of Research and Development for the Defendant's predecessor company and subsequently was an employee of the Defendant. The Claimant contends that he, Dr. McAleer, was heavily involved in the circumstances surrounding the Defendant's non-performance of the merger agreement, as well as in the negotiation of the merger agreement and in the amendments in 2014 and 2015.

5. Dr. McAleer was therefore both the author and recipient of important documents relevant to the issues in the Californian proceedings and has personal knowledge of matters concerning the same. The Claimant further contends that the evidence is that Dr. McAleer routinely used his personal e-mail account to conduct the company business that is the subject of the Californian proceedings. As a result, the Claimant suggests that evidence produced by the Defendant itself in the US proceedings is insufficient and that it appears likely that the Defendant itself is not in possession of documents created or received by Dr. McAleer using his personal e-mail.

6. The Claimant's case is that in summary: first, Dr. McAleer was intimately involved in the matter, the subject of the US proceedings. Secondly, documents he created and received, which are relevant to the issues in the US proceedings exist, are in his sole possession, custody or control and have not and will not be produced by the Defendant

in the US. Thirdly, Dr. McAleer has personal knowledge of matters relevant to the issues in the US proceedings.

The LOR.

7. On 27 June 2018 the Claimant applied to the US court for a letter of request to be addressed to the High Court. In support of that application the Claimant relied upon two declarations from a Mr. Blonigan, a US attorney, and a Mr. Barratt, an English solicitor. The basis of the application was the matters to which I have just referred. The application was accompanied by a draft of the proposed order and letter of request.

8. In the application the Claimant asserted that the document sought and oral testimony of Dr. McAleer would provide:

> "Facts and information to the [Claimant] that the [Claimant] considers highly relevant."

It was also asserted that:

> "The Defendant is not arguing that the [Claimant's] discovery requests seek irrelevant materials or are otherwise improper under California law."

The application contained a number of further references to descriptions of what was being sought as "discovery".

9. On 28 June 2018 the Defendant filed its response to the Claimant's application, supported by a declaration from a Mr. Justin Raphael. In that response and in Mr. Raphael's declaration, the Defendant expressly raised the objection that the documents requested were, as a matter of English law, too widely expressed. In particular, the Defendant expressly referred to relevant English case authority and in particular the case of *Refco Capital Markets Ltd. v Credit Suisse (First Boston) Limited* [2001] EWCA Civ 1733 at paragraph 32 and the passage from the case of *In Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331, which passage I refer to below.

10. However, the Defendant did not raise any objections to the request's for documents or for oral examination on grounds that the topics or matters were not relevant to the issues in the case. It further appears that the Defendant's objection had been raised with the Claimant before the application was made. In its application the Claimant itself had anticipated the Defendant's objection based on the impermissibility, in English law, of the document request. In the application itself reasons were given as to why the US court should reject that objection. Further, the declaration in support from Mr. Barratt addressed the issue and cited the case of *In Re Asbestos Insurance Coverage cases.*

The LOR itself

11. The LOR was issued by Judge Wohlfeil on 3 July 2018. It was in substantially the same form as the draft submitted by the claimant. In it, both the complaint of the Claimant and the Defendant's defence are summarised. At section (i) the following is stated:

> "It is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties that you cause the following witness ... who is resident within your jurisdiction to produce documents and be examined orally as more fully described below. Justice cannot completely be done between the parties without the requested testimony and documents." (emphasis added)

12. Section J of the LOR then sets out a list of questions to be put to Dr. McAleer in the examination. For present purposes, topics J8 and J9 are relevant. Then section K sets out the documents to be produced within seven days of service. Eight categories numbered K1 to K8 are then set out. The general type of description in each of those eight categories is similarly expressed. I refer to category K1 below by way of example. Categories K7 and K8 may also specifically be in issue in relation to the question of relevance. They effectively mirror categories J8 and J9 of the topics for oral examination.

