THE HIGH COURT

[2014 No. 1 FTE]

IN THE MATTER OF THE FOREIGN TRIBUNALS EVIDENCE ACT, 1856 AND IN THE MATTER OF A CIVIL PROCEEDING NOW PENDING FOR THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES ENTITLED AS FOLLOWS

CASE NUMBER: BC 471775

BETWEEN:

NEAL R CUTLER, MD

PLAINTIFF

AND

AZUR PHARMA INTERNATIONAL III LIMITED, AZUR PHARMA LIMITED, AVANIR PHARMACEUTICALS, INC.

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered the 11th day of June, 2015.

Introduction

1. This matter comes before the court by way of notice of motion brought by KPMG Ireland ("KPMG") seeking the following reliefs:

> 1. An order pursuant to s. 1 of the Foreign Tribunals Evidence Act 1856 and Order 39 of the Rules of the Superior Courts setting aside the order of this court (Hedigan J.) of the 21st of July, 2014 giving effect to a request for international judicial assistance made by way of letters rogatory to this court ("the Request") by the Superior Court of the State of California for the County of Los Angeles on the 11th of July, 2014 directing a representative of KPMG to be examined upon oath on the matters specified in the Request and to produce the documents specified therein;
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> 2. Alternatively an order varying the said order of the 11th of July, 2014;
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> 3. Further or alternatively an order directing the plaintiff to provide security for costs due to KPMG arising out of compliance with the request.

Background Facts

2. The plaintiff ("Dr. Cutler") is a psychiatrist. In 2000, he founded a corporation called Alamo Pharmaceuticals LLC. Through the medium of this corporation, Dr. Cutler devised and developed a drug called FazaClo for the treatment of schizophrenia. In 2006, Dr. Cutler entered into a unit purchase agreement ("UPA") for the sale of the FazaClo brand to the third defendant ("Avanir"). The consideration for this sale was a purchase price that would comprise deferred payments contingent upon FazaClo's future net revenues. Dr. Cutler alleges that under the UPA, his right to be paid these Contingent Payments, worth up to US $35.45 million, arose upon the net revenues reaching certain thresholds.

3. Avanir subsequently sold the FazaClo business to the first defendant ("Azur III") and Azur III thereby assumed the obligations to Dr. Cutler under the UPA. The second defendant ("Azur Pharma") is an Irish company and the corporate parent of Azur III (collectively "Azur").

4. In 2011, Dr. Cutler commenced the above entitled proceedings in the California court whereby he seeks damages. He alleges that Azur deliberately suppressed and understated, thereby reducing, the net product revenues from FazaClo, thus depriving him of the Contingent Payments to which he says he was entitled. He alleges that Azur brought this about by employing at least three improper marketing and pricing practices. First, Azur wrongly excluded proceeds from certain dosages of FazaClo from net revenues. Secondly, Azur offered unreasonable discounts on FazaClo as a means of suppressing FazaClo's net revenues to avoid reaching milestones that would trigger Contingent Payments. Thirdly, Azur established and maintained an inflated reserve for FazaClo product returns as another means of suppressing the net revenues. All of these allegations are denied by Azur. One of the principle planks of Azur's defence to these proceedings is that these practices, and in particular those relating to the returns reserve, were approved by its auditors, KPMG.

The Letters of Request

5. Counsel for Dr. Cutler in the US proceedings applied to the California court to issue letters rogatory to this court in July, 2014. The application was not opposed by counsel for Azur who was present at the hearings. The letters of request were dated the 11th of July, 2014 and identified the witness therein as "KPMG Ireland". The factual background is set out and then the substantive request in the following terms:

> **"Subject matter of examination and items to be produced.**
> Dr. Cutler seeks to examine the above mentioned witness concerning all matters relating to the audit or review of Azur's financial statements relating to FazaClo, and all advice or consultation regarding FazaClo revenue recognition and reserves against revenues for FazaClo, in the period 2007 to 2013, including but not limited to the following topics:
>
> 1. What audits and other services did you provide with respect to any financial reporting relating, in whole or in part, to FazaClo?

