Neutral Citation Number: [2023] EWHC 167 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2023

Case No: KF-2022-009948

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

BEFORE SENIOR MASTER FONTAINE

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

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

AND IN THE MATTER OF A CIVIL PROCEEDING NOW PENDING BEFORE THE DANISH MARITIME AND COMMERCIAL HIGH COURT

B E T W E E N:

KG BIDCO APS

Claimant in the Danish Proceedings

-- and --

(1) PROCURITAS PARTNERS AB
(2) TOMAS HAKAN THEREN

Defendants 1 and 5 in the Danish Proceedings / Applicants to the Letter of Request

B E T W E E N:

(1) PROCURITAS PARTNERS AB
(2) TOMAS HAKAN THEREN

Claimants/Applicants to the Letter of Request

-- and --

(1) JACK BLOMFIELD
(2) ANDREAS MENTZER

Defendants/Respondents to the Letter of Request

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- -

Richard Hoyle (instructed by **Addleshaw Goddard LLP**) for the **Applicants**
Mark Wassouf (instructed by **White & Case LLP**) for the **Claimant**
James MacDonald KC (instructed by **Sidley Austin LLP**) for the **Respondents**

Hearing dates: 24 January 2023

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Approved Judgment

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of an application dated 21st November 2022 by Procuritas Partners AB ("PPAB") and Thomas Hakan Theren ("Mr Theren"), (together "the Applicants"), who are respectively the first and fifth defendants in proceedings in the Danish Maritime and Commercial High Court ("the DMCC") as referenced in the title to these proceedings ("the Danish proceedings"). The application is made pursuant to a letter of request dated 7th November 2022 made by Judge Peter Juul Agergaard of that court ("the letter of request") which seeks this court's assistance in obtaining oral evidence from the respondents, Jack Blomfield ("Mr Blomfield") and Andreas Mentzer ("Mr Mentzer") (together "the Witnesses"). The application is made pursuant to the Hague Convention of 18th March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, the Evidence (Proceedings in other Jurisdictions) Act 1975 ("the 1975 Act") and CPR 34. The application is supported by the witness statement of Simon Kamstra dated 21 November 2022, and responded to by the witness statement of Andrew Fox dated 10 January 2023.

2. The application was listed at the Applicants' request as a matter of urgency because there is a trial in the Danish proceedings due to commence on 1st March 2023, with an impending deadline for submission of evidence. The Witnesses do not oppose the application entirely, but do seek amendments to the topics for questioning and amendments to the draft order provided by the Applicants. The Witnesses have provisionally agreed to give evidence on an urgent basis on the 2nd and 3rd of February i.e. just over a week from the hearing date, and I am informed that an examiner has been engaged for those dates.

Factual Background to the Danish Proceedings

3. An outline of the underlying proceedings is provided in the letter of request, and in the witness statements, and I summarise that information. KG Bidco APS the claimant in the Danish proceedings("the Claimant") entered into a share sale and purchase agreement on 11 December 2017 for the purchase of GEH Invest ApS, its wholly owned operating company Gram Equipment A/S ("Gram") and its subsidiaries (the "Gram Group") from Green Magnum S.A ("the Seller") with 29 January 2018 provided as the closing date. The Seller was (through its holding company) owned by Procuritas Capital Investor IV LP (PCI LP), and by Procuritas Capital Investors IV Co-Investment AB. PCI LP's partner is Procuritas Capital Investor IV GP ("PCI IV GP"), together a Guernsey based private equity fund, which are advised by PPAB. Mr Theren was managing partner of PPAB until 2020 and a board member of Gram and GEH Invest ApS until the closing date. On 20th September 2018 the Claimant commenced arbitration proceedings against the Seller claiming EUR 103.7 million for breach of warranties on a purchase price adjustment of approximately EUR 16.3 million. On 23 June 2020 the arbitral tribunal awarded the Claimant the sum of approximately EUR 70 million plus interest and costs, an aggregate amount of approximately EUR 87.5 million. The Seller did not have the financial means to comply with the arbitral award and filed for bankruptcy in July 2020.

4. On 20 December 2019 the Claimant commenced the proceedings against PPAB, Mr Theren and others in the DMCC claiming that the defendants are liable on a joint and several basis to pay to it the sum of EUR 87.5 million plus interest to satisfy the award in the arbitration proceedings. It is argued that in the planning and completion of the sale of the Gram Group, the Claimant and its owners were provided with misrepresented or misleading information about the Gram Group's financial situation.

The Claimant argues that it would not have proceeded with the transaction if true and fair information had been supplied to it. It is alleged that Mr Theren has incurred liability by organising and conducting the sales process in an actionable manner in his capacity as a partner without having regard for the Claimant's interests, and fraudulently withholding material information.

Background to the Application

5. I summarise the information provided in the witness statements. William Blair International Limited ("William Blair") was engaged by an engagement letter dated 2nd December 2016 to provide investment banking services to the selling shareholder of Gram and its general partner. At the time of this transaction the Witnesses were employees of William Blair: Mr Blomfield was a vice president and Mr Mentzer was a director. Both are currently employed by William Blair, each now with different titles. The letter of request seeks oral evidence from the Witnesses in relation to the role of William Blair in the transaction and the topics for questioning are set out in Appendix A and Appendix B to the letter of request.

