Neutral Citation Number: [2016] EWHC 3268 (QB)

Case No: Appeal No: QB/2016/0202

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR MASTER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2016

Before:

MR JUSTICE MORRIS

- -

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

AND IN THE MATTER OF THE HAGUE CONVENTION OF 18TH 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 UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE DIVISION) ENTITLED AS FOLLOWS:

Case No. 15-cv-2220-RMW-HRL

MICROTECHNOLOGIES, LLC	**Plaintiff**
AUTONOMY, INC (a/k/a HP AUTONOMY) **AUTONOMY SYSTEMS LIMITED**	**Defendants and Plaintiffs in Counterclaim /Appellants**
- and -	
MR SUSHOVAN TAREQUE HUSSAIN	**Non-Party /Respondent**

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- -

Conall Patton (instructed by **Travers Smith LLP**) for the **Defendants and Plaintiffs in Counterclaim/Appellants**

Richard Lissack QC and Oliver Jones (instructed by **Simmons & Simmons LLP**) for the **Non-Party/Respondent**

The Plaintiff did not appear

Hearing dates: 28 October 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Morris:

Introduction

1. This is an appeal by Autonomy Inc and Autonomy Systems Ltd ("the Autonomy Parties") against paragraph 3 of the order of the Senior Master dated 27 September 2016 refusing their application for an examination of Mr Sushovan Hussain pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act"). The appeal is brought with permission of the Senior Master.

2. The Autonomy Parties are defendants in proceedings in the US District Court for the Northern District of California ("the US proceedings") brought by MicroTechnologies LLC ("MicroTech"). The Autonomy Parties have brought a counterclaim in those proceedings. The Autonomy Parties and another have brought a claim in fraud against Mr Hussain, and others, in the Chancery Division in London ("the Chancery proceedings").

3. By application dated 18 April 2016 to the Senior Master in this court, the Autonomy Parties sought to give effect to a letter of request issued by the US District Court requesting that Mr Hussain be required to attend an examination to give evidence for the purposes of the trial of the action in California ("the Letter of Request"). The US District Court had rejected Mr Hussain's objections, made to that Court, to the issue of the Letter of Request. Mr Hussain opposed the Autonomy Parties' application to the Senior Master.

4. In her reasoned judgment handed down on 26 July 2016 ("the judgment") the Senior Master dismissed the Autonomy Parties' application on two grounds: first that it would be oppressive for Mr Hussain to be required to attend an examination in circumstances where he is also defendant to the Chancery proceedings; and, secondly, that his right, under Article 6 of the European Convention on Human Rights, to a fair trial of the Chancery proceedings would be infringed. In that judgment, the Senior Master rejected a third argument put forward by Mr Hussain, namely that an examination would be pointless because Mr Hussain would invoke the privilege against self-incrimination under the Fifth Amendment to the US Constitution ("the Fifth Amendment") as a basis for declining to answer *any* question posed to him at the examination.

5. The Autonomy Parties now appeal, contending that the Senior Master was wrong on the first and second arguments, but correct to reject the pointlessness argument. Mr Hussain seeks to uphold the Senior Master's decision both on the grounds underlying her decision, and on alternative grounds, and in particular on the ground that the examination would be pointless.

Factual background

6. The following description of the factual background to the application is drawn from the summary in the judgment (paragraphs 9 to 26) with certain modifications and updating.

7. The Autonomy Parties were, at the material time, subsidiaries of an English company now known as Autonomy Corporation Limited (together with its group,

"Autonomy"). Autonomy was founded by Dr Michael Lynch, who became its Managing Director and Chief Executive Officer, with Mr Hussain serving as Chief Financial Officer. It carried on a software business. Its core product provided tools for analysing "unstructured" data (i.e. data that has not already been organised into database entries).

8. Until November 2011, Autonomy was a publicly listed company, trading on the London Stock Exchange. It regularly issued information to the market about its financial performance, including by way of quarterly reports and annual accounts.

9. In October 2011, Autonomy was acquired by a subsidiary of Hewlett-Packard Company (together with its group, "HP") for a total price of about £7.15 billion. It is common ground that Mr Hussain realised about £6 million on the disposal of his shares and share options in Autonomy.

10. In late 2012, HP announced that it had discovered serious irregularities in the conduct of Autonomy's business pre-acquisition and, in particular, in its published financial information. One of the irregularities alleged was improper revenue recognition on Value Added Reseller ("VARs") transactions. VARs are companies that re-sell a manufacturer's product, while adding value in some way (e.g. by providing an associated service). MicroTech is one of the VARs identified by Autonomy as having entered into contrived transactions with Autonomy, designed to enable the improper recognition of revenue in circumstances where Autonomy had been unable to conclude a sale with the end-user customer within the relevant financial quarter.