The Order of Master Eastman

13. On 16 July 2018 the Claimant applied, without notice, to the High Court for an order under the 1975 Act, to give effect to the LOR. The application was support by a witness statement of Mr. Sharman. It is accepted that in that witness statement no reference was made to the fact, that the issue of whether the document request was improper as a matter of English law had been raised by the Claimant and by the Defendant in the application to the US court. Mr. Sharman has subsequently accepted that, as a result, the application was not sufficiently full and frank and in his witness statement he has apologised to the Court for not having drawn that objection to the attention of the High Court when the application was made without notice.

14. The Order itself was made on 27 July 2018. It provides, by paragraph 1, that the document's set out in section K of the LOR, held by Dr. McAleer, shall be produced by Dr. McAleer to the Court. By paragraphs 2 and 3, further provision is made in relation to the production of those documents. By paragraph 8 of the order, Dr. McAleer was at liberty to apply to set aside or vary the order. By paragraph 9 it is stated that Dr. McAleer shall be entitled to his reasonable costs of searching for and producing the documents, his reasonable copying costs and to payment of his expenses and for his loss of time as on attendance at an oral examination.

(3) This application

15. Dr. McAleer made such an application pursuant to the liberty to apply in paragraph 8 of the order. The application raised a number of matters, some of which have now been resolved. As matters now stand, Dr. McAleer seeks an order that:

    i) The order for the documentary requests that is paragraphs 1 to 3 of the order, be set aside because:

        a) the order is not for the production of particular documents but rather is a request for US style discovery;

        b) the document request is oppressive in any event;

c) the relevance of two of the categories of documents, namely K7 and K8, is not made out.

ii) The order for oral examination be varied so that questions which relate to topics J8 and J9 may not be asked on the grounds that those topics are not relevant to the issues in this case.

16. Thus, essentially, two matters arise for determination. First, whether the order for production of documents should be set aside in whole or in part. Secondly, whether two particular topics for the oral examination of Dr. McAleer should be excluded on the grounds of absence of relevance to the issues in the case. I deal with each of these two issues in turn

(4) Relevant legislation and general principles

17. Before turning to the two issues, I make some general observations about the relevant legislation and principles.

18. First, the 1975 Act implements the United Kingdom's obligations under the Hague Convention. It provides and is the basis of the jurisdiction of this Court to make orders to give assistance to foreign courts.

19. Secondly, section 2 of the 1975 Act contains the principal provisions. As Mr. Riches, counsel for the Claimant, pointed out, section 2(1) gives the High Court the power to give if effect to a letter of request and gives the High Court a discretion to make such provision "as may appear to the court to be appropriate for the purpose of giving effect to the request". I accept that this court has a discretion as to the manner in which it exercises that jurisdiction. There are, however, limitations as to the exercise of that discretion, set out most notably in subsections (3) and (4) of section 2. I will refer to section 2(4) further below in relation to the issue of production of documents.

20. Thirdly, as Mr. Riches submitted, the underlying basis of the approach to the 1975 Act is one of respect for comity (see in particular the oft quoted remarks of Lord Denning MR in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC at 560H).

21. Fourthly, the English court will not give effect to a letter of request if, on balance, the burden which it imposes upon the intended witness is oppressive (see for example *First American Corporation v Al-Nahyan* [1991] 1 WLR 1154 at 1165H). On the specific issues of documents and relevance, I address relevant principles when I consider each of those issues.

(5) Issues

Issue (1): Documents

22. As regards the first issue – documents - by way of illustration of the nature of the request I refer to item K1 of the LOR, which provides as follows:

> "It is requested that the witness be compelled to produce the following documents ...
>
> 1. The correspondence and attached documents you sent or received from October 2009 to present, via your e-mail address […] and which was to, from, cc'd, or bcc'd to David Galas, Andrew Miller, Rich Roth, Jay Fister, Belinda Lou, Ellen Chiniara, Brion Burmer, Myron Whipkey, Matthew Rose, Avi Pelossof, Namal Nawana and/or Ron Zwanziger and which concerned or regarded negotiation of, drafting of, and/or performance under the June 17, 2010 merger agreement between Ionian Technologies and Alere and its May 7, 2014 and December 23, 2015 amendments, including such correspondence and documents concerning milestones and other content of Section 3.13, Schedule 3.13(B) and/or Schedule 3/13(B) of the merger agreement and its amendments. These documents are known to exist or to have existed because Alere has produced other documents in this case showing that Dr. McAleer sent or received a number of such correspondences." (emphasis added)

23. Category K7 describes a similar type of document between the same individuals "which concerned or regarded Twist Dx or its RPA technology and/or any patent-related milestones involving RPA technology included in Alere's March 11, 2010 merger agreement with Twist Dx". Category K8 also describes a similar type of document, this time "concerning Alere's termination, lay off or dismissal of Andrew Miller from Alere ..."

