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Abstract
[extract] Given the [tobacco] industry's international manufacturing base, it was inevitable that Australia would not escape the trawling for evidence in support of the claim. The Australian 'connection' was claimed to be one Nicholas Cannar, a solicitor, now resident in Sydney, who formerly headed the legal Department of BATCo in the United Kingdom for many years, and later became BATAS' Director of Legal Services in Australia from March 1997 to September 1999.

In search of supporting evidence, the US District Court issued a Letter of Request for international judicial assistance to the Registrar of the Supreme Court of New South Wales, identifying certain matters in relation to which the person nominated by the United States is seeking Cannar's testimony. This would involve Cannar being orally examined before trial by satellite video-link. The US proceedings are entitled United States of America v Philip Morris Inc et al. The Opponent/Respondent being one Sharon Y Eubanks, the person nominated by the US District Court for purposes of the Letter of Request.

Keywords
legal professional privilege, Australia, United States of America v Philip Morris Inc et al

Case Note

LEGAL PROFESSIONAL PRIVILEGE: CAN ONE PARTY TO LITIGATION SEEK TO CALL EVIDENCE UNDER COMPULSION FROM THE OPPOSING PARTY'S SOLICITOR?

By Paul Gerber[1]

British American Tobacco Australia Services Ltd (BATAS) v Eubanks for the United States of America; Nicholas Cannar v Eubanks for the United States of America; British American Tobacco (Investments) Ltd (BATCo) v Eubanks for the United States of America [2004] NSWCA 158 constitute a new chapter in the on-going 'war' between the United States of America and US tobacco companies.

In 2002, the United States began civil proceedings in the District Court of Columbia (US District Court) against a number of tobacco manufacturers, including BATCo, alleging a civil conspiracy, said to consist of, inter alia, concealing and suppressing relevant research on the health consequences of smoking, and marketing and advertising its products with the intent of addicting children into becoming lifetime smokers. Readers will recall that similar allegations were the subject of an action in Victoria in *McCabe v BATAS* [2002] VSC 73, resulting at first instance in a victory for the plaintiff, only to be set aside by a unanimous Victorian Court of Appeal (*cf* the author's case note of the appeal, reported in (2003) 77 *ALJ* 226), and his later note on the High Court's refusal to grant special leave: *The British American Tobacco Saga: et tu, Brute* (2004) 23 *UQLJ* 205.

Given the industry's international manufacturing base, it was inevitable that Australia would not escape the trawling for evidence in support of the claim. The Australian 'connection' was claimed to be one Nicholas Cannar, a solicitor, now resident in Sydney, who formerly headed the legal Department of BATCo in the United Kingdom for many years, and later became BATAS' Director of Legal Services in Australia from March 1997 to September 1999.

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The sequence of events are set out below:

Acting on the Letter of Request, James J, in ex parte proceedings in the Supreme Court of New South Wales, ordered Cannar to answer the detailed and searching information sought in the 'topics of testimony' set out in the Letter of Request, including questions relating to the destruction of 'sensitive documents'. In making the order, his Honour relied on s 33 of the *Evidence on Commission Act 1995* (NSW) ('the Act').

The width of the information sought persuaded BATAS to apply to be joined as a party. Canner, in turn, applied to have the order set aside, and both matters came before Bell J. Her Honour rejected both Cannar's application to have the order set aside, and BATAS' application to be joined as a party. Her Honour also dismissed an application by BATCo, which asserted that the evidence sought from Cannar, relating to his actions and knowledge whilst in its employ, was protected from disclosure by legal professional privilege.

All matters having failed before Bell J, the three parties sought leave to appeal to the New South Wales Court of Appeal and all applications were heard together. Spigelman CJ, in a careful and lengthy examination of the various issues raised, delivered the three decisions of the judges of the Court; Handley and Bryson JJA concurring.

At the outset, there was a threshold question in the Cannar application: Is an order compelling a witness to attend for examination pursuant to the Act merely a matter of practice and procedure, as submitted by the Opponent, or is the order one of substance, affecting the civil rights of a witness, as submitted by the Claimant?