11. As regards these contrived transactions, the Autonomy Parties allege that, in reality, Autonomy would continue negotiating with the real customer and, upon concluding a direct contract of sale with that end-user, would then relieve the VAR by one means or another of its ostensible obligation to pay (for example, by issuing a credit note to the VAR). Where Autonomy was ultimately unsuccessful in achieving a direct contract of sale with the end-user, Autonomy usually bought goods or services from the VAR that Autonomy did not need or use, so as to put the VAR in funds with which to pay Autonomy.

The Chancery Proceedings

12. On 30 March 2015, the Autonomy Parties, Autonomy Corporation Limited and Hewlett-Packard Vision BV ("Bidco") (the HP entity that acquired Autonomy) (together "HP/Autonomy") issued the Chancery proceedings against Dr Lynch and Mr Hussain seeking damages or equitable compensation of at least £3.2 billion.

13. In those proceedings, HP/Autonomy contend that, as a result of the alleged improper transactions and false accounting, including in relation to the use of VARs summarised above, Autonomy's published information for the period from the first quarter of 2009 until the second quarter of 2011 contained false statements or material omissions, to the knowledge of Dr Lynch and Mr Hussain. They further contend that HP and Bidco reasonably relied on that information in deciding to buy Autonomy at the acquisition price; and that Bidco would have paid a much lower price (by approximately £3.2 billion), had it known the truth.

14. HP/Autonomy claim damages from Dr Lynch and Mr Hussain for breach of fiduciary and other duties, which have caused Autonomy to be exposed to a claim from Bidco under Schedule 10A of the Financial Services and Markets Act 2000. Bidco also makes direct claims for alleged misrepresentations under the Misrepresentation Act 1967 and/or in the tort of deceit. The Autonomy Parties further claim for losses caused to them as a consequence of the breach of duties owed to those companies by Dr Lynch and Mr Hussain.

15. Mr Hussain has denied all of the claims in a Defence dated 1 October 2015, which is supported by a statement of truth signed by his solicitor.

16. At a CMC in July 2015, Hildyard J (to whom the proceedings have been assigned by the Chancellor) directed a 23 week trial, which is now due to commence in January 2019. HP/Autonomy are seeking to amend their Particulars of Claim, with an application that is due to be heard in January 2017. A copy of the draft Amended Particulars of Claim has been placed before this Court.

The pleaded case

17. As regards the current Particulars of Claim, paragraphs 73 and 74 set out the general allegations about contrived VAR transactions and how they operated (as described above). Particulars of each of the specific contrived VAR transactions are set out in Schedule 3, containing summary details for each of 37 transactions (or groups of transactions) with the different VARs, including 9 transactions between Autonomy and MicroTech as VAR (including the Vatican Library transaction and the HP transaction – see paragraph 22(1) and (2) below). Those details include the identity of the VAR and the proposed end-user, whether a transaction was concluded with the end-user, the conclusion of the VAR transactions and a cross reference to the allegation of false accounting involved.

18. Reverting to the body of the pleading, section E of the Particulars of Claim (paragraphs 132 et seq) sets out the case as to Mr Hussain's involvement in, and knowledge of, the VAR transactions. Dr Lynch and Mr Hussain led the sales process. It is alleged that Mr Hussain, with Dr Lynch, was ultimately responsible for revenue recognition and managed the reporting of gross margin. Paragraph 136.1 of the Particulars contains a shortly expressed allegation that Dr Lynch and Mr Hussain managed Autonomy's sales and were personally involved in attempts to conclude sales to end-users, which, when unsuccessful, were followed by contrived VAR transactions.

19. In his detailed Defence, Mr Hussain contends that he was not aware of any understanding that, if there was no end-user agreement, the VAR would not have to pay. MicroTech was on risk to pay. Then at Schedule 3, Mr Hussain responds to Schedule 3 to the Particulars of Claim - in detail over 87 pages - addressing each VAR transaction. The overarching contention is that Autonomy/HP has not set out any particulars of Mr Hussain's involvement in any of the VAR transactions or his knowledge of false accounting, contending that the claim is inadequately pleaded and liable to be struck out.

20. As to the Draft Amended Particulars, in paragraph 74A, it is now further alleged that there was an agreement between Autonomy, represented by, inter alia, Mr Hussain,

and each VAR that the VAR would not be required to satisfy its liability to Autonomy from its own resources.