6. The Applicants first requested the evidence of the Witnesses on a voluntary basis by e-mail from Mr Theren dated 11 January 2021 copied to the Applicants' Danish counsel Kromann Reumert ("Kromann"). They were referred to William Blair's legal advisors, Sidley Austin LLP ("Sidley"). A call between Kromann and Sidley took place on 18 January 2021. There was subsequent correspondence for some six weeks, until Sidley communicated William Blair's decision to decline to provide the assistance requested in a telephone call with Kromann on 21 February 2021. There were no further communications between Sidley and Kromann or between William Blair and Kromann until April 2022, although there were a number of unsolicited communications from Mr Theren to Mr Mentzer which largely went unanswered. Then on 29 April 22, Kromann contacted Sidley to arrange a telephone call. That call took place on 3 May 2022 and was attended by representatives of Kromann and Mr Lafferty of Sidley. Kromann explain that the trial in the Danish proceedings were scheduled to commence at the beginning of 2023 and reiterated their clients' request that William Blair's employees provide evidence for use in those proceedings. It was explained that given the time it takes to obtain evidence for use in foreign proceedings they would need to embark on that process sooner rather than later. William Blair considered the renewed request in May and June 2022 and Sidley informed Kromann on 15 July 2022 that William Blair declined to engage in further correspondence on the matter. The Applicants then applied to the DMCC for the letter of request on 20 September 2022.

7. Although the Claimant did not apply for a letter of request, it appears in these proceedings as an interested party, and to request that this court comply with the request of the DMCC that the topics or themes for examination which were included in the letter of request at their request at Appendix B, be permitted in addition to the topics or themes for examination requested by the Applicants at Appendix A .

8. The issues between the Applicants and the Claimant of the one part, and the Witnesses of the other part, are as follows:

    i) the scope of the themes or topics for questioning;

ii) in relation to documentary materials to be provided to the Witnesses before the examination;

iii) mode of examination: whether the Applicants and the Claimant should be permitted to cross examine the Witnesses in accordance with Danish procedure;

iv) the length of time permitted for examination of each witness.

9. Because my decision on these issues is required urgently if the dates for the examination are to be met, I summarise the respective submissions of the parties in only brief terms, and set out my conclusions on these issues and my reasons for reaching those conclusions.

The Relevant Legal Principles

10. The relevant legal principles are summarised in *Aureus v Credit Suisse* [2018] EWHC 2255(QB) at [30] – [44] as follows:

"30. The court's jurisdiction to order an examination derives from Sections 1 and 2 of the 1975 Act. It may make such an order only if satisfied that:

i) the application is made in pursuance of a request issued by and behalf of the requesting court;

ii) the evidence to which the application relates is to be obtained for the purposes of civil proceedings instituted before the requesting court (Section 1(a) and 1(b)).

31. Once those jurisdictional requirements have been satisfied, the court has a discretion to make such orders: "*as may appear to the court to be appropriate for the purposes of giving effect to the request in pursuance of which the application is made.*" (Section 2(1), (2) (a)). Section 2(3) requires that no steps can be taken other than "*steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the English court*".

32.The law on the exercise of the court's discretion is well established by the authorities. The English court will give effect to a request to the extent that it can for reasons of judicial comity: *Seyfang; Rio Tinto Zinc.* The starting point of the English court in relation to letters of request from foreign states under the 1975 Act is that they should be given effect to as far as possible: *Rio Tinto Zinc Corporation* and *In re State of Norway's Application* at page 470B; *Smith v Philip Morris* per Andrew Smith J. at §33.

33.However, the court's powers cannot be used in aid of a "fishing expedition". There are numerous authorities which confirm that the examination must be confined to eliciting evidence for trial and cannot extend to US style oral discovery by deposition: *The State of Minnesota* per Lord Woolf at paragraph 13; *Rio Tinto Zinc Corporation* page 635 per Lord Diplock; *In re State of Norway's Application* [1987] (No. 1) per Lord Kerr LJ at page 482; *Refco Capital Markets Ltd* per Waller LJ at 1; *First American* per Sir Richard Scott VC at 1160H, 1164C, 1165D-E, 1166D-H, 1167E-1168C; *Gredd* per Stanley Burnton J. at §27(3), (4), (5).

34. If the width of the topics for questioning is too wide, or uncertain or vague, it may be refused on the grounds that it is oppressive to the witness: *First American* per Sir Richard Scott VC at 1167F-H. This might also lead to the inference that: "*the letter of request was designed to elicit information which might lead to the obtaining of evidence rather than to establish allegations of fact, and that would amount to an impermissible fishing expedition*." *Smith v Philip Morris* per Andrew Smith J. at §§37-40.

35.If the request is considered to be too wide ranging, the court retains a discretion whether to grant the request and can "blue pencil" but not redraft the request. The court has no power to redraft a question or supplement the request on the basis it considers expedient to do so: *State of Minnesota -v- Philip Morris* at §§50-51.

36.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: *In re Asbestos Insurance Coverage Cases* [1987] 1 QB 331 at page 339G.