(A) The parties' contentions.

24. Dr. McAleer submits:

    i) Categories K1 to K8 are search requests for discovery/disclosure and do not amount to the specification of particular documents.

    ii) What is sought by way of documents is oppressive. The documents sought cover an eight to nine year period against a former employee and would require a review and search of 10,000 documents.

    iii) In any event, topics K7 and K8 have no discernible relevance to the issues in the California litigation.

25. The Claimant submits as regards the issue of sufficient particularity, first that the requests are not for disclosure. Rather, they are made with sufficient specificity as to fall within the 1975 Act. The requests identified documents in a sufficiently narrow time period and content as to be specific. The fact that a request seeks more than a single e-mail does not mean that it is not sufficiently specific. Each request can be broken down and unbundled into what is effectively a series of requests for a specific e-mail from or to a specific e-mail address between specific individuals in relation to a specific period of time about a specific topic. The true test is whether the documents are sufficiently identified such that there is no real doubt, in the mind of the person to

whom the request is addressed, about what he is required to do. Here, Dr. McAleer can be in no such doubt.

26. Secondly, Dr. McAleer does not object on the grounds that the documents do not exist. The documents are at least "likely to exist".

27. Thirdly, Dr. McAleer cannot object to the scope of the requests, particularly where the Claimant is willing to allow him to use key word search terms to assist.

28. Further, the requests are not oppressive. Keyword search terms can be used and the time period is justified. Moreover, Dr. McAleer will not be put to any burden of expense because of the terms of paragraph 9 of the order, pursuant to which the Claimant will pay for the exercise. As regards the issue of relevance of K7 and K8, the Claimant relies on the submissions it makes on topics J8 and J9 of the oral examination.

(B) Analysis

(1) Particular document

29. Section 2(4)(b) of the 1975 Act makes very specific provision in relation to an order for production of documents. It provides:

> "An order under this section shall not require a person… to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or likely to be, in his possession, custody or power." (emphasis added)

30. There are a number of authorities relevant to this sub-section. In particular, I have been referred to the *RTZ*, *Asbestos Insurance Coverage Cases* and *Refco* cases already cited above and to *Tajik Aluminium Plant v. Hydro Aluminium AS* [2006] 1WLR 767 and the recent decision of Mrs. Justice Cockerill in *Allergan Inc. et al v Amazon Medica* [2018] EWHC 307 (QB), and further to the textbook *Documentary Evidence*, 13th Edition at paragraph 29-04.

31. First, there is a clear distinction between an order for discovery or for disclosure and an order for the production of specific documents. The former is not permissible under the 1975 Act. Secondly, in my judgment the relevant test in relation to section 2(4)(b) of the 1975 Act remains that set out in the speech of Lord Fraser in the *Asbestos Coverage Cases* at pages 337G to 338C. Under that test there are to specific aspects to the requirements under section 2(iv)(b). First, what must be specified in the order is either individual documents separately described, or a compendious description of several documents provided that the exact document in each case is clearly indicated. Secondly, the documents must be "actual documents about which there is evidence that they exist or did exist and are likely to be in the possession of the addressee". This principle has been adopted on numerous occasions in subsequent cases, in particular by the judgment of Court of Appeal in the *Refco* case at paragraph 32.

32. I do not consider that this principle has been modified or adumbrated as a result of the judgment of Lord Justice Moore-Bick in *Tajik*, subsequently cited by Mrs. Justice Cockerill in the *Allergan* case. In the *Tajik* case at paragraph 28, Lord Justice

Moore-Bick, after expressly citing Lord Fraser's speech in the *Asbestos Coverage Cases*, said that those observations:

> "Are nonetheless helpful because they provide an example of the ways in which, without describing them individually, it may be possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed, about what he is required to do. In my view that is the test that should be applied when considering whether documents have been sufficiently identified in a witness summons."