21. As regards involvement and knowledge, paragraph 136.1 is expanded upon over some 18 pages and in numerous sub-paragraphs. It is now positively asserted that Mr Hussain must have been aware of the wrongful practice of introducing VARs to end-user deals that could not be concluded in order to enable Autonomy to recognise revenue for those deals. Then substantial detail is pleaded, in the body of the pleading, in relation to Mr Hussain's personal involvement in, and knowledge of the purpose of, two of the MicroTech VAR transactions: the Vatican Library transaction (paragraph 136.1A.1) and the HP transaction (paragraph 136.1A.6). Further, in the other new sub-paragraphs of paragraph 136.1A, allegations are sought to be introduced in relation to Mr Hussain's knowledge of VAR transactions with five other VARs. Then, based on those matters, paragraph 136.1B alleges that Mr Hussain (and Dr Lynch) must have known of those VAR transactions, of their contrived nature and further that it is inconceivable that Mr Hussain did not have similar involvement or knowledge in relation to all other VAR transactions in Schedule 3, including the further 7 MicroTech transactions. At paragraph 144B of the Draft Amended Particulars, it is alleged that Mr Hussain was involved in the active misleading of Deloitte as to the true nature of the VAR transactions. One of the examples given is Mr Hussain's own involvement, and alleged false statements to Deloitte, in relation to the Vatican Library transaction.

The US Proceedings

22. In the meantime, on 18 May 2015 MicroTech issued the US proceedings; the defendants are now the Autonomy Parties. MicroTech claims that, in respect of two particular transactions, MicroTech paid Autonomy for the software, but because the transactions with the expected end-users never materialised, it was never repaid or given an allegedly agreed 10% profit. The two transactions in issue are:

    (1) A purchase order dated 31 March 2010 (the last day of the relevant quarter), where the expected end-user was said to be the Vatican Library ("the Vatican Library transaction"). This was for software worth $11.55 million, of which MicroTech says that it has paid just over $9.2 million.

    (2) A purchase order dated 30 June 2011 (also the last day of the relevant quarter), where the expected end-user was said to be HP ("the HP transaction"), for a total amount of $7.35 million (which MicroTech says it has paid).

23. MicroTech claims repayment of the sums paid (but not the 10% uplift), in a total amount of about $16.55 million (about £11.27 million).

24. The Autonomy Parties contend that the arrangement between Autonomy and MicroTech, as described and relied upon by MicroTech in the US proceedings, appears to have no legitimate benefit accruing to Autonomy, and thus that the case made by MicroTech in the US proceedings is entirely consistent with the allegation in the Chancery proceedings that sales to the VARs were merely contrived arrangements designed to create the false appearance of a sale for revenue recognition purposes.

25. The Autonomy Parties dispute the claim on various grounds, including that the monies used by MicroTech to pay Autonomy represented funds that had previously been funnelled to MicroTech by Autonomy for that purpose. MicroTech was effectively paying Autonomy with Autonomy's own money. However, the Autonomy Parties also allege that these two transactions, and at least seven others, were part of a fraudulent scheme whereby MicroTech knowingly assisted Dr Lynch and Mr Hussain to cause Autonomy improperly to recognise revenue. The Autonomy Parties therefore counterclaim damages against MicroTech for aiding and abetting alleged breaches by Dr Lynch and Mr Hussain of the fiduciary duties that they owed to the Autonomy Parties, and also advance a claim in unjust enrichment.

26. The breach of fiduciary duty argument is not only central to the Autonomy Parties' counterclaim, but also to its defence to MicroTech's claim. They contend that they needed to advance the breach of fiduciary duty argument in order to defend themselves fully against MicroTech's claim. Further they point out that, as the US Magistrate Judge observed (see paragraph 37 below), it is a rule of US procedure that all counterclaims arising from the same transaction or set of transactions must be advanced in those proceedings, failing which the counterclaims may be treated as waived. They had no choice but to bring their counterclaim in the US proceedings or risk losing it forever.

27. The trial of the US proceedings was listed to take place in January 2017, but the latest information is that it now appears unlikely that it will commence at that time.

Issuance of the Letter of Request

28. On 11 September 2015, Judge Whyte made a Protective Order for the purposes of the US proceedings. In summary, this enables documents or witness evidence to be designated as confidential by the party or non-party producing it.

29. On 4 December 2015, the Autonomy Parties applied for the Letter of Request to be issued by the US Court. MicroTech did not oppose the application.