2. What procedures and methodologies did you use in performing those audits and other services?

3. What potential issues or irregularities did you suspect, find, identify, raise, or discuss in connection with those audits and other services?

4. What communication did you have relating to the product returns reserves for FazaClo?

5. What communication did you have regarding the formulations or dosages of FazaClo that should be included in the contingent payment calculation?

6. What communications did you have regarding Dr. Cutler?

7. What communications or projections did you have regarding any and all contingent payments earnable by Dr. Cutler based on the net revenues of FazaClo?

Dr. Cutler also seeks the production of documents in KPMG Ireland's possession, custody, or control that relate to the above topics, including but not limited to the following specific categories of documents:

1. All financial statements relating to FazaClo, in whole or in part.

2. All audit letters relating to FazaClo, in whole or in part.

3. All work papers from audits and other services relating to FazaClo, in whole or in part.

4. All documents that relate to any schedule of adjustments past related to FazaClo.

5. All documents that relate to any management letter relating to FazaClo.

6. All documents that relate to any audit, review, or examination of any reserve for product returns for FazaClo, in whole or in part.

7. All documents that relate to any evaluation, analysis, or consideration of any adjustment of any reserve for product returns for FazaClo.

8. All documents that relate to any audit, review, or examination of any accrual for product returns for FazaClo.

9. All documents that relate to Dr. Cutler.

10. All documents that relate to the contingent payments.

11. All documents that relate to the contingent payment quarterly reports."

6. On the 21st of July, 2014, the plaintiff applied to this court (Hedigan J.) for an order giving effect to the Request. Although the order is stated to have been made *ex parte*, counsel for KPMG attended at the hearing and although some submissions were made, it would appear that the court indicated that KPMG could apply to vary or set aside the order if they wished.

7. By the terms of the order, the court directed that a representative of KPMG should attend before an examiner, Eileen Barrington senior counsel, on a date to be fixed for the purpose of being examined on oath regarding the matters set forth in the Request. The witness was further ordered to produce the documents set out in the Request at such examination. Both parties were to be entitled to examine the witness. Although the order provided that the examination was to be governed by the law of California, it is agreed that this provision appears to have made its way into the order in error in that it was not sought by the plaintiff. The plaintiff now accepts that any such witness examination should properly be governed by Irish law.

The Foreign Tribunals Evidence Act 1856

8. Section 1 of the above Act provides as follows:

"I. Where, upon an Application for this Purpose, it is made to appear to any Court or Judge having Authority under this Act that any Court or Tribunal of competent Jurisdiction in a Foreign Country, before which any Civil or Commercial Matter is pending, is desirous of obtaining the Testimony in relation to such Matter of any Witness or Witnesses within the Jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the Examination upon Oath, upon Interrogatories or otherwise, before any Person or Persons named in such Order, of such Witness or Witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same Order, or for such Court or Judge or any other Judge having Authority under this Act, by any subsequent Order, to command the Attendance of any Person to be named in such Order, for the Purpose of being examined, or the Production of any Writings or other Documents to be mentioned in such Order, and to give all such Directions as to the Time, Place, and Manner of such Examination, and all other Matters connected therewith, as may appear reasonable and just; and any such Order may be enforced in like Manner as an Order made by such Court or Judge in a Cause depending in such Court or before such Judge […]

IV. Provided always, That every Person whose Attendance shall be so required shall be entitled to the like Conduct Money and Payment for Expenses and Loss of Time as upon Attendance at a Trial.

V. Provided also, That every Person examined under any Order made under this Act shall have the like Right to refuse to answer Questions tending to criminate himself, and other Questions, which a Witness in any Cause pending in the Court by which or by a Judge whereof or before the Judge by whom the Order for Examination was made would be entitled to; and that no Person shall be compelled to produce under any such Order as aforesaid any Writing or other Document that he would not be compellable to produce at a Trial of such a Cause."

