THE HIGH COURT

[2017 No. 49 I.A.]

BETWEEN

U. DORI CONSTRUCTION LIMITED

INTENDED APPLICANT

AND

JAMES GREANEY

INTENDED RESPONDENT

AND IN THE MATTER OF TWO SETS OF CIVIL PROCEEDINGS NOW PENDING BEFORE THE TEL AVIV JAFFA DISTRICT COURT, ISRAEL, ENTITLED AS FOLLOWS:

(Civil Action 20431-09-13)

NETIVIM DAROM LTD

PLAINTIFF

AND

U. DORI CONSTRUCTION LTD.

DEFENDANT

(Civil Case 4890-05-14)

T. M. TAL-EDEM LTD

PLAINTIFF

AND

U. DORI CONSTRUCTION LTD.

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 7th day of July, 2017

1. In this case the respondent applies to set aside and/or vary an order made by Humphreys J. on the 15th of May, 2017 (the Order). The Order was made upon the *ex parte* application of the intended applicant U. Dori Construction Ltd. (the applicant) and directs that Mr. Greaney be examined under oath pursuant to the Foreign Tribunals Evidence Act 1856 (the FTE Act) and/or O. 38, r. 39 of the Rules of the Superior Courts and/or the inherent jurisdiction of the High Court. The *ex parte* application was grounded on the affidavit of Rahn Cohen Nissan sworn on the 11th of May, 2017 (the Nissan affidavit) and a booklet of exhibits attached thereto (referred to as the Nissan Book).

2. The order was made in respect of two sets of civil proceedings in Israel, between the applicant and two subcontractors, namely:-

(a) Netivim South Ltd. v. U. Dori Construction Ltd. (the Netivim proceedings); and

(b) T.M. Tal-Edem Ltd. v. U. Dori Construction Ltd. (the Tal-Edem proceedings).

3. Mr. Greaney is a director of G.T.S. Power Solutions Ltd. (G.T.S.) a subsidiary of Wood Group Gas Turbines Service Holdings Ltd. (Wood Group). The applicant and G.T.S./Wood are engaged in ongoing International Chamber of Commerce (ICC) Arbitration Proceedings (the "London Arbitration") between *inter alia* G.T.S./Wood and the applicant. Both the London Arbitration and the Israeli proceedings arrived out of the development of a major power plant in Israel known as the Dorad Project.

4. The evidentiary hearing in the London Arbitration will take place in London from the 17th to the 28th of July, 2017. At that hearing, the respondent who has already provided three witness statements totalling 216 pages and references approximately 248 documents, will provide testimony and will be G.T.S.'s primary witness.

5. Counsel for the applicant indicated that they require the respondent to give evidence in Ireland in connection with the Israeli proceedings, prior to the London Arbitration hearing. Counsel on behalf of the respondent (Declan McGrath S.C.) states that "requiring the respondent to give evidence in Ireland in connection with the Israeli proceedings immediately prior to the London Arbitration would be oppressive and impractical and would in fact entitle the applicant to a "dry run" cross-examination of the respondent in advance of the hearing".

6. The respondent's application to set aside the order is grounded on the affidavit of Michael Byrne sworn on the 22nd of May, 2017 (the Byrne affidavit), the verifying affidavit was sworn by Ankita Ritwik and Helen Raziela on the 24th of May, 2017, the supplemental affidavit of Michael Byrne was sworn on the 15th of June, 2017, the affidavit of Ankita Ritwik was sworn on the 16th of June, 2017 as well as the affidavit of James Greaney and the affidavit of Helen Raziela. I will summarise now the difficulties surrounding both the *ex parte* application and the subsequent order.

(1) The order was made without any letter rogatory or letter of request from the competent Israeli authority.

(2) The order is clearly oppressive in the light of the central role of the respondent in the imminent hearings in the London Arbitration, involving the applicant and the respondent/G.T.S.

(3) The order is silent as to the scope and subject matter of the examinations of the respondent, and the procedural and evidentiary roles to be followed in the course of the examination of the respondent.

(4) The within proceedings were commenced against the respondent personally and inexplicitly a costs order was made against the respondent personally.

(5) Material matters were not disclosed to the court in the *ex parte* application.

The Legal Principles for the Application

7. Section 1 of the FTE Act provides as follows:-

> "(1) 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."

