



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 15
P127/23

Lord President
Lord Woolman
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the Petition by

LIV GOLF INC

Petitioners

for

An order for the production of documents held by

R&A TRUST COMPANY (No. 1) LIMITED

Respondents

Pursuant to a Letter of Request issued by the United States District Court for the Northern
District of California, United States of America

in the proceedings

LIV GOLF, INC & OTHERS v PGA TOUR, INC

Petitioners: McBrearty KC, Reekie sol adv; Brodies LLP
Respondent: Borland KC, T. Young; Shepherd & Wedderburn LLP

31 March 2023

Introduction

[1] The petitioners have lodged a letter of request from the United States District Court for the Northern District of California seeking an order for the recovery of documents and the examination of a witness under the powers granted to the court by the Evidence

(Proceedings in Other Jurisdictions) Act 1975. They have done so without reference to the Central Authority designated under the Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters 1970. The court asked to be addressed on the competency of such a course of action. It ordered intimation of the petition to the Scottish Government Justice Directorate as the designated Central Authority for the receipt of such letters of request.

Background

[2] The PGA Tour Inc. have owned and operated a professional golf tour in North America and elsewhere since the 1960s. LIV Golf were formed in 2021. They intended to launch a gold league tour in 2022, but held a series of invitational events instead. LIV are suing the PGA in the requesting court. They allege that the PGA have engaged in anti-competitive practices in order to dissuade players from joining LIV's tour. LIV allege that the PGA are seeking unlawfully to monopolise the elite golf event services market.

[3] LIV have petitioned the court seeking an order to recover evidence which they say is held by the R&A Trust Company (No. 1) Ltd. The R&A organises and promotes The Open. LIV allege that the PGA have "leaned" on the R&A to engage in anti-competitive practices with them.

The 1975 Act and the Hague Convention

[4] The Hague Convention of 1970 makes provision for the cooperation of the courts of Convention signatories in the taking of evidence in civil or commercial litigation. One of the purposes of the 1975 Act was to incorporate the Convention into domestic law (*In re Westinghouse Uranium Contract* [1978] AC 547 at 608; *In re Asbestos Insurance* [1985] 1 WLR

331 at 335). It does not just do that. It provides that courts in the constituent parts of the United Kingdom can give effect to an application for assistance from any foreign state, not just Convention signatories.

[5] Section 1 of the Act empowers this court to make an order “for evidence to be obtained in the part of the United Kingdom in which it exercises jurisdiction” when it is satisfied:

- “(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ... exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and
- (b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated...”.

[6] Section 2(1) defines the nature and scope of the court’s power as being:

“...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.”

[7] In addition to those elements which are incorporated by the 1975 Act, the Hague Convention provides:

“Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.”

The Central Authority for the United Kingdom is designed as the “Senior Master, Foreign Process Section, Royal Courts of Justice”, but the contact details for applications relating to Scotland are “Scottish Government Justice Directorate”. The Convention continues:

“Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

...

Article 27(a)

The provisions of the present Convention shall not prevent a Contracting State from –

- (a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2.
- (b) permitting, by internal law or practice, any act ... to be performed upon less restrictive conditions.

...”

Submissions

R&A Trust Company

[8] The respondents accepted that there was nothing in the 1975 Act or the relative Rules of Court (RCS Chapter 66) prohibiting applications from private parties. Nevertheless, the applications in reported cases in Scotland had been made by the Lord Advocate (eg *Lord Advocate, Petr* 1998 SC 87; *Lord Advocate, Petr* 1993 SC 638; *Lord Advocate v Sheriffs* 1978 SC 56). Where a statute had been passed in order to give effect to the obligations of the UK under an international treaty, reference could be made to the terms of the treaty as an aid to interpretation (Bennion: *Statutory Interpretation* (8th ed) para 24.16). The reason why the Lord Advocate became involved in Scottish proceedings was because the Central Authority for Scotland was a department of the Scottish Government and the Lord Advocate

represented the Scottish Ministers in related proceedings. In contrast, the situation in both England & Wales and Northern Ireland was that the Central Authority was a judicial one. Elsewhere in the UK, direct applications from parties could be made. These would be forwarded to the Central Authority, ie the court (*In re Westinghouse Uranium Contract; In re Asbestos Insurance*). The English Civil Procedure Rules mentioned the relevant practice (paras 34.21.16 and 17).

[9] In these circumstances the petition was incompetent. The Central Authority was intended to be the sole conduit through which to channel letters of request, unless there had been a declaration under Article 27(a), which there was not. Nothing could safely be taken from the practice elsewhere in the UK given the difference in the nature of the Central Authorities. If the 1975 Act were to be interpreted as permitting a direct application by a party, it was not clear how it would be possible for the state to ensure that the UK had complied with its international obligations given that the Central Authority would know nothing about the letter of request.

LIV

[10] The petitioners submitted that the 1975 Act went beyond the Convention in not confining itself to signatory states. The designation of a Central Authority to receive letters of request referred to requests coming from signatory states. There was no obligation on the Central Authority to receive requests from non-signatories, yet the 1975 Act was framed in a manner whereby the court was obliged to entertain such requests (for example from Canada). All that the 1975 Act required was an application to the court. There was no restriction on those who might make an application. Private persons could do so in England. Applications from parties had been considered and granted by the court in the

past, albeit on an unopposed basis. Time was a further factor. The Scottish Government Justice Directorate took an estimated 6-12 months to process letters of request.

The Central Authority

[11] The Lord Advocate lodged a written note of argument in response to the intimation of the petition on the Central Authority. The Central Authority raised no objection to a direct petition by a private party, which was competent in terms of section 1 of the 1975 Act. It had been intended not only to give effect to the Hague Convention, but also to re-enact the existing law. The Foreign Tribunals Evidence Act 1856 had allowed direct applications (*Baron de Bildt, Petnr* (1905) 7 F 899; *McCorquodale, Petnr* 1923 SC 792). An Explanatory Report to the Hague Convention noted that articles 27(a) and (b) permitted the issuing authority to send letters direct “from court to court” or through a party to the action direct to the executing tribunal, by-passing the Central Authority, although this was not normally permissible in a Convention case. The parties lodged brief written responses to the Central Authority’s position. The petitioners endorsed the view that the 1975 Act fell within the scope of Article 27(b), but not (a). The respondents disagreed that Article 27 was relevant. It could only be operated by the government (*Halsbury’s Laws of England* (5th ed) Vol 61 para 19).

Decision

[12] The court’s concerns about direct applications were prompted by the idea that, where a foreign judicial authority wishes to invoke compulsory measures to obtain evidence in Scotland, comity or at least courtesy ought to require that the relevant application pass through the offices of government. As the Central Authority does not maintain that

position, it cannot be for the court to impose such a requirement, which was intended to be for the government's benefit. Since the 1975 Act does not prohibit direct applications, and this petition meets the criteria in section 1, the court holds the application to be competent. This is consistent with the position elsewhere in the UK. The petition can now proceed as accords.