The Rules of the Superior Courts

9. Part V of Order 39 deals with obtaining evidence for foreign tribunals and insofar as relevant to these proceedings, provides as follows:

> "39. Where under the Foreign Tribunals Evidence Act, 1856, or the Extradition Act, 1870, section 24, any civil or commercial matter, or any criminal matter, is pending before a court or tribunal of a foreign country, and it is made to appear to the Court, by *commission rogatoire*, or letter of request or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction, the Court may, on the *ex parte* application of any person shown to be duly authorised to make the application on behalf of such foreign court or tribunal, and on production of the *commission rogatoire*, or letter of request, or other evidence pursuant to the Foreign Tribunals Evidence Act, 1856, section 2, or such other evidence as the Court may require, make such order or orders as may be necessary to give effect to the intention of the Acts above mentioned in conformity with the Foreign Tribunals Evidence Act, 1856, section 1.
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> 40. An order made under rule 39 shall be in the Form No. 1 in Appendix D, Part III.
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> 41. The examination may be ordered to be taken before any fit and proper person nominated by the person applying, or before one of the officers of the Court, or such other qualified person, as to the Court may seem fit […]
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> 43. An order made under rule 39 may direct the said examination to be taken in such manner as may be requested by the *commission rogatoire* or letter of request from the foreign court or tribunal, or therein signified to be in accordance with the practice or requirements of such court or tribunal, or which may, for the same reason, be requested by the applicant for such order. In the absence of any such special directions being given in the order for examination, the same shall be taken in the manner prescribed in Part II of this Order."

Submissions on behalf of KPMG

10. Counsel for KPMG, Mr. Fanning BL, said that the court must approach the matter *de novo* without regard to the fact that the plaintiff had been granted an order *ex parte* and relied on *Cornec v. Morrice* [2012] 1 I.R. 804 in that regard. He said that the wording of the statute and Order 39 made clear that the court retained a discretion in relation to the matter as recognised in the judgment of Denham J. (as she then was) in *Novell Inc. v. MCB Enterprises* [2001] 1 I.R. 608, although he accepted that the same judgment was authority for the proposition that the court should be favourably disposed towards giving effect to the request where possible.

11. One of the primary grounds relied upon by KPMG in support of its application to set aside the *ex parte* order is that the request is in reality a request for discovery of documents. If the court accepted that proposition, the order must be set aside and he referred to *Sabretech v. Shannon Aerospace* [1999] 2 I.R. 468 where an order was refused on the basis that it was in substance and effect a request for discovery of documents. This was evident when one analysed the Request because it showed that it was not aimed at seeking the production of specific documents but rather wide categories of documents with a view to establishing whether or not they existed. The language of the Request is typical of a request for discovery in this jurisdiction. Of the seven topics listed in the request upon which oral testimony is sought, five are simply directed towards identifying documents and these issues would be answered by the documents themselves without oral testimony. Therefore, such testimony serves no useful purpose.

12. The conclusion that document discovery is what is in reality being sought is further supported by the fact that Dr. Cutler is unable to identify any actual witness by name whose testimony he requires. Furthermore Dr. Cutler's own lawyers referred to the request as being one for "discovery". The terms of the request itself are entirely consistent with a request for discovery of documents as it refers to the "custodian of records." Thus, Mr. Fanning submitted, if the court reaches the conclusion that the reality of the request is that it is a request for discovery of documents, it must be refused on that ground alone.

13. If the court however is not of that view, he submits that there are discretionary matters that should compel the court to exercise its discretion against giving effect to the request. He submitted that the categories of documents sought are excessively broad and offended the requirement in the Act to identify precisely the documents sought. He refers to the decision of the Supreme Court in that regard in *Ernst & Young v. King* (Unreported, Supreme Court, Keane C.J., 28th November, 2003), which appears to follow *Rio Tinto Zinc v. Westinghouse Electric Corporation* [1978] 1 All E.R. 434. He said that the plaintiff's lawyers themselves appeared to accept that the breadth of documents sought is excessive. It was submitted that no meaningful attempt had been made by Dr. Cutler's lawyers to limit the categories of documents until six months after obtaining an *ex parte* order which might have been avoided. In a similar vein, it was contended that the request is oppressive and disproportionate and reliance was placed on *Novell* in that regard. Oppression was said to arise in circumstances where KPMG could be required to produce thousands of documents which would take several months to review and potentially require a significant number of witnesses to attend before the examiner to deal with these documents.