8. Part V of O. 39 of the Rules of the Superior Court in 1986 deals with the obtaining of evidence for Foreign Tribunals and r. 39 invoked by the applicant herein provides as follows:-

> "*V. Obtaining evidence for foreign tribunals*
>
> 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."

9. The jurisdiction to set aside an *ex parte* order is contained in O. 52, r. 3 which provides that:-

> "In any case the court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise and subject to such undertaking, if any, as the court may think just; and any party affected by such order may move to set it aside."

10. Counsel on behalf of the respondent cited a number of authorities, the most recent of which was *Cutler v. Azur Pharma International* [2015] 1 I.R. 167. In that case Noonan J. summarised the applicable principles as follows:-

> "(a) The starting point in such an application is that the court will use its best endeavours to give effect to a request for assistance from the *courts of another jurisdiction* (this Court's emphasis).
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> (b) While 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.
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> (c) Before any such order could properly be granted, it would be necessary to establish that:
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> (i) the evidence proposed to be taken is relevant to the foreign proceedings;
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> (ii) the application is not oppressive;
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> (iii) the grant of the request would not override any established privilege or protection available to the prospective witness; and
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> (iv) the evidence so taken on commission is itself admissible under the law of the requesting state."

11. Counsel for the respondent stated that in common with all applications for *ex parte* relief, there is an obligation to make full disclosure and to act within the upmost good faith, albeit that the application of the principle of disclosure should not be carried to extreme lengths, citing *Bambrick v. Cobley* [2006] 1 I.L.R.M. 81 (Clarke J.).

12. Noonan J. in *Cutler v. Azur Pharma International* [2015] 1 I.R. 167 summarised the issue of oppression, stating that to meet this concern, the applicant may be required to give an undertaking that he will not join the examinee in any existing proceedings or institute any fresh proceedings against the examinee, either in Ireland or elsewhere relating to any matters which are the subject of the extant foreign proceedings. He also stated that it would be quite unjust that the examinee 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 expenses. Accordingly, as a condition of acceding to the terms of request, the court may order the applicant to furnish such security for costs as the parties agree or in default, same may be fixed by the court.

13. Counsel for the respondent stated that there was no letter of request or letters rogatory. Counsel on behalf of the respondent said that the applicant based its application for the order on a submission that the Israeli Court was generally "desirous of obtaining the testimony" of Mr. Greaney as that phase appears in s. 1 of the FTE Act. The applicant cites the following:-

> "(a) in the Netivim proceedings, a District Court order dated the 18th of March, 2017 granted the applicant's motion to compel Mr. Greaney to give evidence pursuant to The Hague Convention on the taking of evidence abroad in civil or commercial matters; and

(b) in the Tal-Edem proceedings, a ruling dated the 8th of November, 2016 granted the applicant's motion to summons Mr. Greaney. A motion dated the 1st of December, 2016 [was issued] seeking a witness summons under the Israeli legal assistance law."

In the Nissan affidavit, the applicant states that it asked the Israeli Courts for a letter rogatory, but that both judges indicated that this was not necessary.

14. The respondent maintains that there is procedure in Israel for the making of requests for the taking of evidence abroad. The 1998 International Legal Assistance Law provides for the mechanism for the taking of evidence abroad. Chapter 4 deals with requests for legal assistance on behalf of the State of Israel. It identifies the Attorney General or his delegate (the International Department of the Administration of Courts), as the authority to submit requests for legal assistance. It then provides that the authority may submit a request to another State that it take evidence, if the court certifies that the evidence is required for legal proceedings in Israel.

15. This procedure was notified to the applicant on the 10th of November, 2016 in the Netivim proceedings. However, the documentation notifying the applicant of the procedure for obtaining such a letter of request does not appear to have been brought to the attention of the High Court.

16. Counsel for the respondent stated that the applicant had not followed this procedure but relies instead of a series of orders made by the Israeli Court which go only part of the way towards meeting the proofs necessary in an application under the FTE Act. The failure to proceed by way of formal letter of request/letter rogatory from the proper Israeli authority is a fundamental error and means that the order should never have been made.