On this issue the Chief Justice held:

> It is not in my opinion, an accurate characterisation of proceedings which are directed only to the question of taking evidence and its subsequent transmission to a foreign court under the Act (as procedural). The Supreme Court of New South Wales must determine whether it is satisfied of the matters set out in s32 and, if so, whether an order should be made under s33 of the Act. I would not classify the order as interlocutory, but leave is in any event required under s101(2)(r) of the *Supreme Court Act (1979)*. On either basis, the matter is sufficiently final in the sense of having, of itself, a significant impact on Mr Cannar's civil rights, that leave should be granted. [14]

The Claimant had challenged the jurisdiction, or alternatively the power, of the Court to make an order to compel him to attend for examination. In examining that contention, the Chief Justice proceeded to examine the wider issue raised by the application. This raised a number of other highly contentious issues, involving a close examination of the application of ss 32(1)(b) and 33 in Pt 4 of the Act, which is entitled '*Taking of evidence for foreign and Australian Courts*'. This part of the Act enacts, as a law of New South Wales, the provisions of *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* 847 UNTS 231. The principal challenge turned on the use of the word 'evidence' in s 32 of the Act (with respect to jurisdiction), and in s 33 of the Act (with respect to power). [No attempt is made in this case note to do other than deal briefly with some of the more significant issues raised on this aspect, leaving the wider implications to a future article.]

In the end, although all applications were dismissed, Mr Cannar achieved a minor pyrrhic victory in being granted special leave to appeal on his Grounds 1, 2 and 3, the issues therein raised being deemed of sufficient public importance to afford the parties the opportunity for additional argument. Collectively, these grounds mainly involved submissions that Bell J erred in (i) finding that s 32(1)(b) of the Act was sufficient to enliven the jurisdiction of the Court, and (ii) that her Honour should have held that s 33(1), either alone or in combination with s 33(4), confines the scope of the order that can be made to one for obtaining evidence that is admissible and to be admitted at the trial.

After an exhaustive review of the authorities on the meaning of the word 'evidence' in the Convention, the Chief Justice stated that the summary of the English law, set out by Burton J, in *Gredd v Arpad Busson* [2003] EWHC 3001 at [27] should be adopted in Australia, the tenor of which may be gathered from the opening paragraph:

> (1) Comity requires this court to view a letter of request issued by a foreign court for the purpose of civil proceedings before it benevolently. It is our pleasure and duty to assist these courts and the parties to them in arriving at a fair and just determination of their civil litigation where we can properly do so.

Burton J set out some 14 guidelines of the matters courts should take into account in dealing with Letters of Request. Given Spigelman CJ's approval of these guidelines, they will henceforth be the litmus test – at any rate in New South Wales – when determining whether a witness summons will be granted or set aside.

In outlining the scope of the word 'evidence', the Chief Justice quoted with obvious approval the analysis by Lawrence Collins in his *Essays in International*

Litigation and the Conflict of Laws, e.g. at 295 and 304, in which the author noted that:

> … the Hague Evidence Convention was intended primarily to apply to 'evidence' in the sense of material required to prove or disprove allegations at trial. It was not intended to apply to discovery in the sense of the search for material which might lead to discovery. [35]

On this analysis, his Honour held, after further detailed analysis of the relevant case law, that whilst the terms of a Letter of Request are not conclusive, in the instant case they were, in his opinion, unambiguous:

> The background documentation indicates clearly that the United States Court was well aware of the Australian legal position and framed its Letter of Request accordingly. There is no evidentiary basis for the submission that the evidence was sought for an impermissible purpose. Her Honour's conclusion to the contrary was correct. [62]

The Claimant submitted that the wide ranging nature of the proceedings, and the serious allegations made against the tobacco companies in those proceedings, should have led Bell J to exercise her discretion in refusing the order. That submission received short shrift. The Chief Justice concluded that her Honour was entitled to find as a fact that:

> … Each of the topics of testimony is referable to the allegations that are made in the complaint. It appears from the assertions contained in the Letter of Request that the applicant may reasonably be expected to have relevant evidence to give with respect to the topics identified. [94]

The Claimant's final ground, to the effect that the order, if granted, could expose him to criminal proceedings, was likewise found to have no merit, the Chief Justice concluding that her Honour was entitled to exercise the discretion, notwithstanding the possibility of the Claimant's exposure to criminal proceedings. The Chief Justice held that s 34 of the Act contains a comprehensive regime to protect the privilege of a witness that is intended to operate in accordance with its terms. An order made under s 33 operates subject to the s 34 regime. Since there was no evidence of a real possibility of criminal proceedings against the Claimant, leave to appeal in this respect was refused.

Dealing with the BATCo application, when the *Cannar* appeal came before Bell J, the company sought leave to appear and to cross-examine its former employee. The company's application turned largely on its own facts. For present purposes, it is sufficient to note that in earlier proceedings, instituted by the Attorney-General of Minnesota against a number of tobacco companies, including BATCo, some documents which became exhibits in the application before Bell J had become publicly available. The claim for legal professional privilege for the remaining documents, which had become exhibits in the proceedings before Bell J, had been

the subject of similar claims for privilege and had been rejected by the District Court of Minnesota. BATCO's appeal against that decision was subsequently dismissed. Suffice it merely to note that when the Minnesota action against BATCo was discontinued, the company voluntarily entered into a consent judgment, which contained a regime pursuant to which certain documents (including all the exhibits for which legal professional privilege had been claimed before Bell J) were deposited in what was referred to as the Minnesota Depository.