14. It was further argued that internal KPMG documentation, as sought in the request, could not be relevant to the foreign proceedings because Azur's defence depended upon reliance on the KPMG documents. Thus, if they were purely internal and had never been furnished to Azur, they could not be material to the case.

15. It was further argued that the Request was both premature and unnecessary in circumstances where most of the documents sought must necessarily be in the possession of Azur and the discovery process had not yet been completed in the American proceedings. By analogy, the procedure in third party discovery applications was relied upon whereby the court would not order such discovery where it could be obtained from a party to the proceedings – *Chambers v. Times Newspapers* [1999] 2 I.R. 424.

16. It was finally argued that Dr. Cutler had failed to disclose material information in the *ex parte* application and that there was a lack of candour which should influence the court against giving effect to the Request. Reference was made to *Tate Access Floors Inc. v. Boswell* [1990] 3 All E.R. 303, *Bambrick v. Cobley* [2005] IEHC 43 and *O'Flynn v. Carbon Finance* [2014] IEHC 458. The non-disclosure complained of is that many of the documents were in the possession of the defendants who were at that stage in the process of completing extensive discovery and in fact had already discovered some KPMG documents.

Submissions on behalf of Dr. Cutler

17. Mr. Jeffers BL on behalf of Dr. Cutler contended that the testimony of KPMG together with the documents referred to in the request are essential to enable Dr. Cutler to test one of the central planks of the Azur defence. This is the only opportunity that he will have of doing so and the interests of justice require that this opportunity should not be denied him. As is evident from *Novell*, the courts will not refuse international judicial assistance if at all possible. KPMG's evidence is of crucial importance in relation particularly to the returns reserve amounts which Azur claim were audited and signed off by KPMG.

18. In the three Irish cases where *ex parte* orders were set aside, namely, *Novell, Cornec* and *Sabretech,* there were very particular circumstances in each for the refusal to give effect to the letters rogatory. Thus, in *Novell,* the witnesses sought to be examined for the purposes of US proceedings were in fact defendants in Irish proceedings concerning the same subject matter and it would clearly have been oppressive to require them to submit to examination when that very evidence could be used against them in the Irish proceedings.

19. In *Sabretech*, the court was satisfied that the witness whose testimony was sought was being requested solely for the purposes of producing documents and he had in fact no evidence of relevance to give. In *Cornec*, the request related to the evidence of two witnesses, a Ms. Tallant and a Mr. Garde. Ms. Tallant was a journalist who had interviewed Mr. Garde in relation to the subject matter of the proceedings and published a newspaper article in an Irish newspaper. Hogan J. held that the evidence that these witnesses could give would be clearly covered by journalistic privilege under Irish law and accordingly in the exercise of his discretion declined to give effect to the letters rogatory. It was submitted that none of the very particular considerations that arose in those cases were relevant here.

20. Mr. Jeffers disputed that the application was unnecessary and premature simply because the American discovery process was not completed given that it had taken significant time to get the matter on for hearing before the Irish court. He said that the evidence was clearly relevant and central for the reasons already explained. Because KPMG's oral testimony was critical, the fact that any of the documents might be produced in the American discovery process is irrelevant. In any event, clearly internal KPMG documents will not be produced in the American proceedings and such documents will be relevant to KPMG's testimony regarding signing off on the Azur accounting procedures which were alleged to have deprived the plaintiff of Contingent Payments.