17. He also said that it is the almost universal practice for such letter to identify and delineate the subject matter of the examination and/or the questions for the examinee, the documents to be inspected and the evidentiary and procedural rules to be followed. The absence of such a letter in the present case has led to a host of onward ambiguities and practical difficulties with the order. The order is not limited to any particular questions/subject matter and does not identify the evidentiary/procedural rules to be followed. The applicant would be essentially "at large" in its examination of Mr. Greaney. Counsel for the respondent then set out a number of arguments:

Oppression

18. Counsel for the respondent said that it is well established that the court, when exercising its discretion under the FTE Act must take into account whether an order sought in favour of one party would be oppressive of another party in the same or related proceedings, and he quoted from Denham J. in the Supreme Court in *Novell Inc. v. M.C.B. Enterprises* [2001] 1 I.R. 608. She said:-

"There are essentially two matters which the court has to decide. The first is whether in all the circumstances the proposed examination of the respondents at this stage would be oppressive. If the court were of the view that the High Court order would not be oppressive, or that a more limited order to be worked out by this Court would not be oppressive, the next question which would have to be considered is whether the purpose of the proposed examination is essentially for discovery of documents in the Irish sense rather than for the purposes of testimony whether on an application for summary judgment under the Utah procedures or a full contested trial in Utah."

19. Counsel submitted that the terms of the order amount to an oppression of the rights of the respondent and G.T.S. in the related proceedings, namely the London Arbitration. The respondent is G.T.S.'s key witness in the London Arbitration wherein the claims exceed US$80 million. Under the terms of the order, the respondent will be required to suspend his preparation for giving evidence in the London Arbitration, and prepare for a whole-sale untrammelled examination in Ireland, on issues which arise both in the London Arbitration and also in the Israeli Court proceedings, with practically no notice, let alone any reasonable time to prepare. More fundamentally the order would effectively permit cross-examination of the respondent in advance of the hearings in the London arbitration scheduled to take place from the 17th to 28th of July. It would circumvent the normal entitlement of a party (G.T.S.) to elect as to whether it calls the respondent as a witness. The information gleaned would or could be extremely useful to the applicant in the London Arbitration. He also submitted that the applicant had not demonstrated that it was necessary for the examination of the respondent to take place prior to the hearing of the London Arbitration.

Breadth and Ambiguity of the Order

20. Under this heading he cited:-

(a) the scope and subject matter of the proposed examination;

(b) legal representation – the order does not indicate whether the respondent may have his own legal representation or whether the cost of same will be borne by the applicant;

(c) attendance of other parties - the order is silent on this;

(d) evidential rule - the order is silent on this;

(e) procedures - the order fails to state whether the respondents evidence is to be recorded by way of stenography or videography or both;

(f) transmission of evidence - the order is silent as to how the respondents evidence is to be provided to the Israeli Courts.

21. Counsel for the respondent indicated that by letter dated the 24th of May, 2017 the applicant's solicitors proposed a radically "varied order" which attempted to retrospectively assume (but not all), of the foregoing deficiencies in the original order.

Commencement of Proceedings and Costs Order

22. The next heading is the commencement of proceedings and costs order against Mr. Greaney personally.

23. The order of Humphreys J. makes a substantive costs order against the respondent, who is not a party to the Israeli proceedings, and was not a party to the ex parte application before Humphreys J. on the 15th of May, 2017.

Non-Disclosure

24. Counsel for the respondents said that the applicant was under a duty to disclose all material facts, and to bring to the attention of the court matters which on an objective basis would have had the potential to influence the court's determination.

25. In *Bambrick v. Cobley* [2006] 1 I.L.R.M. 81 Clarke J. described the test of materiality as follows:-

> "The test by reference to which materiality should be judged is one whether objectively speaking the facts could reasonably be regarded as materiality to be construed in a reasonable and not an excessive manner."

He then applied those criteria to the facts of that case:-

> "Applying those criteria to the facts of this case, it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above, there is a very real possibility that the court would either have made no order or potentially required short service and considered an order only in respect of a significantly lesser sum had it been apprised of the full facts.
>
> While I am not prepared to hold on the evidence that the plaintiff deliberately mislead the court I am constrained to the view that as a solicitor the plaintiff, in particular, ought to have been aware to his duty to disclose all material facts and must be regarded as significantly culpable in failing to bring to the attention of the court matters which on any objective view would have had the potential to influence the courts determination."

