



# DISPUTE RESOLUTION BULLETIN

## “No property in a witness”...?

The principle that there is “no property in a witness” is often cited. The Commercial Court’s judgment in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG and others* (8 February 2013) confirmed that it covers both factual and expert witnesses and that it extends to improper attempts by one party to prevent the other interviewing or obtaining facts from a witness before trial. It also emphasised the witness’s freedom of choice in deciding whether to cooperate, subject to their obligations in relation to confidential and privileged information.

The case concerned the evidence of a surveyor instructed by the Defendants to determine the cause of a ship casualty and extent of loss. Their surveyor prepared a report which was disclosed to the Claimants. The Claimants had not instructed their own expert and wanted to interview the surveyor to obtain factual evidence and his technical judgment on certain issues.

The Defendants eventually accepted that the surveyor could discuss factual matters with the Claimants but only on the condition that either their solicitor was present at the discussion or that a transcript of it was taken. However, they considered it inappropriate for the surveyor to discuss or provide technical evidence to the Claimants and refused to allow him to do so.

Relying on authorities concerning the principle there is no property in a witness, the Claimants applied to the Court for an injunction compelling the Defendants to allow their expert to be interviewed on the basis that they were entitled to free and unimpeded pre-trial access to the Defendants’ expert and arguing that the Defendants’ attempts to prevent such access amounted to contempt of Court. They provided an undertaking that they would not ask the expert any questions relating to privileged matters.

The Court emphasised that the “no property in a witness” principle meant the Defendants’ expert was not prevented from discussing



facts or technical opinions with the Claimants solely because he had previously discussed the same with the Defendants. However, it was not appropriate for a witness to engage in what is effectively a cross examination before trial. The Court held that previous authorities embodied a wider principle, namely that it “*may be a contempt [of Court] to interfere with attempts to interview a potential witness, or to prohibit the other side from getting facts from him*”, but only if such interference is improper.

Whether the interference is improper will depend on the facts of the case, leaving the test dependent on judicial discretion. In this case, the Claimants’ application was refused. The Court considered an injunction unnecessary because the Defendants’ conduct was not improper (and did not amount to contempt of Court) as the rationale behind their refusal to allow the expert to discuss technical matters with the Claimants and the conditions imposed were intended to prevent the pre-trial disclosure of confidential information and waiver of privilege over privileged information.

It was the expert’s choice whether he agreed to a pre-trial interview with the Claimants; the Defendants could

express an opinion or preference, but nothing further. The Defendants must not put pressure on the expert. However, a witness must not reveal confidential information before trial (though they may be required to do so at trial) and must not reveal privileged information, whether before or during trial.

The Court found there was no merit in the Defendants’ argument that rights in a witness, once their witness statement has been served, are governed by CPR 32, stating that the CPR is a purely procedural code, whereas the rights and obligations in respect of witnesses are governed by the law regarding confidence, privilege and contempt.

This judgment provides helpful guidance on the principle that there is no property in a witness, whether factual or expert, the duties of witnesses in Court proceedings and the limits of a party’s control over their witnesses. It also highlights the Court’s concern to protect privileged and confidential information.

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## Dispute resolution in the UAE: precautionary attachments

Last month, as part of a series of articles focusing on different aspects of dispute resolution in the UAE, [Simon Cartwright](#) and [Anas Al Tarawneh](#) from HFW’s Dubai office looked at enforcing commercial pledges. This month, they focus on precautionary attachments.

Precautionary attachments in the UAE are generally governed by the UAE Civil Procedures Law (the CPL). They are a procedural measure by which a court or arbitral tribunal can issue an order to freeze the movable and immovable assets of an alleged debtor pending the resolution of a dispute. They are a quick and effective tool where there is concern that the alleged debtor may abscond or dissipate assets in order to avoid a potential judgment or arbitral award being enforced against him.

Precautionary attachments can be imposed on various assets, including real property (broadly, land assets), vehicles and vessels. In practice, the most common targets are real property and bank accounts. Certain assets are excluded from precautionary attachments, including public property owned by the state of the UAE or any of the emirates.

Article 252 of the CPL sets out the general principles governing precautionary attachment in the UAE. It identifies the circumstances in which precautionary attachment is available, including where:

1. There is a risk that the creditor’s right may be lost, including if:
  - a. The debtor has no stable

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residence in the UAE.

- b. The creditor is concerned or believes that there is a risk that the debtor will dissipate assets.
  - c. There is a risk over the collateral of the debt.
2. The creditor holds an unconditional, valued and due debt document (for example a bounced cheque or a due promissory note).

Article 252 does not govern precautionary attachments imposed on vessels, or on movable assets relating to trademark infringements. These are governed by the UAE Maritime Law and the UAE Trademark Law respectively.