30. The Letter of Request specifies, in some considerable detail, the "subjects" upon which Mr Hussain is requested to give evidence. These include:

> "1. His educational background, employment history, professional qualifications, and personal preparation for the deposition
>
> 2. His knowledge of any agreements or understandings, formal or informal, written or oral, or manifested by the conduct of the parties to the Autonomy Government Reseller Agreement between MicroTech and Autonomy, Inc, entered into on or about June 30, 2006… that supplemented or varied the terms of the MicroTech Reseller Agreement, and if so the nature of such supplemental or varied terms or conduct, how they came to be agreed between Autonomy and MicroTech, and all communications of which Mr Hussain is aware regarding such supplemental or

> varied terms or conduct that involved members of Autonomy management, including without limitation himself, Michael Lynch, Stephen Chamberlain, Christopher "Stouffer" Egan, Joel Scott, and Andrew Kanter."

Then, at subject 3, there are a series of nine numbered questions, each to be asked in relation to each of ten specific transactions between Autonomy and MicroTech, relating to ten different end-users, including the Vatican Library transaction and the HP transaction. Subjects 4 to 10 all relate to the dealings between Autonomy and MicroTech.

The challenge to the Letter of Request in the US

31. On 11 December 2015, Mr Hussain's US attorneys issued a motion for a protective order forbidding the issuance of the Letter of Request on the basis that it was *"both improper and unduly burdensome"*. It was contended that the letter of request would cause *"significant oppression and undue burden and expense"*, and further that most of the information which Autonomy sought related to the case in London and not the claims in the US, and therefore the application was a "transparent" and "brazen" attempt to evade English discovery limits.

32. By an Order dated 14 March 2016, Magistrate Judge Howard R. Lloyd ruled on the application, deciding it in the Autonomy Parties' favour. I address the Magistrate Judge's reasoning in the next section. On 28 March 2016, Mr Hussain issued a motion for relief from that Order (in effect, an appeal), contending that the Magistrate Judge's decision was *"clearly erroneous and/or contrary to law"* on various grounds. It turned out that, before receiving Mr Hussain's motion for relief, the US District Judge, Ronald M. Whyte, had already issued the Letter of Request. Judge Whyte nevertheless explained, by an Order dated 6 April 2016, that he would have rejected the motion in any event on substantive grounds.

The Magistrate Judge's reasoning

33. The Magistrate Judge held that an examination of Mr Hussain would be proportionate to the needs of the US proceedings, giving six reasons:- (1) Autonomy has raised serious counterclaims against MicroTech; (2) the counterclaims put several million dollars in controversy; (3) Mr Hussain was likely to have the best access to probative information that establishes whether Mr Hussain breached fiduciary duties owed to Autonomy; (4) the parties to the US litigation were willing to spend the money necessary to conduct the examination, and Mr Hussain did not contend that the expense of preparing for and sitting through the examination would be significant relative to his personal wealth; (5) Mr Hussain's evidence is "important to the accurate resolution" of the counterclaims; and (6) the likely benefit of Mr Hussain's evidence outweighs the burden and expense of the proposed deposition.

34. As regards the specific question of oppression, the Magistrate Judge found that there was no authority to support the proposition that the taking of evidence would be unduly oppressive when it related to a separate civil case against the proposed deponent. Under US law an enquiry into oppression depended, instead, on whether a party seeks "marginally" useful information in order to inflict a "hardship" on the

person who possesses that information. That was not the position in the present case. Rather, Autonomy was seeking highly probative evidence of counterclaims against MicroTech.

35. In relation to oppression and the risk of criminal charges, the Magistrate Judge specifically referred to Article 11 of the Hague Evidence Convention and the ability of Mr Hussain to invoke his Fifth Amendment right against self-incrimination, which right was expressly specified in the proposed letter of request. The Magistrate Judge concluded that "the proposed deposition would not unduly oppress or burden [Mr] Hussain by requiring him "to be a witness against himself" with respect to possible criminal culpability".

36. The Magistrate Judge rejected the argument that adequate substitute evidence could be obtained from MicroTech's employees, finding that Mr Hussain is likely to possess unique and highly probative knowledge in relation to the issue of whether he had breached his fiduciary duty to Autonomy.

37. The Magistrate Judge went on to reject Mr Hussain's argument that Autonomy was seeking improperly to circumvent English procedures, and in particular as part of a scheme to evade English discovery limits. He pointed out that it was MicroTech, and not Autonomy, who had begun the proceedings in the US; the counterclaims brought by Autonomy arose from the same underlying business deals, and had they not been brought, under US procedure, they may have been waived. Autonomy did not seek discovery broadly but rather sought information about the specific deals between Autonomy and MicroTech, the subject of the counterclaims. The fact that Autonomy had not chosen the US forum tended to show that Autonomy was not seeking evidence as part of a scheme to misuse the legal process. Rather, Autonomy was merely litigating the present case to the best of its abilities.