26. Counsel for the respondent said the applicant had failed to disclose material matters relating to the background of the March order in the Netivim proceedings namely:-

> (a) The letter of request depended on the motion dated the 13th of October, 2016;
>
> (b) the views expressed by the Israeli Court in the Netivim proceedings in its decisions of the 26th of October, 2016 and the 8th of January, 2017 as to the doubtful relevance and necessity of Mr. Greaney's evidence;
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> (c) the notice dated the 10th of November, 2016 filed by the Office of the Legal Advisor outlining the proper procedure to be followed for obtaining evidence abroad;
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> (d) the alternative proposal encouraged by the Israeli Courts in the Netivim proceedings of putting a series of questions to G.T.S./the respondent to be answered in writing; and
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> (e) the list of 30 questions prepared by the applicant and filed on the 26th of January, 2017 in response to the Israeli Courts request for the same in its decision of the 8th of January, 2017 which would confine the proposed evidence of the respondent to written answers to a finite number of questions.

Counsel for the respondent said that these are significant omissions and had the court been aware of these matters, it is highly probably the court would either have made no order or potentially have required short service and considered an order only in respect of a significantly narrow range of issues, subsequent to the London Arbitration proceedings.

27. Counsel for the respondent summarised his arguments that the applicant's application under the FTE Act was 'procedurally wrong footed' from the start. The order is vitiated by serious and fundamental errors, omissions and ambiguities, the order is plainly oppressive of the respondent G.T.S. and the applicant failed to comply with the principle of disclosure and sought to have the order set aside.

28. In opening the case on behalf of the applicant, counsel for the applicant (Mr. Rossa Fanning S.C.) set out that the applicant's defence in both actions relies on the "back to back clause" in the subcontracts, whereby the applicant is not obliged to pay the subcontractors unless the applicant itself has received the relevant payment from G.T.S. This is set out in the first affidavit of Mr. Cohen-Nissan.

29. The burden of proof in respect of this defence lies on the applicant in the Israeli proceedings. Mr. Greaney's evidence is necessary in order for the applicant to be able to prove in the Israeli proceedings which works have and have not been paid for by G.T.S."This evidence will assist probably determinatively" in rebutting Netivim and Tel-Edem assertions. Mr. Greaney has extensive knowledge which he ought be examined upon, for the purpose of the Israeli proceedings.

30. He submitted that enforcement of requests from Foreign Tribunals for the taking of evidence has been described as "the default position" requiring "some facts or factors which could convince the court to exercise its discretion otherwise" and he cites *Cutler v. Azur Pharma International* [2015] 1 I.R. 167.

31. He submitted that the matters raised by the respondent are not such as to warrant departing from the default position in granting the present application.

32. He submitted that no direct claim is made on behalf of the respondent in the affidavits or even in the submissions disputing the fact that the Israeli Courts are "desirous of obtaining the testimony" of Mr. Greaney in both proceedings.

33. He also noted that despite the swearing of some seven affidavits in support of the respondent's application, references to the Tal-Edem proceedings are absent. He says that G.T.S. raises objections based on procedural formality. He also noted the first affidavit of Michael Byrne solicitor of Matheson "that the pertinence and relevancy of the evidence of James Greaney to both the Israeli proceedings and the Arbitration proceedings is the core issue which goes to the crux of this application". He further submits that it is not easy to see how G.T.S.'s position in the Arbitration would in fact be prejudiced by the taking of evidence.

34. He submitted that G.T.S. successfully overturned in the Israeli Supreme Court an order joining it as a third party to the Netivim proceedings, and in the course of this, the Supreme Court was referred to the possibility of the applicant's summoning G.T.S. witnesses to testify. He submitted that the respondent's points at their highest seem only to favour the Court varying the order.

The 1856 Act and the Respondent's "Letter Rogatory Point"

35. He quoted s. 1 of the FTE Act. He states that there is no requirement for a letter rogatory in the Act. Thee Act expressly permits

in broad terms "other evidence" if the Foreign Tribunal is "desirous" of obtaining such evidence. He says that this is not at all altered by O. 39, r. 39.

36. He says that the Irish Courts have adopted broad general principles, even in cases concerning letters rogatory. He quotes from Noonan J. in *Cutler v. Azur Pharma International* [2015] 1 I.R. 167: "the starting position 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". He says that it cannot be asserted that a letter rogatory is a requirement to the making of an order under the FTE Act, however, he asserts that this is a common practice.

Israeli Procedure under 1998 International Legal Assistance Law
37. Counsel contested that a point of Israeli law and procedures was properly at issue in the application at all. Foreign law is a matter of expert evidence, and none of the respondents/deponents had the necessary degree of independence to adopt the role of an expert in this respect.

38. As stated in the first Cohen-Nissan affidavit, the Israeli Courts have indicated that letters rogatory were not necessary. The applicant had been advised by the Office of the Legal Advisor in Israel to utilise the Irish Courts.