The UAE Courts will accept jurisdiction to hear any application for a precautionary attachment order to be executed in the UAE, even where they do not have jurisdiction to hear the substantive claim. However, in several judgments, UAE Courts have ruled that they will not accept jurisdiction where the agreement governing the relationship between the parties contains an arbitration clause which expressly states that the competent arbitral tribunal has jurisdiction in respect of precautionary attachments.

In order to obtain a precautionary attachment, an application with supporting evidence must be filed before the urgent matters judge or the judge hearing the substantive claim. The applicant must also identify assets to be attached, for example bank account details.

The applicant may be required to provide an indemnity and undertaking, to indemnify against any loss incurred by the debtor as a consequence of the precautionary attachment. This is to counter-secure any subsequent claim that the attachment was “*unfounded, unjustified or scandalous*”.

Applications are heard without notice and the judge will usually issue an order on the same day, without providing reasons. Objection to a precautionary attachment order can be made by filing a grievance at the Court of First Instance and subsequently on appeal to the Court of Appeal and thereafter to the Court of Cassation.

If a precautionary attachment is granted, the applicant must commence the substantive proceedings for confirmation of his right in the underlying claim and the validity of the attachment before the competent court within eight days of enforcing the attachment. Otherwise, the attachment will automatically be revoked under Article 255 of the CPL.

If the contract governing the relationship between the parties contains an arbitration clause, the UAE Courts will normally uphold this clause and stay the substantive claim in favour of the arbitration if asked to do so. In those circumstances, the substantive claim before the UAE Courts would be for the recognition and enforcement of the arbitral award once it is issued.

Precautionary attachments should always be considered by a party bringing a claim in the UAE or seeking to enforce a judgment or award on assets located in the

UAE. It is possible to obtain a precautionary attachment within one day of making an application and this makes it a very effective way to avoid the risk of an opponent absconding or dissipating their assets pending a final judgment or arbitral award.

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### The race to issue proceedings - the importance of timing and method of transmission

The jurisdiction in which a claim is heard can have a significant impact on the outcome and should always be considered before proceedings are issued. The timely and effective transmission of judicial documents can significantly affect whether a party achieves its choice of jurisdiction. That was the situation in *Arbuthnot Latham & Co Limited v (1) M3 Marine Limited (2) Alan Lubin* (25 April 2013).

The case arose in the context of a claim for debt and/or damages arising from the financing of a luxury motor yacht. The relevant contracts contained non-exclusive jurisdiction agreements.

The Claimant arrested the Defendants’ yacht in France to obtain security for its claims. Whilst the yacht was still under arrest, the Defendants issued a writ before the French Court seeking declarations of non-liability. The French writ was sent





to the FPS by fax and post on 24 October 2012. The documents were received by fax that same day and by post on 30 October 2012.

The FPS initially issued an Acknowledgment of Receipt of the Writ on 1 November 2012, stating that it had been received on 30 October 2012. A revised Acknowledgement was issued on 31 January 2013, stating that the date of receipt was 24 October 2012.

This timing was important because under Article 30 of EC Regulation 44/2001 (the Judgments Regulation), an English court is seised when the document instituting proceedings is lodged with the court; a French court, on the other hand, is deemed seised only when the document to be served, before being lodged with the court, is “received by the authority responsible for service”. In England, the authority responsible for service is the FPS.

The Claimant issued proceedings in England on 26 October 2012. The Defendants argued that they should be stayed pursuant to the Judgments Regulation, on the ground that the French Court was first seised.

The English Court was asked to decide whether the French Court was seised when the FPS received the Writ by fax on 24 October 2012, or

only when the FPS received the Writ by post, on 30 October 2012.

As the concept of service in the Judgments Regulation should be consistent with the concept of service in EC Regulation 1393/2007 (the Service Regulation), the English Court considered the provisions of the Service Regulation. Its recitals state that documents are to be transmitted “directly and by rapid means”. The relevant Manual published by the European Commission stipulates that in the case of the FPS, “documents will be transmitted by fax and post”.

In granting a stay of the English proceedings, the Court held there was no good reason for requiring transmission by both fax and post before considering that the foreign court was seised. If that had been the intention, it should have been clearly expressed in the Manual. A requirement for a double receipt may undermine certainty, whereas allowing receipt by fax promotes the Service Regulation’s aims of speed and efficiency. It was also persuasive that service of a claim form by fax is permitted in England and the best evidence of the view and practice of the FPS was in the revised Acknowledgement of Receipt. For those reasons, the English Court decided that the French Court was first seised.

This decision is a reminder of the impact the timely transmission of judicial documents can have on the race to issue proceedings. It is also useful to have clarification of the English Court’s interpretation of “by fax and post”, so as to ensure effective transmission.

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