38. Finally the Magistrate Judge indicated that whether it would be consistent with English law to provide the judicial support requested in the proposed letter was not a question for the US Court.

The Senior Master's judgment

39. At paragraphs 30 to 53 of her judgment, the Senior Master identified, and set out the parties' rival contentions in relation to, the three reasons relied upon by Mr Hussain as to why the Court should not give effect to the Letter of Request; those reasons being, in shorthand: (1) oppression; (2) privilege (or "pointlessness"); and (3) Article 6 ECHR.

40. As the basis for Mr Hussain's argument that the examination would be pointless, a witness statement from Mr Hussain's solicitor, Mr Ian Hammond, stated, at various points, that Mr Hussain would invoke his rights under the Fifth Amendment in response to all questions. In particular, at paragraph 41, Mr Hammond stated:

> *"I am instructed that it is my client's intention to rely on his rights afforded to him under the Fifth Amendment to the United States Constitution in response to all questions on the subject matter identified in the Letter of Request."*

41. At paragraphs 54 to 61, the Senior Master set out the governing legal principles to be applied, recording that it was not disputed that the jurisdictional requirements under the 1975 Act were satisfied in the present case, and that what was in issue was the exercise of the Court's discretion. The relevant case law established that the English court will generally defer to the view of the foreign court on the question of whether the evidence sought is relevant, but that the English court would not accede to a letter of request where the burden imposed upon the intended witness would be oppressive. She observed, at paragraph 60, that in the present case it is not disputed that the evidence sought would be relevant to the US proceedings. She then turned to deal with each of the three "reasons" in turn.

42. As regards oppression, in her analysis at paragraphs 62 to 74 of her judgment, she began by referring to *First American Corp v Al Nahyan* [1999] 1 WLR 1154 in which the Court of Appeal refused to order an examination of certain accountants who were said to have been complicit in the fraud but who had not been joined as defendants to an action, citing certain passages of the judgment of Sir Richard Scott VC. (Relevant passages from that judgment are set out below). The Autonomy Parties had contended that the *First American* case was distinguishable for two reasons: first, because in the present case the Autonomy Parties had already pleaded a claim in fraud against Mr Hussain in the Chancery proceedings; and secondly because Mr Hussain would be able to avail himself in the examination of his right to silence under the Fifth Amendment and that that would negate any possible oppression.

43. The Senior Master rejected the first argument. Her principal reason for doing so (at paragraphs 67 to 68) was that the claims of the Autonomy Parties in the Chancery proceedings were not adequately particularised. No allegations were made against Mr Hussain or particulars given as to what is alleged *against him* in relation to each of the transactions identified in Schedule 3. She concluded that, at least in relation to eight of the nine MicroTech transactions, the allegations of fraud had not been particularised in the Chancery proceedings and that Mr Hussain was in the same position as the accountants in *First American*. At paragraphs 69 and 70, the Senior Master referred to other factors which she considered to be suggestive of oppression, in particular (1) the potential availability of other witnesses, (2) a "suggestion" of "a tactical approach by the Autonomy Parties… to embark upon a train of enquiry to obtain evidence… before they have particularised their case against him"; and (3) the fact that the Autonomy Parties/HP are not prepared to give undertakings (a) not to use the evidence from the examination in the Chancery proceedings and (b) not to bring civil proceedings against Mr Hussain in the US concerning these or other VAR transactions.

44. She then addressed the Autonomy Parties' second argument - that any oppression would be countered by Mr Hussain's Fifth Amendment rights - in the following terms:

> *"72. I have to consider whether the oppressive nature of the examination is countered by the ability and intention of Mr Hussain to rely on his Fifth Amendment privilege. Insofar as his concerns about any potential regulatory and criminal proceedings in the US are concerned, I do consider that this is the case and that this was the view reached by the US court … to which I must accord due respect. In respect of any*

> *regulatory/criminal proceedings in this jurisdiction, Mr Hussain would also be entitled to rely on the privilege against self-incrimination. This issue, therefore, on its own would not be sufficient to constitute oppression such that the request should be refused.*
>
> *73. However, from the evidence provided to me it does not appear that the same consideration was given* [i.e. by the US Court] *in relation to the Chancery proceedings nor to any potential civil proceedings in the US. The US Court considered only the more limited issue of whether the proposed deposition request was an attempt "to evade English discovery limits".*

It thus appears, and the Autonomy Parties certainly submit, that in paragraph 73, the Senior Master was, expressly or at least implicitly, concluding that invoking the Fifth Amendment rights to silence would not protect Mr Hussain from oppression in relation to use of the evidence obtained on the examination in the Chancery proceedings or in any potential civil proceedings in the US. In this way Mr Hussain's ability to invoke the Fifth Amendment did not neutralise any oppression arising in the context of civil proceedings in England or in the US.