33. In my judgment this passage does not replace the well-established approach identified by Lord Fraser. First, it is to be observed that *Tajik* is not a case under the 1975 Act and the specific provisions of section 2(4)(b). Rather, this is a case of a witness summons under CPR 34.2 (see paragraph 28 at 773G - H). Secondly, Lord Justice Moore-Bick emphasises this clear distinction between an order for disclosure on the one hand and an order for production of documents on the other (see paragraphs 24 and 27). Thirdly, he seeks support, in the context of a witness summons, from the approach in the principles by Lord Fraser in the *Asbestos Insurance Cases* and specifically approves of that approach (see paragraph 27 at 773D - G).

34. For these reasons, the "leaving no real doubt" approach is not a different principle to be applied. Rather, it identifies the underlying rationale for the principles set out by Lord Fraser. If, any case, all that had to be satisfied is that the addressee of the request was left with no real doubt as to what he should do it might well be said that Lord Fraser's well known second example in the relevant part of his speech of "all your bank statements for 1984", would be a sufficient description to leave the addressee in no such doubt. However, Lord Fraser considered that such an example would not fall properly within section 2(4)(b).

35. Finally, in relation to the *Tajik* case, it is instructive to look at the documents requested there and to Lord Justice Moore-Bick's response to that request. I refer to paragraph 9 of his judgment in its entirety and note in particular item 3 in that paragraph, stating the following category of documents:

> "Any documents passing between Ermatov and/or Shushko and/or Nazarov and/or Ashton and/or Ansol Ltd ("Ansol") and/or Hydro relating to the operation or performance of:
>
> (a) a barter agreement between the Claimant and Hydro dated 21 July 2000; or
>
> (b) an aluminium agreement between Ansol and Hydro dated 21 July 2000; or
>
> (c) a barter agreement between the Claimant and Hydro dated 25 September 2003; or
>
> (d) an aluminium agreement between Ansol and Hydro dated 25 September 2003."

36. At paragraph 29 Lord Justice Moore-Bick, after setting out the relevant principles, concluded in relation to all those documents, that the documents had not been sufficiently identified, in the following terms:

> "In the present case the documents are described in the schedule to each of the witness summons in broad terms of the kind that would be appropriate to an application for disclosure but which fail to identify the documents with sufficient certainty to enable the witness to know what is required of him. I am satisfied therefore that the judge was right to set aside the witness summons on this ground ..."

37. Thirdly and finally, it is common ground that if a request is too widely drawn it can only be modified by applying the blue pencil test. The request cannot be rewritten.

Application of principles to the present case

38. Applying these principles, in my judgment the order for production of documents in the present case is not permissible under the 1975 Act. It is not an order to produce particular documents specified in the order, it does not meet the first limb of Lord Fraser's test.

39. First, each of the categories in section K of the LOR is directed to a wide class of documents, it does do not identify any specific document; Whilst each category may amount to a "compendious description"; that description does not "clearly indicate exact documents".

40. Secondly, whilst it may be possible, as suggested by Mr. Riches, to unbundle each category into a series of requests for individual e-mails between one identified person and another identified person and at specific times, the difficulty arises with the link between such e-mail and the subject matter of the e-mail and in particular the words which are to be found in each of the categories "which concerned or regarded ..." the particular transaction or other subject matter of the topic. Whether an e-mail "concerned or regarded the subject matter" would be a matter for interpretation for the addressee and even applying "a leave no doubt" rationale would not enable Dr. McAleer to identify clearly the documents in question.

41. In this regard, the suggested use of key word search terms would not overcome this difficulty. Once a specific e-mail had been found using keyword search terms, a further exercise of judgment would be required to identify whether the identified e-mail "concerned or regarded the particular subject matter in question", for example whether it concerned or regarded the negotiation of the 2010 merger agreement under K1. Indeed, I agree that the Claimant's suggested use of keyword search terms to enable documents to be identified supports the conclusion that the exercise being required of Dr. McAleer is more truly an exercise in disclosure rather than the production of particular documents.