37.There are limited circumstances where the court can consider the relevance of the evidence sought, where the relevance of the topics for examination in the request are not considered by the requesting court: *Gubarev* per Jay J. at §§ 54-59. In *Gubarev* Jay J. referred at § 55 to the comment of Stanley Burnton J in *Gredd* that:

> "…orders for letters of request are normally made by the US judge without any real scrutiny. The order is normally made and the terms sought by the applicant without any (or any significant) amendment, and without the judge being informed of the significant differences between US federal procedure and of these courts".

38.Jay J also referred at paragraph 57 to that issue as addressed by Simon J in *Credit Suisse* where the latter states at paragraph 15:

> "It seems to me, however, that [Counsel] is correct in his submission that the approach of the court will depend on whether the requesting court has itself considered questions of relevance. If it has, then it is hardly in the interest of comity that the court to whom the request is made should embark upon on a close consideration of questions of relevance on what is likely to be limited material and a less clear understanding of the issues than the requesting court. If, on the other hand, the requesting court has plainly not considered the question of relevance where it is clear, even on a broad examination, that the evidence is not relevant then the Vice-Chancellor's first question must be addressed".

39.That is a reference to a dictum of Sir Richard Scott VC in *First American* when he identified that the first issue was:

> "whether the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned in the amended schedule".

40. Thus, Jay J in *Gubarev* concluded, at paragraph 58:

> "if the position is that the requesting court plainly has not considered the question of relevance, it must fall on the receiving court to undertake that exercise".

41. The test is identified as "*Can the intended witnesses reasonably be expected to have relevant evidence to give on the specified topics*?" Jay J. agreed that the test imported a low threshold. Jay J also stated in the same paragraph:

> "In circumstances where the court has evidence from a lawyer with experience and qualifications in a requesting state, and that evidence stands uncontradicted, considerable deference must be given to it". "

11. See also *Galas v Alere* [2018] EWHC 2255 (QB) per Morris J. at [53]

The Scope of the Themes/Topics for Questioning

12. The Witnesses object to many of the themes for questions on grounds of relevance, breadth and vagueness of many of the questions, on the basis that many constituted impermissible fishing expeditions and that the extent of the themes and/or questions combined with the volume of documents to be put to the Witnesses, the proximity of the trial and the deadline for the evidence from the Witnesses set by the DMCC meant that the extent of the questioning sought by the Applicants and the Claimantswas unfair to the Witnesses. The Witnesses are prepared to give evidence on the basis of a more limited number of and/or amended themes, and their legal representatives have provided a detailed schedule of their proposed amendments to Appendices A and B attached to Sidley's letter of 17 January 2023.

13. The Applicants and the Claimant resist those proposed amendments, remind the court that relevance is a matter for the requesting court, that the concept of fishing is one most usually applied and applicable to documentary rather than oral evidence, and that the authorities, whilst permitting the court to amend the description of the evidence sought by a request, to some extent (described in the authorities as "the blue pencil test"; see *State of Minnesota -v- Philip Morris* [2006] 1 LPr 170; [2004] 1 CLC 811 at §§50-51) it is not permissible for there to be a redraft of the description of the evidence sought. They also refer to the fact that the Witnesses delayed asking for the documentary evidence (which in error was not served with the application) but received the documents relevant to the themes for questions on 2 January 2023, a month before the agreed dates for the examinations.

<u>Relevance</u>

14. All parties relied on one sentence in the brief reasons given in judgment of the DMCC dated 7 November 2022 on the application for the issue of a letter of request, in support of their position on relevance. That states as follows:

> "The Court also finds that the possibility that the evidence to be given by Andreas Mentzer and Jack Blomfield may be of relevance to these proceedings cannot be ruled out in advance."

15. The Applicants submit that this demonstrates that the judge in the DMCC has actively considered relevance. The Witnesses say that the judge does not conclude that the evidence requested is necessary for the proceedings.

16. The authorities make it clear that unless it is apparent that the requesting court has not considered the relevance of the evidence sought, the English court should defer on this issue to the more detailed knowledge that a judge in the requesting court will have on this issue: see extract from *Aureus* above. Although there is no attempt in the judgment to address what evidence the Witnesses would be likely to have relevant to particular issues in the proceedings, I conclude that the judge was satisfied that the Witnesses may have relevant evidence, and it would be inappropriate to go behind that finding. The letter of request also expressly states that the testimony is to be used for the trial. In any event it is apparent from my reading of the documents submitted by the parties that the Witnesses will have relevant evidence to give, even if, as submitted by Mr Hoyle for the Applicants, their evidence is that they were unaware or did not know about particular matters put to them, as that evidence may also be of assistance to the parties and the Danish court. Furthermore, the Witnesses accept that they have some relevant evidence to give, as is clear from the amended Appendices submitted by their legal advisors.

Fishing

17. The Witnesses submit that many of the themes for questions are speculative requests for evidence and constitute impermissible fishing expeditions. It is submitted that many of the themes or questions ask them to speculate on the motives or actions of third parties, that some ask for evidence on general areas, rather than in relation to the specific phases of the dealings leading up to the transaction the subject of the DMCC proceedings, which should properly be the remit of expert witnesses; and that many ask the Witnesses to comment on communications to which they were not a party, or on discussions at meetings that are unparticularised, or where the evidence could be given by the parties to the DMCC proceedings.