21. He disputed that the request was over broad and vague or oppressive and disproportionate on the basis that documents sought related to one product of one client of KPMG. KPMG had not identified which elements of the request are oppressive in relation to documents. On the point of failing to identify a specific witness, counsel contended that this was perfectly understandable in circumstances where Dr. Cutler had no means of knowledge as to who in KPMG was best placed to deal with the issues arising in the request. Although Dr. Cutler's lawyers had identified a number of individuals in KPMG who appeared to have dealt with Azur in relation to these issues, they had no way of knowing which, if any or all, of these witnesses were actually in a position to give the relevant evidence.

Analysis

22. It seems to me that the starting point in an application such as this is that the court will use its best endeavours to give effect to a request for assistance from the courts of another jurisdiction. Thus, as stated by Denham J. (as she then was) in *Novell* (at p. 623):

> "Under the principle of comity, the courts of this jurisdiction would always be favourably disposed towards complying with such a letter of request from a court of another jurisdiction. The courts should be slow to refuse such an order. There is nevertheless a settled jurisprudence as to the circumstances in which it would be appropriate for a court to exercise its discretion against making the order."

23. Similar views were expressed by Hogan J. in *Cornec*, where he said (at para. 19):

> "The power to grant international assistance via the letters rogatory is, of course, a discretionary one. Naturally, in the interests of the international judicial comity, this court will endeavour to give assistance where at all possible to requests of courts from foreign states and, as Denham J. put it in *Novell*, it should "be slow to refuse such an order". Nevertheless, before any such order could properly be granted, it would be necessary to establish that (i) the evidence proposed to be taken is relevant to the foreign proceedings; (ii) the application is not oppressive; (iii) the grant of the request would not override any established privilege or protection available to the prospective witness; and (iv) the evidence so taken on commission is itself admissible under the law of the requesting state."

24. Whilst therefore it is clear that the enforcement of letters rogatory remains a matter of discretion, the default position is that they will be enforced absent some factor or factors which could convince the court to exercise its discretion otherwise. One such factor would of course be the well-settled jurisprudence where the request is found to be in substance and effect a request for discovery of documents. Thus, in *Sabretech*, McCracken J. considered an established line of English authorities dealing with this issue including *Eccles and Company v. Louisville & Nashville Railroad Company* [1912] 1 K.B. 135 and *Radio Corporation of America v. Rauland Corporation (No. 2)* [1956] 1 Q.B. 618 and observed (at p. 471):

> "Accordingly, it appears to me that what I have to determine is whether the request in this case is in reality merely a request for discovery of documents, or whether it is a request that [the relevant witness] produces the documents as ancillary to his oral testimony."

25. He continued (at p. 472):

> "In particular, I am quite satisfied that I have no power to order discovery of documents under [s. 1 of the 1856 Act], nor have I any power to order the taking of evidence which in reality solely amounts to discovery of documents. [The witness] cannot give any evidence directly relating to the work carried out by the respondent on the Valujet aircraft concerned, as he took no part in such work. All that he can do is produce documents from the records of the respondent. This would seem to me to come clearly within the class of evidence which Devlin J. in *Radio Corporation of America v. Rauland Corporation (No. 2)* [1956] 1 Q.B. 618 excluded from the Act, namely 'examining witnesses in order to ascertain what certain documents contained, or in order to ask them questions as to matters arising out of or relating to the documents.'"

26. It would appear that the decisive factor in *Sabretech* was that the letters rogatory were in substance and effect clearly no more than a request for discovery of documents. The witness in question was identified purely as the custodian of records and the court concluded that he could have no relevant evidence to give by way of oral testimony other than simply producing documents.

27. Whilst in the present case it is true to say that at least some of the request for documents has the appearance of a request for discovery, I do not think it could be said that it is clear that the KPMG witness or witnesses can have no relevant evidence to give. It is not in dispute between the parties in the US proceedings that KPMG were Azur's auditors and as such approved critical elements of Azur's accounting procedures including the highly contentious issue of the returns reserves. KPMG undoubtedly have relevant evidence to give in relation to that matter. In that regard, I cannot ignore the fact that the California court has determined in an application unopposed by the defendants that this evidence is relevant and required in the interests of justice.