42. Thirdly, the order here is in effect an order for discovery or disclosure as that term is understood both in US and English law. This conclusion gains support from the fact that in the Claimant's own application to the US court for the LOR, what the Claimant describes is that it is seeking is "discovery of documents" and further, from the

explanation, that this application for documents has arisen because the discovery process against the Defendant has not produced documents on Dr. McAleer's personal account.

43. Fourthly, the facts in the present case bear a striking similarity to those in *Tajik Aluminium Plant* where, as I have already pointed out, Lord Justice Moore-Bick concluded that the description of documents there was not sufficiently certain and was of the kind appropriate to an application for disclosure. In my judgment, the description of categories of documents in the present case is also the same type as those in paragraph 9 of the *Tajik* judgment and in particular paragraph 9(3): see paragraph [33] above.

44. As regards the second limb of the approach of Lord Fraser, namely the existence of the documents, in my judgment in the present case there is sufficient evidence to support the existence of documents of the type sought and that they are likely to be in Dr. McAleer's possession. In this regard I refer to the express statement in the LOR that the documents in each of the categories in section K are known to exist or ought to have existed.

45. Nevertheless, the first limb of Lord Fraser's approach is not satisfied. On this ground alone I consider that the order for the production documents does not satisfy the requirements of section 2(4)(b) of the 1975 Act and accordingly paragraphs 1 to 3 of the order should be set aside.

46. In the light of this conclusion the issues of oppression and relevance in relation to documents do not arise for determination. Nevertheless, I add brief observations on those two points.

(2) Oppression

47. Had I concluded that the categories of documents were specified with sufficient particularity, then, subject to the issue of the time allowed for the exercise, I would not have been persuaded that the request for documents was so oppressive as to be disallowed. A detailed search amongst 10,000 documents does appear to be a very substantial task. However, the combination of the ability to use keyword search terms, the use of Dr. McAleer's legal representation and the requirement that the costs of that exercise, including these, of legal representation, are to be borne by the Claimant would have led me to the conclusion that as a matter of discretion the balance would lie in favour of making the production order.

48. Had the particular documents been specifically specified I do not consider that the fact that there are many such documents, or that they cover a lengthy period of time, render the requests for those reasons oppressive. I would have found, had it been necessary, that the requirements to produce documents within 7 days was oppressive, but that was something which could have been modified.

(3) Relevance

49. Had I been required to rule on the relevance of categories K7 and K8 I would have reached the conclusion which I reach in relation to categories J8 and J9 in relation to oral examination and to which I now turn.

Issue (2): The examination: relevance of topics

50. Topics J8 and J9 for examination of Dr. McAleer mirror categories K7 and K8 of the document request. I have explained above the essential content of categories K7 and K8. These two topics concern Dr. McAleer's knowledge and understanding regarding respectively Twist DX or RPA Technology and the dismissal of Andrew Miller from the Defendant.

51. On this issue Dr. McAleer submits:

    i) These two topics are not relevant to any issue in the US proceedings.

    ii) The US court did not address its mind specifically to the relevance of these two topics and it follows that this court is able to and should consider their relevance. The US court effectively merely rubber stamped the Claimant's application for the LOR and in any event nothing is said in the application specifically about these two particular topics.

    iii) There is no evidence before this court to explain or show how those two topics are relevant to any issue in the litigation of the US proceedings. The only evidence before the court is that of the Defendant, who says that the two topics are not relevant.

    iv) This court can accordingly rule that these two topics are irrelevant and exclude them from the scope of the oral examination of Dr. McAleer.

52. The Claimant before the US court the Claimant asserted that each of the topics for questioning is relevant to the issues in those proceedings. The Defendant did not raise any objection on the grounds of relevance to these areas of questioning and it must be taken to know the scope of the disputes in the proceedings. It cannot be said that the US court did not consider the issue of relevance. It is not for this court to second-guess the view of the US court.