18. The Applicants and Claimant submit that there will be many areas of evidence where their own clients cannot provide the evidence, and that simply because those parties are not in a position to know in advance the extent or otherwise of the Witnesses' involvement that is not a fishing expedition. It is helpful to the Danish court, and to the parties, to have evidence coming from Witnesses who are not parties to or associated with parties to the proceedings, even where the parties are able to give evidence on the same topics, and a party is able to seek evidence form other witnesses in addition to that from their own side. There is nothing to prevent a party being asked about a document or communication to which they were not a party, and in any event if the witness has no evidence to give on a particular question or topic they can say so in the examination: see *In re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331 per Lord Fraser at 339 G-H.

19. I have not concluded that the themes for questions in Appendix A amount to "fishing". It is sometimes the case that where two witnesses are asked identical questions that can suggest "fishing" as it is usually unlikely that questions for two witnesses would cover the same topics. However, where Mr Mentzer and Mr Blomfield worked together on the same transaction, and where the Applicants do not know precisely who was responsible for what part of the transaction, I consider that is a reasonable explanation

for the fact that no distinction is made between the Witnesses in the lines of questioning. There is no suggestion made that the formulation of the topics or the intention underlying that formulation is an intention to use the information for some investigatory or other impermissible intention: see *First American Corpn v Zayed* [1999] WLR at 1165 C-D and at 1166 C-D per Sir Richard Scott V-C.

20. Appendix B is much more lengthy and the questions are in many respects vague, unclear and unfocused. I address these issues in more detail below. There are some instances where I have concluded that questions constitute fishing where some questions appear unrelated to areas for cross examination which suggest that they are investigatory in nature.

Oppression

21. Mr Hoyle for the Applicants correctly identified the final ground relied on by the Witnesses as oppression. In summary the Witnesses say that when balancing the right of a party to obtain relevant evidence for trial in a foreign jurisdiction with the potential prejudice to the witness from whom that evidence is sought, the extent, breadth and vagueness of the themes for questions, the Applicants' and the Claimant's asserted reservations of their wish to pursue other unidentified lines of questioning, combined with the late notice given to the Witnesses and the volume of documentation provided, together with the lack of clarity as to the extent of the final bundle of documents to be put to them, all amount to unfairness to the Witnesses. The Witnesses are willing to provide evidence if suitable protections can be put in place to prevent or guard against such unfairness, and have agreed to attend for examination for a day each on 2 and 3 February 2023, but ask that the time for examination be limited to 5 hours, similarly to court hours, rather than the 7 hours requested by the Applicants.

22. The Applicants (whose submissions are adopted by the Claimant) submit that the late notice is partly the fault of the Witnesses for failing to co-operate voluntarily when requested on repeated occasions in 2021 and in May 2022, and for failing to request documents not served with the Application, until 23 December 2023. It is submitted that the court should not attempt to amend the themes for questioning, which have been selected carefully, with an explanation given in for each topic in terms of both background information and relevance or purpose.

23. I have concluded that the late notice and urgency of this application is the fault primarily of the Applicants. Witnesses are not obliged to agree to provide evidence for foreign courts on a voluntary basis. The Witnesses instructed Sidley to engage in discussions with Kromann in January 2021, and following exchanges of correspondence Sidley communicated the decision of the William Blair not to agree that any of their employees could provide the requested evidence voluntarily, in a call on 21 February 2021. Although there were subsequently unsolicited communications between Mr Theren and Mr Mentzer, there was no further indication from William Blair that their position had changed: Fox paras 14-17. There was no further action or communication from Kromann until 29 April 2022, at which point the Applicants were aware that the trial in the Danish proceedings was scheduled to commence at the beginning of 2023: Fox para 19. Kromann would presumably have known that a deadline prior to trial would be set for submission/service of evidence, and it is also clear from the evidence that they were aware that it takes some considerable time to obtain evidence for use in foreign proceedings. They took no steps to commence this process until 20 September 2022,

which led to a hearing in the DMCC on 7 November 2022, a letter of request of the same date, submitted to the Foreign Process Section of the Central Office of the King's Bench Division or after 21 November 2021, responded to by my email to the Applicants' solicitors dated 2 December 2022. It is unclear why the Applicants did not take steps to apply to the DMCC for a letter of request at an earlier date. They might have hoped that William Blair would change its earlier decision not to agree to provide evidence voluntarily, but there was no guarantee, or it seems, any indication, that this was likely to occur. Even if William Blair had agreed to do so, they could then have withdrawn the request to the Danish Court once they were sure that the evidence would be, or had been, provided voluntarily.

Documentary Materials to be provided before the Examinations

24. It is accepted by the Applicants and the Claimant that the volume of documents provided to the Witnesses is substantial, but it is submitted that this is misleading. Although there are 1994 pages of documents for Appendix A themes of questioning, almost 600 pages are differing drafts of the Vendor Due Diligence Report (VDD) and some 300 pages is the Claimant's Reply in the Danish proceedings. In relation to Appendix B themes the documents in the bundle consist of 3673 pages, but of these the Second Deloitte Investigation Report is 1404 pages, and the final arbitration award consists of some 420-430 pages so the remainder is about 1840-1850 pages. The Applicants and the Claimant are considering whether the bundles can be cut down and/or amalgamated to reduce the number of documents. The point was made that the Witnesses will not necessarily be referred to every document, but they are included for completeness.