45. The Senior Master then concluded, in relation to oppression, that the burden upon Mr Hussain outweighed the disadvantage to the Autonomy Parties, and the US court, in not having available to them Mr Hussain's evidence and the disadvantage to the wish of the English court to comply with a request from a sovereign state.

46. As regards the second "reason" – the privilege argument – at paragraphs 75 to 77, the Senior Master rejected Mr Hussain's contention that the examination would be pointless because Mr Hussain would rely on his Fifth Amendment rights in answer to every question. The US Court had been well aware of this as a possibility but it did not prevent it from issuing the letter of request. Relying upon the reasoning of Moore-Bick J at first instance and of Brooke LJ in the Court of Appeal in *US v Philip Morris Inc* ([2003] EWHC 3028 (Comm) and [2004] EWCA Civ 330), she could not conclude that Mr Hussain would be advised to rely on those rights in answer to every question. She continued, at paragraph 77:

> *"For example, there may be areas of questioning where the answer has already been given in the defence in the Chancery proceedings so that the privilege would not attach to such evidence. It is of course likely that the examination may be very limited in its usefulness but I cannot conclude that it would be entirely pointless such that this would persuade me not to make an order. It is clear from USA v Philip Morris… that as a reason not to make an order this is a high threshold to cross. That must be particularly so when the foreign court has already considered at issue."*

47. Thirdly as regards Article 6(1) ECHR, at paragraph 79 she concluded that it would be a breach of Mr Hussain's right to a fair trial for him to have to submit to examination in respect of the nine MicroTech transactions well ahead of disclosure, and written

and oral evidence in the Chancery proceedings. This was a second reason not to give effect to the Letter of Request.

Recent development

48. Since the hearing of oral argument on this appeal, I have been informed that on 10 November 2016 the US Department of Justice filed an indictment against Mr Hussain charging him with wire fraud offences in relation to the acquisition of Autonomy by HP. The DOJ has made broad factual allegations against Mr Hussain which include but are not limited to the MicroTech transactions, the subject matter of the request. No further details of these allegations are known. However neither party before me has sought to make any further particular submissions arising from this development.

The Relevant Legal Principles

49. The power of the English court to give effect to a letter of request is derived from the 1975 Act and is now regulated by section II of CPR Part 34. The court must first decide whether it has jurisdiction to give effect to the request, and then secondly whether, as a matter of discretion, the examination should be ordered. It is common ground that in the present case the jurisdictional requirements (in s.1 (a) and (b) of the 1975 Act) are satisfied. It is also common ground that Mr Hussain's evidence, if given, will likely be relevant to the matters in issue in the US proceedings.

The discretion under the 1975 Act

50. As regards the exercise of discretion, a number of general principles apply. First, the proper starting point is the well known dictum of Lord Denning MR (endorsed by Viscount Dilhorne on appeal) in *Rio Tinto Zinc Corporation Inc v Westinghouse Electric Corp* [1978] AC 547 at page 560, where he said of a request by a US court:

> *"it is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States court to help us in like circumstances. 'Do unto others as you would be done by'."*

Lord Diplock, to similar effect, stated that the English court should hesitate long before exercising its discretion in favour of refusing to make an order.

Oppression

51. Secondly, however, it is also well established that the Court should not order an examination where it would be oppressive to the proposed witness. The court must hold a fair balance between the interests of the requesting court and the interests of the witness: see *US v Philip Morris Inc* (CA) at paragraph 17 per Brooke LJ.

52. In this regard, and for present purposes the decision of the Court of Appeal in *First American Corp*, supra is important. That case concerned an attempt to examine various partners of Price Waterhouse, the auditors of BCCI, in litigation relevant to the collapse of BCCI and where allegations of wrongful conduct had been made by the plaintiff against those partners themselves. Sir Richard Scott VC said at 1160 F-G.