39. Counsel stated that the applicant is clearly a person authorised by the Israeli Courts to seek to summon Mr. Greaney, for all of or any of the following reasons:-

> (1) the official order of the 18th of March, 2017 in the Netivim proceedings states "I permit the defendant to exhaust the deposition proceedings regarding witness Greaney";
>
> (2) the order of the 26th of December, 2016 in respect of the Tal-Edem proceedings states that "to the extent that a judicial permit is required in order to conduct the summons, it is included in my decision to permit the summoning of witness Greaney dated the 8th of November, 2016".

40. Both judges in Israel had been kept updated of the applicant's efforts in Ireland to obtain evidence from Mr. Greaney, and the judges have adjourned the proceedings on foot of same albeit that the proceedings are now due to close on the 1st of August, 2017.

Relevance and Admissibility
41. Counsel for the applicant referred to Hogan J.'s decision in *Cornec v. Morrice* [2012] IEHC 376:-

> "Before any such order could properly be granted, it would be necessary to establish that:
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> (i) the evidence proposed to be taken is relevant to the foreign proceedings;
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> (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."

Mr. Cohen-Nissan has confirmed twice that the evidence would be admissible in Israel.

42. There appears to be no averment by Mr. Greaney or anyone else to the effect that any of the matters on which it is desired he will give evidence on are not within his own direct knowledge. He says the case is therefore entirely different from *Sabretech Inc. v. Shannon Aerospace Ltd.* [1999] 2 I.R. 468. McCracken J. stated that the witness from who it is proposed to take evidence "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". In this light, counsel submitted that the applicant's affidavits establish that the evidence is relevant to both sets of proceedings.

Alleged Oppression Personal to Mr. Greaney
43. The alleged oppression which Mr. Greaney asserts in his affidavit is that he will not have adequate time to prepare for the arbitration, and he also refers to his upcoming trip to Hong Kong.

44. Counsel submitted that Mr. Greaney cannot credibly complain about evidence being taken shortly before the Arbitration, in circumstances where there has been a steadfast and constant refusal to facilitate the giving of any evidence in the Israeli proceedings since the District Court judges made orders in 2016.

45. In relation to the 'oppression' or strategic disadvantage counsel for the respondent has referred to, the applicant's response is three-fold:-

> (1) English and Irish case law provides an answer to this objection which favours the applicant. By contrast the respondent has adduced no authority which supports its position in this respect, but merely points to *Novell Inc. v. MCB Enterprises* [2001] 1 I.R. 608.
>
> (2) The issue of prejudice in the arbitration proceedings was considered and rejected by the Israeli Courts, and their decision in that respect is entitled to comity.
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> (3) Independent of the foregoing, to the extent that there is any prejudice to G.T.S. in the arbitration, it is of minor and hypothetical nature. *Novell Inc. v. MCB Enterpris*es [2001] 1 I.R. 608 concerned the issue of allegations of fraud, and this merited special considerations.

46. Counsel then quoted *Cornec v. Morrice* [2012] IEHC 376. This related to the subject of comity, where Hogan J. stated:-

> "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 Inc. v. MCB Enterprises* [2001] 1 I.R. 608, it should "be slow to refuse such an order"."

47. He submitted that the prejudice facing the applicant is stark and certain. The applicant is defending claims for judgment in the sum of approximately €2.2 million. The major part of its defence is the back to back clause, in respect of which the applicant bears the onus of proof. The applicant needs the evidence of Mr. Greaney to make out that defence.

48. In relation to nondisclosure, Mr. Cohen-Nissan states in his second affidavit "there was absolutely no intention to withhold any relevant materials". He submitted that *Bambrick v. Cobley* [2006] 1 I.L.R.M. 81 was an inappropriate authority on which to place reliance. He submitted that applications such as the present one, can be resolved by the court by making a more limited order than the one ordered at the *ex parte* stage.

49. The Court notes that decision of Judge Lushi-Abudi in the Netivim proceedings.At para. 3:-

> "Regarding the witness's relevance to the questions in the trial, even though I said in this context that the witness testimony is relevant, after most of the testimonies were heard, various decisions were made by me that expressed reservations about this position. Nevertheless, at the last hearing that was held on the 6th of November, 2016, I believe there was a basis for allowing the applicant to exhaust the possibility of summoning the witness […] even in the view of my reservations about the need for his testimony, in order to allow the applicant his day in court."