25. On behalf of the Witnesses it is submitted that this volume of documents far exceeds that thought acceptable in the authorities and although the documents were provided on 2 January 2023, they are not organised in a logical fashion, i.e. they are paginated chronologically, rather than by reference to the topics for questions, and there is no indication of what documents are relevant to which theme of questioning. The legal representatives will have to go through these documents in order to advise the Witnesses, and the volume and lack of cohesion combined with the extent of the questions results in unfairness to the Witnesses. It is unsatisfactory to be informed that there may be a new slimmed down bundle of documents only a few days before the examinations, which gives very little time to prepare.

26. In *State of Minnesota v Philip Morris* [1998] 1.L.Pr. 170 at [45] (an authority not referred to by the parties) Lord Woolf suggested that where it was considered appropriate to impose some limitations on examinations for the protection of the witness the applicants should identify the documents upon which they were proposing to rely prior to the order being made. Although bundles have been provided, it appears that these consist of a considerably larger volume than the particular documents that will actually be referred to the Witnesses, or indeed whether there would be sufficient time at the examination to refer to all documents in the bundles. It is not sufficient to say that reference might only be made to a few pages of the larger documents, or that reference may not be made to all of the documents, as the Witnesses and their advisors will not know until the examination to which specific documents or pages of documents they will be referred (and for an examination lasting one day it will clearly not be possible for reference to be made to all the pages in both bundles). The Witnesses and their legal advisors will have no option but to consider all the documents in such

circumstances. Even if I order that a only a limited number of documents be permitted, these would be available to the Witnesses in an amended bundle or bundles only a few days before the examination. It is apparent from submissions from Counsel for the Applicants and the Claimant in court and from correspondence received from their solicitors following the hearing that the process of completing a concluded and amalgamated bundle is still an ongoing process. This is obviously unsatisfactory, particularly as the themes for questioning were known since at least 7 November, so there seems no reason why a more limited number of documents could not have been identified at an earlier date.

Conclusion in respect of the Application

27. In the circumstances set out above I have concluded that if the examinations are to proceed on the agreed dates the themes for examination in Appendices A and B need to be restricted to avoid unfairness to the Witnesses, in circumstances where they have been given short notice of the application, and the extent of the areas for questioning is extensive. I also conclude that the bundles of documents be reduced to the documents that are realistically likely to be referred to the Witnesses in respect of the more restricted areas of questioning, and that the Witnesses be informed to which theme of questioning each document relates. My decision in respect of the reduction in the lines of questioning is set out in Annex A in relation to Appendix A and in Annex B in respect of Appendix B. I have not attempted to re-draft the themes but to "blue pencil" where possible so that the potential unfairness caused to the Witnesses by reason of the combination of the short notice, the extent and breadth of the areas for questioning and the large volume of documentary material is alleviated without causing unfairness to the Claimant and the Applicants: see *First American* at 1165H -1166 A-B.

28. I make the following general comments as to why I have reached the decisions I have in respected of the "blue pencilling" of the themes for questions. First, the application is made under the Hague Evidence Convention. The Hague Model form (a copy of which is reproduced at CPR 34APD.13) suggest a list of questions to be put to a witness. In more complex proceedings this may not be possible, and of course the answers to specific questions may require follow up questions. But if a list of questions is impractical, the issues or topics for questions should be clearly defined so that their ambit is less likely to be the subject of debate. Secondly, I have deleted the word "include" in relation to each them. This is not intended to exclude reasonable follow up questions in relation to the Witnesses' answers to any particular theme, but the Witnesses are entitled to some certainty as to what events their evidence is to be addressed.

29. My reasoning in respect of each theme/question is as follows:

Appendix A

30. Theme 1: I consider that the topic is a suitable introductory topic as is usual in examinations of professional people: see *First American* per Sir Richard Scott V-C at 1164.

31. Theme 2: There is no reason to restrict the topics at the first three bullet points as sought by the Witnesses. They would presumably have been parties to the meetings and discussions referred to, and if not they can say so. I have deleted the last bullet point

because it is unclear, it does not explain whether the Witnesses' evidence is sought on their understanding of the role of PPAB or investment advisors in general.

32. Theme 3: I have included the first four bullet points which are unobjectionable. It is apparent that the Witnesses are being asked about their own experience, not to give expert evidence. I have deleted the last bullet point as it is vague, imprecisely worded and unclear what is sought.

33. Theme 4: I have not changed the topics, but the meetings referred to must be identified for the Witnesses before the examinations, and the parties should liaise about this before the examinations takes place.

34. Theme 5: I consider that the Witnesses' suggested limited amendments are appropriate for the reasons they have provided.

35. Theme 6: I have included Mr Mentzer, who is said to have had only limited involvement and no evidence to give. He can provide his limited evidence, or state that he has no evidence on the topic under oath. I have left in the reference to FSN and other bidders. If the Witnesses have no evidence on this topic they can say so under oath. I have deleted 'certain relevant due diligence activities' as being vague and unparticularised. I have retained the reference to the timing of bidders' decisions to exit the process, as the Witnesses can say if they do not know this.