Principles on relevance

53. In this regard I have been referred to the recent case of *Aureus Currency Fund, L.P. v Credit Suisse Group AG* [2018] EWHC 2255 (QB), where Senior Master Fontaine, at paragraphs 36 to 41, addressed this issue in some detail. She referred in turn to a number of other cases, including *In Re Asbestos Insurance Coverage Cases*, supra, at 339G, to *BuzzFeed Inc v Gubarev* [2018] EWHC 1201 (QB) at paragraphs 54 to 59; *Gredd v Arpad Busson* [2003] EWHC 3001 (QB) and; *CH (Ireland) Inc v Credit Suisse Canada* [2004] EWHC 626 (QB). From these authorities the relevant principles can be stated as follow:

    i) As a general rule, the English court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues for trial.

    ii) There are limited circumstances where the court can consider the relevance of the evidence sought.

iii) If the requesting court has itself considered questions of relevance, then the English court should not embark upon a close examination of questions of relevance.

iv) However, the English court may conclude that the intended witness should not be required to give evidence on a particular topic if two conditions are satisfied; (a) the requesting court has "plainly not considered the question of relevance"; (b) it is clear to the English court, even on a broad examination, that the evidence is not relevant.

Application of principles to the present case

54. The arguments here in relation to topics J8 and J9 are finely balanced. Nevertheless, in my judgment it is not appropriate for this court to conclude that Dr. McAleer should not be required to give evidence in relation to these topics.

55. First, I am not satisfied that in the present case the US court "plainly did not consider the question of relevance" of those two topics. Mr. Cregan, for Dr. McAleer, correctly points out that the terms of the LOR as issued are, for all practical purposes, the same as the terms sought by the Claimant in his application. I am not satisfied that this alone indicates that the US court plainly did not give the request and in particular the issue of relevance any proper consideration.

i) It is the case that the Claimant did positive assert before the US court that each of the topics identified in the application (and the documents) are relevant to the issues in the case.

ii) Moreover, the Defendant took no objection on grounds of relevance (whilst expressly objecting to the nature and scope of the document request.) In this way the Defendant, at least before the US court, tacitly accepted the relevance of those topics. I note, as pointed out above, that in the application the Claimant not only asserted the issue of relevance but also positively asserted that the Defendant was not arguing that the request sought irrelevant materials.

iii) The US court itself did not issue its decision for a matter of some days. If, for example and by contrast, it had been issued on the day of the submission of the application, that might have supported more strongly an inference of lack of detailed consideration.

iv) Finally and although the wording was in the application itself, there is the statement in the LOR in section I that "justice cannot be done without the requested testimony and documents".

56. Secondly, on the very limited information before this court, I cannot say that it is clear to me, on a broad examination, that evidence relating to Twist DX or RPA Technology and the dismissal of Andrew Miller from the Defendant is not relevant to the issues in the US proceedings. I am in no position to make that determination. I accept that despite the issue having been raised by Mr. Cohen's witness statement in support of Dr. McAleer's application (at paragraph 7.14), the Claimant has not provided further evidence to establish positively the relevance of these two particular topics. However, the only evidence that those items are not relevant; is the reported evidence of the

Defendant's US counsel now saying to this court that they are not relevant, an assertion made despite the fact that no objection was taken by the Defendant before the US court in circumstances where other objection was taken. Moreover, there remains the general assertion of relevance of the information sought in the Claimant's original application and in the declaration of Mr. Blonigan in support.

57. Thus, for these two reasons I do not accept Dr. McAleer's objection to these two topics at J8 and J9 and the application for a variation of the Order to that effect is dismissed.

Conclusion

58. Accordingly, in relation to the two disputed issues, Dr. McAleer's application is successful as regards the order for the production of the documents, yet fails in relation to the topics for oral examination.

59. I will hear the parties on the precise terms of the order to be made and the modifications to be made to the order. There may be one or two minor points of detail which are in the process of being worked out. I will also hear the parties on issues of costs and any other consequential matters. In view of the absence this afternoon of Mr. Cregan, it may be that these matters are to be dealt with subsequently. That is something which I will now discuss.

60. I should finally add that I am most grateful to Mr. Cregan and Mr. Riches for the assistance provided to me by their written and oral submissions, made at short notice.

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This transcript has been approved by the judge.