After an exhaustive review of the factual background before dismissing the leave application, Spigelman CJ held:

> The fact that BATCo exercised the right, conferred by that very regime, to object to the documents so becoming available, did not constitute an absence of consent within the meaning of s122(4) [of the *Evidence Act 1995* (NSW)]. Nor did its prior objection to documents on the privilege log being disclosed to the plaintiffs.
>
> That BATCo did not want the documents to be made public does not determine the issue of consent. By undertaking obligations and acquiring rights under the consent judgment, BATCo gave implied consent to the disclosure of any document which may find its way to the Minnesota Depository in accordance with procedures established by the consent judgment. … As such it constitutes an implied consent under s122(4). [185], [186]

Dealing with the BATAS leave application, it will be recalled that the company had sought to be joined as a party in the proceedings before Bell J; alternatively, it sought to be heard as amicus curiae. The basis for its application was that it asserted an interest of a right of confidentiality and legal professional privilege in the information known to Cannar derived in his capacity as its Director of Legal Services. Relying on Pt 8 r8(1)(a) of the *Supreme Court Rules*, BATAS asserted that it 'ought to have been joined as a party'.

Bell J, dealing with the BATAS application, cited the judgment of McHugh J in *Victoria v Sutton* (1998) 195 CLR 291 at [77]-[78] as setting out the applicable test:

> … it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order.

Her Honour held:

> BATAS is not a party to the US proceedings. BATAS' interest in maintaining its legal professional privilege … should any examination of the applicant be proceedings to which the *Evidence Act 1995* (NSW) applies did not seem to me to amount to a right or interest in the proceedings such that it ought to be joined as a defendant. Nor did I

> consider that BATAS was a person whose joinder was necessary in order to ensure that all matters in dispute in the proceedings be effectually and completely determined and adjudicated upon. In the event that the applicant is required to be examined on the topics of testimony set out in the Letter of Request, it is open to BATAS to attend at the examination and to object to evidence being adjudicated that would disclose the contents of its privileged communications. [15]

In dismissing BATAS' application to be joined either as a party or as amicus curiae, the Chief Justice held that her Honour's decision was a discretionary decision on a matter of practice and procedure with which an appellate court is reluctant to interfere:

> In my opinion, no good reason has been advanced to do so. Her Honour committed no error of principle in the exercise of her discretion. [192]

The case would seem to indicate that Australian courts, applying comity, are likely to treat Letters of Request from countries whose laws and courts are comparable with ours with considerable latitude and benevolence.

It is therefore of interest that a similar application subsequently came before the English Court of Appeal in *United States of America v Philip Morris Inc and British American Tobacco (Investments) Ltd* [2004] EWCA CIV 330, 23 March 2004. As in this case, a Letter of Request sought to examine a Mr Foyle, a partner in an English firm of solicitors that had acted for BATCo. It was claimed that Mr Foyle played a significant role in the implementation of the document destruction program, the sole purpose of which was to shield BATCo from future litigation, even though none was then on foot. After a judge ordered Mr Foyle to present himself for examination, BATCo was given permission to intervene to assert a claim of privilege. On appeal, the Court of Appeal, after a careful review of claims of privilege, examined the criteria for the litigation privilege, concluding that privileged communications come into existence for the purpose of the provision of legal advice where litigation is pending or anticipated, adopting the conclusion of Batt JA in *Mitzuhbishi Electric Australia Pty Ltd v Victoria Work Cover Authority* [2004] VR 332 that:

> ..as a general rule at least, there must be a real prospect, as distinct from a mere possibility, but it does not have to be more likely than not. [341]

After reviewing the history of the tobacco litigation, both in the USA and Australia, the Court of Appeal held that:

> ..it would be impossible to conclude that litigation against BATCo was itself reasonably in prospect when that company engaged Mr Foyle's services to advise it. [69]

It is of interest to note that on 26 July 2004, the Federal Attorney-General announced a reference to the Australian Law Reform Commission to review the various provisions of the *Evidence Act 1995* (Cth). No doubt legal client privilege will be one matter the Commission will review in light of recent decisions, both here and in the United Kingdom.

Meanwhile, one awaits with interest how a Letter of Request from, say, the Attorney-General of Zimbabwe will be treated should the occasion arise.