36. Theme 7: I have accepted the Witnesses' amendments to the first two bullet points for the reasons they have given. I have retained the remaining bullet points. If the Witnesses have no evidence to provide they can say so on oath.

Appendix B

37. Appendix B is 26 pages long, compared to Appendix A, which is slightly less than 4 pages. Appendix B contains most of the themes in Appendix A plus two other themes, A and B. It duplicates Appendix A to some extent, and many of the questions contain long extracts from documents and are unclear. It is also unclear in many respects how the questions for cross examination are related to the themes in Appendix A. Many of the questions, although stated to relate to the Appendix A themes, appear to be entirely new questions. That is inappropriate. If the Claimant had wished to put other questions in respect of other themes or topics it should have made its own application for a letter of request. I regard Appendix B as unhelpfully drafted for those reasons.

38. The position of the Claimant in this application is unusual. Mr Wassouf for the Claimant was punctilious in explaining to the court that his client had not sought evidence from the Witnesses in the DMCC proceedings, but relied only on their right to cross examine the Witnesses, and Appendix B is intended to explain the likely cross examination from the Claimant. Despite this there are numerous references in Appendix B to the Claimant reserving its right to ask further and supplementary questions. All the latter references are inappropriate and must be removed. The Appendices are intended to be attached to the court's order, which is not an appropriate place for a party to assert any reservation of rights. Such reservations are entirely unnecessary in any event. The other party in foreign proceedings who has not sought the letter of request is usually considered to be entitled to cross examine, but cross examination questions are not meant to be new topics for questions but further questions

arising out of an examination in chief. I have done the best I can to address the numerous topics and questions outlined, but I largely accept the submissions on behalf of the Witnesses that much of the topics and questions are disproportionate, speculative and unhelpfully drafted. For those reasons, and because of the circumstances in which the examinations have been arranged at short notice, with entirely disproportionate volumes of documents for perusal beforehand, I consider that to permit the entirety of the questions in Appendix B would cause oppression to the Witnesses. I have applied the "blue pencil" to remove some of the questions to ensure that the Witnesses will have, in my judgment, appropriate protection from such oppression.

39. Mr Wassouf for the Claimant submitted that :

> "The Danish court, ……..put in certain protections for my client in the way in which it made the request, and one of the key protections was that we should be allowed to ask the questions in appendix B, and to put documents to the respondents ourselves. It would be wholly inappropriate for Appendix A and Appendix B to be treated as effectively two separate Applications. They are not. They are one application. The consequences of that,... is that if you agree with the respondents that this sort of wholesale rewriting of the letter of request is required before the English court can give an order, then the proper course is to refuse to give an order. It is not to reduce it to the third of the size that the Danish court had in mind and to strike out all sorts of questions and lines of examination."

Mr Wassouf relies for this submission on my judgment in *Gubarev v Buzzfeed* Inc [2018] EWHC 2255 (QB) at [136], which states that:

> " The authorities are clear that there cannot be a wholesale rewriting of the order to rescue it."

40. Mr Hoyle for the Applicants disagrees with this submission. He submitted that if the Claimant's complaint is that if the English court refuses to grant a substantial part of the themes/questions in Appendix B, that is an issue to put before the Danish court, and it is a matter for this court's discretion to grant what the Applicants seek, and make the same determination in respect of what the Claimant seeks.

41. I have not been referred to any evidence to support the submission made by Mr Wassouf on this point. There is nothing about it in the letter of request, which simply asks that the questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined are "described in further detail in Appendix A and B". I take the view that I must exercise the court's discretion in the usual way in the circumstances described above, to balance the desire of the Claimant to obtain evidence to support its case at trial or to allow it to counter the defendants' case at trial, with the potential prejudice to the Witnesses. In any event, if the themes and questions in Appendix A were permitted as protection for the Claimant, as submitted, the Witnesses have an equivalent right to protection from being subject to an examination which is oppressive, and those rights must be balanced to try and achieve fairness to both parties.

42. I have therefore amended Appendix B in such a way as to attempt to balance those competing interests and provide fairness to both parties. Although some of the questions are repetitive of those in Appendix A, I am not concerned about that, as the Claimant has a right to cross examine on those topics. I have not repeated the introductory material set out in lengthy sections of Appendix B, but made it clear which questions are permitted and which have been removed, as oppressive or for other reasons, as stated.

43. There is thus no necessity to consider the suggestion (made only in written submissions and not pursued in oral submissions) that the Witnesses be treated as hostile witnesses. In any event I consider that would be wholly inappropriate in circumstances where there is no evidence that either of the Witnesses bear any hostile animus to the party calling them, where they entered in discussions with the Claimant's Danish Counsel through their own lawyers, have engaged fully with the application, provided dates when they are available for examination at short notice and given no indication whatsoever that they will answer questions other than fairly and truthfully.

44. Finally, with regard to the lack of certification of the documents translated from Danish, I agree that this is unsatisfactory, but do not know whether there will be time to arrange for certified translations before the examination dates, and I suspect that is unlikely. I hope that the Danish Counsel for the Applicants and the Claimant can agree on the translations (if not already done) and that any issues that may arise be submitted to the Danish Court.