50. The court notes the strident position of the Judge Lushi-Abudi as she was indicating no desire to ensure that the witness came, nor of seeking letters rogatory: rather, she expressed her reservations of the need for witness testimony.

51. In relation to the FTE Act, he said that the Act could be viewed as giving expression to the principal of comity, and further, the FTE Act does not require letters rogatory.

52. Counsel for the applicant further submitted that the court has a discretion as to whether or not to make an order as was made by Humphreys J., but the case law suggests that the default position is that a request from a foreign court ought to be enforced. He agrees that the burden of an application to set aside remains on the original applicant, and not on the party seeking to set it aside, however, he submits that the respondent has to point to the factors that ought cause the court to exercise its discretion in not enforcing the order.

53. He says that the Tel Aviv Jaffa District Court has a broadly similar jurisdiction to the Irish High Court - the monetary value of the case before the Tel Aviv Jaffa District Court is measured with the jurisdiction of the Commercial Court.

54. He also submitted that the evidence sought is of manifest relevance - the applicant can demonstrate what they have paid for and what they have not been paid for. He says that the judges managing the litigation in Tel Aviv, envisage there would be appropriate circumstances to summon witnesses where the witness was outside the jurisdiction.

55. Counsel argued that this was a classic argument of form over substance, concerning the absence of the letters rogatory. The Act does not say that letters rogatory are required and the Rules of Court do not say that the letters rogatory are required. The Rules of Court refer to letters rogatory as one of the bases upon which an order might be sought, but the Rules also refer to "other evidence". In the affidavit of Cohen-Nissan it is stated that:-

> "the applicant's Israeli lawyers asked for a letter rogatory and the judge indicated that this was not necessary in the light of the order."

56. The uncontradicted affidavit evidence is that both judges, Judge Lushi-Abudi and Judge Ettugi were asked for letter rogatory and both judges refused this request, on the basis that a letter rogatory was not necessary. However, counsel for the applicant states that the judges refusing the letter rogatory does not preclude the applicant from seeking to adduce evidence – the judges did not say "we are refusing letter rogatory to stop you obtaining the evidence in Ireland".

57. He also dealt with the issue of non-disclosure and stated that it had been over played by the respondents.

58. In relation to the point raised by the respondents regarding prejudice, that the applicant seeks to have a 'dry-run' at cross-examining prior to the arbitration, he notes that this would be an incredibly cumbersome and expensive means by which to do so.

Decision

59. Procedural due process is a method by which the Courts ensure the vindication of citizens rights. This is a central issue in this case.

60. This application amounts to the Court being asked to give assistance to the Courts of Israel, however, the Israeli Courts themselves have not asked the Irish Courts for assistance - it is the litigants involved in the proceedings who are making the application. There is not any sufficient evidence that the Israeli Courts have indicated that they want to have Mr. Greaney examined.

61. A letter rogatory from the Israeli courts could indicate if the Israeli courts require the evidence that forms the subject matter of this application. No letter rogatory has been put before this Court.

The Proceedings

62. The affidavit of Ankita Ritwik provides some assistance to the Court in relation to the various stages of the proceedings. In relation to the Netivim proceedings, on the 18th of March, 2014, the applicant filed a third party notice against G.T.S. as a result of a claim brought against the applicant by it's subcontractor Netivim Darom Ltd.

63. Netivim sued the applicant for approximately US$1.7million for allegedly unpaid works performed by Netivim. On the 23rd of February, 2015 the Israeli Court joined G.T.S. to the Netivim proceedings and G.T.S. later successfully appealed this order.

64. In relation to the Tel-Edem proceedings, Tel-Edem, the pipe subcontractor, brought claims against U. Dori for approximately US$732,000.00 for works it claims to have performed but have not been paid for. G.T.S. have not been made a party to these proceedings.

65. The Court also has regard to the affidavit of Helen Raziel who also acts on behalf of G.T.S. Power Solutions Ltd. She says that the procedure in Israel for the making of a request for the taking of evidence abroad is set out in the 1998 International Legal Assistance Law. She identifies the Attorney General or his delegate (the International Department of the Administration of Courts) as the "authority" to submit requests for legal assistance.