28. I must also bear in mind that the court has a jurisdiction to limit or "prune" the requirement for the production of documents which is also relevant to the complaint of oppression.

29. Thus, in *Ernst & Young*, the Supreme Court had to consider a request for assistance under the Foreign Tribunal Evidence Act 1856 in circumstances somewhat analogous to the instant case. That matter involved a class action in California in which the plaintiffs claimed that they had suffered losses as a result of the manner in which the company's accounts had been presented leading to a significant effect on the value of the plaintiff's shareholdings. Ernst & Young were the auditors or accountants of the firm and originally defendants in the US proceedings but they were released from the action on terms requiring them to produce certain documents in their possession.

30. Letters rogatory were issued by the California court seeking to have certain members of Ernst & Young examined on oath and produce a wide range of documents. In the course of delivering the judgment of the court, Keane C.J. said (at pp. 2-3):

> "The plaintiffs then brought their application under the Foreign Tribunals Evidence Act, in which they sought to have certain of the defendants examined on oath and required to produce what was, clearly on the face of the order sought and obtained in the United States court, a relatively wide range of documents which are not actually specified with particularity and really relate to wide categories of documents. That was what they sought and the applications were made and properly made in these cases *ex parte*, not on notice to the persons concerned, and it having been granted in that form by Mr. Justice Lavan, the appellants brought a motion before the High Court seeking to have the order either discharged or varied.
>
> In the course of the hearing before Mr. Justice Kearns, it was argued on behalf of the appellants that the order was far too wide ranging in its terms and should be discharged. Mr. Justice Kearns indicated that the matter could possibly be dealt with, with the co-operation of the parties, by a significantly less wide ranging order being sought and by some of the witnesses not indeed being required at all. The parties agreed to consider that approach suggest by him and that led to the matter being left overnight and the following day the learned trial judge was informed that the parties had reached agreement excluding a number of documents from the documents being sought and a number of witnesses also being relieved of the necessity to attend. They left it to the court then to determine the remaining matters of which there were only three that the court then had to rule on."

31. The Chief Justice continued (at p. 4):

> "At an earlier stage, Mr. Justice Kearns, of course, had the benefit of legal argument from counsel as to the order that should be made on foot of the letters of request. In the course of that argument he was referred to a decision of the House of Lords in *Realty Interest Inc. Corporation & Ors -v- Westinghouse Electric Corporation* [1978] All E.R. 434 It was clear from the speeches in that case that the House of Lords in operating the equivalent, perhaps the same, legislation in England, had adopted an approach under which, although satisfied that the letters of request in the form that it came to the English court was too wide ranging they would adopt what was called a pruning exercise and simply cut it down to the number of documents which were appropriate. The alternative was to send it back, of course, to the United States court (as it also was in that case) thereby obviously putting the parties in the foreign litigation to additional extra expense and cost because that would be involving the incurring of additional costs. So, to avoid that, the House of Lords adopted that approach and that was the approach that Mr. Justice Kearns adopted."

32. It seems to me that a similar approach can and should be taken in this case. There has already been some discussion between the parties, albeit unproductive, regarding limiting the scope of the documents required to be produced. KPMG's complaint of oppression directly relates to the quantity of documents potentially required to be produced and the time and effort involved in doing so. It seems to me that those concerns can be addressed by the approach suggested and also by the fact that they will of course be entitled to recoup any expense incurred as a result of compliance with the request.

33. On the issue of prematurity of the application, that has been somewhat overtaken by events given the inevitable length of time involved in getting KPMG's application to set aside on for hearing.