Mode of Examination

45. The general rule is that the CPR applies to examinations carried out pursuant to letters of request, unless the court orders otherwise. The Applicants seek an order that those entitled to ask questions at the examinations be permitted to do so in accordance with Danish procedural law. It is accepted that the constraints in s. 3(2) of the 1975 Act apply, but it is requested that both the Applicant's Counsel; and the Claimant's Counsel be permitted to cross-examine the Witnesses. The letter of request asks that :

> "both Danish and English counsel for the parties be allowed to be present throughout the examination and that the parties through their counsel be allowed to conduct examination, cross examination and re examination of the witness before an examiner. It is specifically requested that Danish Counsel for the parties (if they attend the examination) is permitted to ask open, closed, and leading questions during the examination as it is permitted under Danish law;"

46. The Witnesses oppose that request and say that there is no basis to treat the Witnesses for the purposes of the examination as anything other than the Applicants' witnesses who can be examined in chief and re-examined after cross examination by the Claimant, in circumstances where the Applicants are calling evidence to support their position in the Danish proceedings.

47. This court does make orders for witnesses to be examined pursuant to the procedural law of the requesting court regularly, provided that there is no breach of s. 2(3). It is permitted by CPR 34.18(2)(a). It makes sense where the evidence is to be used for the

purposes of a foreign jurisdiction that it should be taken in accordance with the procedural rules of that jurisdiction. Morris J. addressed this in *Microtechnologies LLC v Autonomy Inc* at [21]-[29]. This court should try to comply with the reasonable requests of requesting court by way of judicial comity, and I consider that it is appropriate to permit the DMCC's request.

48. Mr MacDonald KC for the Witnesses expressed some concern at the hearing as to how in practice this would operate, which was unclear. The parties can discuss this, but it seems to me that it might be most appropriate to adopt the suggestion made by Mr Hoyle in oral submissions in reply, that the order adopts the wording of the letter of request, namely that the Applicants be given permission to examine the Witnesses and to ask open, closed and leading questions during the examination, that the Claimant be permitted to cross-examine and the Applicants to re-examine. That would provide some structure and not be unfair to the Witnesses and their legal representatives, who are entitled to know what to expect.

49. I accept that a 7 hour day of questioning is both tiring and stressful, even with breaks, and that it is longer than the 5 hour day for oral evidence in court. However it is a standard time permitted in most orders for examination, and it is not necessarily the case that all the time is required. This is complex high value commercial litigation, with a limited time before trial, and provided that appropriate breaks are given, and the Witnesses are informed that they are permitted to notify the Examiner if they feel they need a break at any time, I do not consider that it is unreasonable to allow a 7 hour day.

ANNEX A

Topic as described in Appendix A	Judge's decision on topic
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • educational and professional background and experience • what kind of company William Blair is and what services it provides • what William Blair does when retained to act as investment bank on a sell-side mandate in a structured auction process	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • educational and professional background and experience • what kind of company William Blair is and what services it provides • what William Blair does when retained to act as investment bank on a sell-side mandate in a structured auction process
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield : • the initial discussions with/pitch from William Blair • the initial meetings held between the parties • the discussions on the structuring of the sale as well as details on the negotiation and finalization of the engagement letter • the respective roles of an investment advisors such as PPAB vis-a-vis the Seller (Green Magnum), Gram's daily management team and the fund (PCI IV) in a structured auction process, such as the one at hand	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield • the initial discussions with/pitch from William Blair • the initial meetings held between the parties • the discussions on the structuring of the sale as well as details on the negotiation and finalization of the engagement letter
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • the processes involved in a structured auction • what aspects of the sales process the various advisors were responsible for • the role of an investment advisor such as PPAB • the role and degree/type of involvement of Tomas Therén and Tiyam Afshari through the various stages of the sales process • the communication in general between an investment advisor and William Blair in a transaction as well as communication with Gram's day-to-day management team	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • the processes involved in a structured auction • what aspects of the sales process the various advisors were responsible for • the role of an investment advisor such as PPAB • the role and degree/type of involvement of Tomas Therén and Tiyam Afshari through the various stages of the sales process
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • the Fire Side Chat Deck, the Confidential Investor Presentation, and the Management Presentation • the division of work, responsibility, provision of input as well as specific questions to the three documents (who prepared the drafts, who reviewed the drafts, how were Tomas Therén and Tiyam Afshari involved, who was	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • the Fire Side Chat Deck, the Confidential Investor Presentation, and the Management Presentation • the division of work, responsibility, provision of input as well as specific questions to the three documents (who prepared the drafts, who