66. Further, Miss Raziel on affidavit stated that:-

> (1) On the 13th of October, 2016 the applicant initially filed an application under The Hague Convention;
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> (2) When it came to light that Ireland is not in fact a party to The Hague Convention the applicant approached the International Department in Israel to ascertain how such application should be made;
>
> (3) In a direction issued by the Israeli District Court in the Netivim proceedings on the 6th of November, 2016, the court itself requested clarification from the relevant Israeli department as to how such an application should be made;
>
> (4) On the 10th of November, 2016 the Office of the International Administration of Justice filed a notice in the Netivim proceedings in response to the court's request detailing the relevant process and how such an application should be made.
>
> (5) On the 8th of January, 2017 the Israeli District Court in the Netivim proceedings approved the applicants request but specifically asked for questions and raised queries as to why the applicant had not made efforts to put written questions to James Greaney. She quotes from the Israeli District Court in the Netivim proceedings on the 8th of January, 2017 "however, in view of the relevance of the witnesses as stated above, the procedure involved in summoning the witness as stated in the notice of *advocate liat youssim* of the International Department at the Administration of Courts which is the procedure which may take a long and undefined time in the manner taken it's testimony, as can be seen from the respondent's responses should not be ignored".

67. It appears to this Court that the Israeli Courts have placed a decreasing emphasis on the importance of this evidence to its determination of the proceedings.

68. On the 18th of September, 2016 in the Netivim proceedings there was an application by the applicant to summon a representative of G.T.S., Mr. Greaney, to testify in the proceedings. Judge Lushi-Abudi stated that summoning Mr. Greaney "would give the defendant an unfair advantage within the arbitration proceedings … [the claim is] captivating but still has nothing to do with the proceedings here and before me." She made an order that Mr. Greaney was summoned to testify within the action before her.

69. On the 26th of October, 2016 Judge Lushi-Abudi states "in these circumstances I believe the defendant should be allowed to invite Mr. Greaney's representative of the commissioning party, to give evidence otherwise the defence of the defendant is likely to be harmed". She also added: "it is worth clarifying that this position was taken at a time when the parties' evidence had not yet been heard and now after hearing the evidence there is much doubt in my eyes whether this evidence is necessary for the defence of the defendant."

Failure to request a letter rogatory

70. There has been a failure on the part of the Israeli Courts to seek to obtain a letter rogatory within the purposes of the FTE Act. On this basis, the Court will set aside the decision of Judge Humphreys on 15th May, 2017. The court notes the decision of Denham J. in *Novell Inc. v. M.C.B. Enterprises* [2001] 1 I.R. 608 wherein she said:

> "Under the principle of comity, the courts of this jurisdiction would always be favourably disposed towards complying with *such a letter of request* (this Court's emphasis) 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. One instance of this is where the order would be oppressive in all the circumstances."

71. The reality to this case is that Mr. Greaney is G.T.S.'s key witness in the London Arbitration where the claims exceed US$80 million. The order to direct Mr. Greaney to give evidence would effectively permit a cross-examination of him in advance of the hearings in the London Arbitration, which is scheduled to take place from the 17th to the 28th of July, 2017. It would give a significant procedural advantage to the applicant in the London Arbitration. This is not the basis upon which the Court will set aside the application however – the Court sets aside the application on the basis that the Israeli Courts have not requested a letter rogatory seeking the assistance of the Irish Court. To this affect, there is no reason why the Court should order that Mr. Greaney be examined under oath pursuant to the Foreign Tribunals Evidence Act 1856 (the FTE Act) and/or O. 38, r. 39 of the Rules of the Superior Courts and/or the inherent jurisdiction of the High Court.

72. This Court also finds that there has been no evidence of non-disclosure of relevant orders of the Israeli Courts by the applicant. In fact, the applicant was at a disadvantage when the Israeli judges indicated that letters rogatory were not necessary. The Israeli Courts took no steps to apply for letters rogatory, nor was any other application made by them to this Court such that this Court should allow the granting of the *ex parte* application.

73. In summary, the court will set aside the order of Humphreys J. of the 15th of May, 2017 in the following circumstances:-

> (1) The principle of comity would dictate that if the Israeli courts so asked, this Court would grant the present application. However it is clear that the judges of the Israeli Courts were not prepared to make the appropriate application, by way of letters rogatory or otherwise to the Irish High Court. There has been no evidence that the Israeli Courts were prepared to take that step, and it was left to the applicant to make this application. In my view, this is not in accordance with the FTE Act 1856.
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> (2) Further the court is of the view that the requirement sought by the applicant is oppressive towards Mr. Greaney in circumstances where the London Arbitration proceedings are imminent.