> *"This is not a case in which the letters of request merely seek an opportunity to examine third-party witnesses with relevant knowledge of the facts in issue in the action. They seek the opportunity to examine third parties who are alleged to have been knowing participants in the dishonest conduct in which the action is based"*

At page 1168F-G; Sir Richard Scott VC continued:

> *"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 defendant 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. For the reasons I have endeavoured to give, I would not refuse to give effect to these letters of request on the ground that the main purpose underlying them was not to obtain evidence for the existing action but was to obtain evidence for a contemplated action against Price Waterhouse. In In re Westinghouse Electric Corporation Uranium Contract Litigation And DL Dockets Number 235 (No 2) [1978] A C547, Lord Wilberforce commented that, at p611:*
>
> *"the fact, if it be so, that evidence obtained may be used in other proceedings and indeed may be central in those proceedings is no reason for refusing to allow it to be requested."*
>
> *I accept that, in general, that would be so. But allegations of fraud raise special considerations and so long as First American hold themselves free to use any information they may obtain from these two witnesses in a civil action for fraud in which the witnesses, or their firm, are defendants, the requests are, in my judgment, oppressive." (emphasis added)*

This passage was substantially quoted and relied upon by the Senior Master at paragraphs 64 to 65 of her judgment, and, she concluded, gave substantial support to Mr Hussain's case (paragraph 66). On this appeal Mr Hussain again relies heavily on this passage.

53. Sir Richard Scott VC then continued (at 1169 D-G) as follows:

> *"In my judgment First American must come off the fence. Let them, if they so wish join Price Waterhouse as defendant in an*

> *action based on Price Waterhouse's alleged complicity in the fraudulent conduct on which the present action is based. In that case, any request to take evidence from these witnesses can be assessed in the light of the particular pleaded allegations made against them. And, I repeat, the allegations of knowing complicity in the fraud that have already been publicly made by First American preclude them in my opinion, from protesting that they do not yet know enough to plead a case. Alternatively let First American undertake that civil proceedings based on the alleged complicity will not be brought against Price Waterhouse or its partners. In that case the only problem about the request would, in my opinion, be relatively minor ones relating to the excessive width of some of the paragraphs of the schedule. As to these, I do not doubt that First American and its lawyers could reformulate a request that, by limiting the excessive width of some of the paragraphs, would be one to which the courts of this country could properly give effect… For the reason I have given, we should in my view, do so if we properly can. As matters stand, however I agree with Popplewell J that the requests are oppressive and ought not to be acceded to."* *(emphasis added)*

This passage in the judgment of Sir Richard Scott (referred to, although not set out in full in the Senior Master's judgment) was, and is, relied upon by the Autonomy Parties as providing the basis for distinguishing the present case from the *First American* case. Here, it is said, the Autonomy Parties have "come off the fence" and have brought proceedings, and have pleaded allegations, against "the witness".

54. A number of points emerge from these passages. First, it is clear that in cases where fraud is not alleged, it is not oppressive to give effect to a letter of request, even where the main purpose of the request is not to obtain evidence for the existing action in the requesting court, but is for use in other proceedings.

55. Secondly, in a case where fraud is alleged, a letter of request is oppressive where allegations of fraud are made against the witnesses sought to be examined but where those witnesses have not been sued as defendants in respect of those allegations, and where those allegations are being held over the head of the witness with the possibility of being made a party to a claim, whilst at the same time seeking a wide examination of the witness on the very topics that will be relevant in such an action, if brought. This was the situation in the *First American* case.

56. Thirdly, as regards the position where the party seeking the examination *has* already brought proceedings against the "witness", alleging fraud, Mr Lissack QC for Mr Hussain sought to argue that the last sentence of the passage at 1168F-G in the judgment of Sir Richard Scott VC cited in paragraph 52 above, is authority for the proposition that even where a civil action for fraud has been commenced, it would be oppressive to use evidence obtained pursuant to the letter of request. In my judgment this is not a correct reading of that passage, in the context of the entire judgment. First, it is plain that the factual context there was a case where there was no existing fraud action against the witnesses. Secondly, such an interpretation is inconsistent with what Sir Richard Scott goes on to say at 1169D-E, where he accepts that if the

claimant comes off the fence and brings proceedings, the court can assess the request "in the light of the particular pleaded allegations", thereby admitting of the possibility that the request might well not be oppressive. (The words "in that case" are to be read as "in that event" and not as "on the facts of the *First American case*"). The reference to First American "holding themselves free to use" the information obtained from the witness must be a reference to their position in that case of "sitting on the fence" and not that of having commenced proceedings against the witnesses. Where the applicant has already commenced proceedings against the witness making allegations of fraud, then the mere fact that such fraud allegations have been made does not render the letter of request as oppressive. Whether it is oppressive or not will depend upon the particular evidence sought in the context of the particular allegations pleaded against the witness.