Topic as described in Appendix A	Judge's decision on topic
in charge of providing the financial input to the documents etc.) • the participants and discussions prior to and after the meetings • how William Blair prepared for these meetings, including assistance with preparation of Gram's day-to-day management team	reviewed the drafts, how were Tomas Therén and Tiyam Afshari involved, who was in charge of providing the financial input to the documents etc.) • the participants and discussions prior to and after the meetings • how each of Andreas Mentzer and Jack Blomfield prepared for these meetings, including assistance with preparation of Gram's day-to-day management team
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • the purpose and characteristics of a VDD, in general and specifically in this case • William Blair's role and comments on the VDD • decisions and responsibility in terms of finalizing the VDD report • discussions between William Blair, EY, PPAB, and Gram's day-to-day management team to keep or take things out of the VDD report as well as the reasoning behind this	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • the purpose and characteristics of a VDD in this case • William Blair's role and comments on the VDD • decisions and responsibility in terms of finalizing the VDD report • discussions between William Blair and (i) EY, (ii) PPAB and (iii) Gram's day-to-day management team to keep or take things out of the VDD report
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • William Blair's role and responsibility in relation to the data room and the due diligence process • which review processes were established • how were different analyses carried out • communication internally and externally • the due diligence conducted by FSN and other bidders • decide • which discussions did Jack Blomfield and Andreas Mentzer have with potential bidders during the process, and when did some bidders decide to exit the process	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • William Blair's role and responsibility in relation to the data room and the due diligence process • which review processes were established • how were different analyses carried out • communication internally and externally • the due diligence conducted by FSN and other bidders • which discussions did Jack Blomfield and Andreas Mentzer have with potential bidders during the process,

Topic as described in Appendix A	Judge's decision on topic
	and when did some bidders exit the process
Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield include: • how William Blair usually makes valuations of companies such as Gram, and how William Blair proposed to structure the process • the discussions William Blair might have had with PPAB and/or Gram's day-to-day management team in this respect • the budget and the considerations made by William Blair in that regard, including discussions internally in William Blair and externally with e.g. Tomas Therén and/or Gram's day-to-day management team • the decision to take out the 6+6 budget and instead include the 8+4 forecast • the initiative to draft a seasonality analysis	Matters to be addressed in the questioning of Andreas Mentzer and Jack Blomfield: • how William Blair proposed to structure the process • the discussions the witness had with PPAB and/or Gram's day-to-day management team in this respect • the budget and the considerations made by William Blair in that regard, including discussions internally in William Blair and externally with e.g. Tomas Therén and/or Gram's day-to-day management team • the decision to take out the 6+6 budget and instead include the 8+4 forecast • the initiative to draft a seasonality analysis

ANNEX B

APPENDIX B AMENDMENTS

Theme A – questions permitted for the reasons set out in the judgment.

Theme B – first line of questioning deleted as being vague and unclear, and relating to information that it is expressly stated was not shared with William Blair.

Question now reads:

- PCI IV and defendants 1 and 5's role and decision-making throughout the transaction
- PCI IV and defendants 1 and 5's role in engaging and instructing William Blair, including with reference to the contents of the engagement letter entered into directly between PCI IV as client and William Blair
- PCI IV and defendants 1 and 5's role in engaging and instructing the managers of Gram Equipment A/S

Applicants' Theme 2 Question 1: Question permitted. If the witnesses have no information they can say so.

Applicants' Theme 2 Question 2: Witnesses' amendments accepted. It is unclear what is intended by the second question, which asks them to describe a written communication. The description can presumably be read.

Applicants' Theme 2 Question 3: Not permitted. The questions are not cross examination questions and relate to matters not raised by the Applicants in Theme 2. In so far as the question relates to Theme 7 cross examination can be permitted.

Applicants' Theme 3 Question 4: Not permitted. The questions are not cross examination questions and relate to matters not raised by the Applicants in Theme 3. In any event the question is inappropriate as it asks the witness to speculate on the conduct of others.

Applicants' Theme 3 Question 5: Not permitted for the reasons as above.

Applicants' Theme 4 Question 6: Witnesses' amendment accepted for reasons provided.

Applicants' Theme 4 Question 7: Not permitted. The question does not appear to be related to Theme 4 and it is entirely unclear why this question is being put. It is disproportionate to include it.

Applicants' Theme 4 Question 8: permitted provide that the meetings referred to are identified.

Applicants' Theme 4 Question 9: Not permitted. There is no context given for the question and for that reason it is unclear how the witnesses could deal with it. It is also unclear how it relates to Theme 4.

Applicants' Theme 4 Question 10: Question permitted. If the witnesses have no evidence to give they can say so.

Applicants' Theme 4 Question 11: Not permitted. The question is speculative and fishing.

Applicants' Theme 4 Question 12: Not permitted. The question is speculative and fishing.

Applicants' Theme 4 Question 13: Permitted.

Applicants' Theme 4 Question 14: Permitted. If the content of the email does not in fact support the question the witness can object.

Applicants' Theme 4 Question 15: Permitted. If the witness did not receive the exhibit they can say so.

Applicants' Theme 4 Question 16: Permitted. The question is straightforward and can be answered.

Applicants' Theme 4 Question 17: Not permitted. It is unclear what the purpose of the question is. the statement "And similar questions" is unclear in the context of the identified question and fails to identify what further questions are anticipated and is unfair to the witness.

Applicants' Theme 4 Question 18: Not permitted for reasons advanced by the witnesses

Applicants' Theme 4 Question 19: Permitted for reasons advanced by the claimant.

Applicants' Theme 4 Question 20: Not permitted. It is unclear what the purpose of the question is. The reference to reserving the right to ask further questions is not permitted in the context of a schedule of the identified topics and/or questions. The claimant will in any event have the right to ask proper cross examination questions.

Applicants' Theme 5: Not permitted for the reasons set out above.

Applicants' Theme 6: Not permitted for the reasons set out above.

Applicants' Theme 7: Not permitted for the reasons set out above.