34. KPMG argued that there was a failure to disclose material information at the *ex parte* stage, which, on the authorities, should move the court to exercise its discretion against giving effect to the request. The non-disclosure complained of is that the affidavit grounding the *ex parte* application did not refer to the discovery process in the US proceedings. Whilst that is undoubtedly true, I do not think it is a matter that is sufficiently serious to warrant a refusal of the request. There is no suggestion that the omission was in some way deliberate or calculated to mislead, particularly in circumstances where the court would be likely to assume in any event that discovery would be part and parcel of the US proceedings. There is also the fact that no actual advantage was derived from the *ex parte* order and thus no prejudice was suffered by KPMG, unlike the situation that might arise for example if an injunction was obtained *ex parte*. As Clarke J. remarked in *Bambrick* (at p. 9), the application of the principle of disclosure should not be carried to extreme lengths.

35. Finally, as regards the contention that internal KPMG documentation cannot be relevant to the US proceedings, whilst of course Azur cannot have relied on documents they never saw, nonetheless, the internal documents could potentially be relevant to the methodology adopted by KPMG in auditing Azur's accounts and thus to the appropriateness of matters such as the returns reserve policy.

36. Another matter that arose in argument before the court was the issue of whether or not Dr. Cutler intended to allege in the course of examining any KPMG witness that there had been shortcomings or indeed negligence in the manner in which they had audited Azur's accounts and whether that might give rise to the joinder of KPMG as a defendant in the US proceedings. Clearly that would be a matter of significant concern in the context of oppression. In *First American Corporation v. Zeyad* [1999] 1 W.L.R. 1154, the plaintiff alleged in proceedings in the US that the defendants had illegally conspired to obtain control of the plaintiff company by fraudulent means. A British accountancy firm, Price Waterhouse, had audited the accounts of companies within the control of the defendants. The US court issued letters rogatory seeking testimony from Price Waterhouse witnesses. The English Court of Appeal refused to give effect to the letters rogatory on the grounds of oppression. Delivering the court's judgment, Sir Richard Scott V.C. said (at 1168):

> "Price Waterhouse deny these allegations [of fraud]. First American have given no undertaking that they will not join Price Waterhouse in a civil action, whether the existing action or a new action, in an attempt to recover damages for Price Waterhouse's alleged knowing complicity in the fraud. First American's lawyers plainly believe that they already have material that justifies them in making public allegations to that effect. It is, it seems to me, inherently oppressive to hold

over the head of two witnesses serious allegations of complicity in fraud and the real possibility of being joined as defendants in a civil action based on that alleged complicity, while at the same time requesting an opportunity for a wide examination of the two witnesses on the very topics that would be relevant in an action against them."

37. Similar considerations arose in *Novell* which led to the refusal of the request.

38. Although Mr. Jeffers indicated that it was not Dr. Cutler's intention to either join KPMG in the existing proceedings or institute new proceedings against them, nonetheless it seems to me appropriate that an undertaking should be required from the plaintiff in that regard as a condition to the enforcement of the Request.

39. In all the circumstances therefore, it seems to me that the four criteria identified by Hogan J. in *Cornec* as prerequisites to the giving effect of letters of request are met in this case subject to certain conditions which I will address.

Conclusion

40. Accordingly, I am satisfied that I should give effect to the Request in this case subject to the following variations and conditions:

1. It seems to me that it is both unnecessary and oppressive for KPMG to be required to produce documents which are in the possession of Azur and are the subject matter of the discovery order in the US proceedings. I will discuss with counsel the form of order to be made in this regard to avoid such duplication.

2. As pointed out by Keane C.J. in *Ernst & Young*, it would be quite unjust that KPMG should incur any expense as a result of compliance with the request nor should they be placed at any risk of non recoupment of such expense. Accordingly, as a condition of acceding to the letters of request, I will direct Dr. Cutler to furnish such security for costs as the parties agree or in default, as may be fixed by the court.

3. As a further condition of the order herein, Dr. Cutler will be required to give an undertaking that he will not join KPMG in any existing proceedings or institute any fresh proceedings against KPMG either in this jurisdiction or elsewhere relating to any matters which are the subject of the extant US proceedings.

41. I will further direct that KPMG shall not be required to submit to any examination, produce any documents or take any other steps to comply with this order until such time as these conditions are fulfilled.