57. Finally, it follows that I do not accept the submission of Mr Lissack QC that the underlying "rationale for the rule laid down" in *First American* is that if an applicant wishes to bring a criminal or civil claim against the witness, then such a direct claim is the proper forum in which the person's evidence should be given, and that, where such a direct claim is brought, the evidence cannot be obtained through the letter of request procedure. This cannot be correct either generally or in a case where allegations of fraud are made; such a submission is contrary to the views of Lord Wilberforce and Sir Richard Scott.

Privilege against self-incrimination

58. As regards the privilege against self-incrimination, and in particular rights under the Fifth Amendment, s.3 of the 1975 Act provides that a person cannot be compelled to give any evidence which he could not be compelled to give either in civil proceedings in the UK or in civil proceedings in the country of the requesting court. The privilege against self-incrimination provided for by the Fifth Amendment is a privilege covered by s.3(1)(b). The validity of any such claim has to be determined as if it had been made in civil proceedings in the USA: see *Rio Tinto Zinc*, supra, at 612G-H. Here it is common ground that as a matter of US law, Mr Hussain has the right to remain silent at the examination, pursuant to the Fifth Amendment.

59. As a matter of US law, the Fifth Amendment can be invoked where a witness *"reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner"* (Doe v Glanzer 232 F 3b 1258 (9th Circuit, 2000). In this way, where invoked, the Fifth Amendment enables the witness to "withhold testimony" altogether.

60. The procedure which applies where a witness is examined in the UK pursuant to a letter of request and wishes to rely upon the US privilege against self-incrimination is that, where the claim to privilege is supported by a statement contained in the request itself or conceded by the applicant, then the witness will not be required to answer any question in respect of which the privilege is invoked. If, on the other hand the claim is neither supported in the request itself nor conceded, the person conducting the examination or indeed this court in the UK may require the witness to give the evidence. However even in that case the answers in fact given will only ever be transmitted to the foreign court, if the foreign court itself rules that the privilege does not apply: see s.3(2) of the 1975 Act and the detailed procedure in CPR 34.20. In the present case, it is common ground, first, that the availability of the Fifth Amendment

privilege is supported by a statement contained in the Letter of Request, and secondly and in any event, that Mr Hussain will be entitled, should he so wish, to remain silent in response to any question he is asked at the examination and in respect of which he wishes to rely upon his US privilege against self-incrimination. If he remains silent in response to questions the answers to which the privilege against self-incrimination could not apply, then the matter would ultimately be resolved by the US Court. In that case if the US court found that the privilege did not apply and he was required to answer, then those answers would be admissible in the US proceedings. However in that case it is hard to see how those answers could be regarded as oppressive.

"Pointlessness"

61. In *US v Philip Morris Inc*, supra, the court had to consider an argument that the matters the subject of the letter of request were all covered by legal professional privilege and that, since the client did not intend to waive that privilege, it would be a waste of time and money to make any order for examination of the witness at all. Such an order would be "pointless" because the witness could not be required to answer any question of substance put to him.

62. At paragraph 21 of his judgment, Moore-Bick J considered that it would be rare for such a submission to have any basis, but that:

> *"nonetheless if the court were satisfied on the evidence before it that the exercise would indeed be pointless because the witness could and would refuse to answer any questions of substance put to him, I can see no reason why in the exercise of its discretion it should not refuse to make an order for his examination. No doubt such a course would only be justified in the clearest case."* *(emphasis added)*

Moore-Bick J went on to hold that many of the relevant communications were probably covered by privilege, but unless the client could show that its assertion of privilege would prevent the witness from answering any question of substance the court would not be justified in refusing to make an order for examination, since issues of privilege could be dealt with as they arose during the questioning. On the facts in that case it could not be shown that the assertion of the relevant privilege would prevent the witness from answering any questions of substance: see paragraphs 39 and 48. This analysis was approved by the Court of Appeal: see Brooke LJ at paragraphs 46 and 88; and in the latter paragraph commenting that there was *"no good reason why the whole enterprise should be called off now. It must be remembered that it is the duty and pleasure of the English court to respond positively to a letter of request if it can."*

The approach to discretion on this appeal

63. This is an appeal against the exercise of a discretion by the Senior Master. It is not a de novo rehearing of the matters placed before her. In this regard, before interfering with the Senior Master's decision, it must be shown that she has either erred in principle in her approach or has left out of account or has taken into account some feature that she should, or should not, have considered or that her decision was wholly wrong because the court is forced to the conclusion that she had not balanced the

various factors fairly in the scale: see Lord Woolf MR in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 at 1523.

64. Whilst it is the case that the Senior Master has particular jurisdiction in relation to letters of request proceedings and is highly experienced in these matters, it was common ground that this is not one of those cases where the appeal court is required to show particular deference to the decision below by reason of the lower court's specialist expertise.

65. I approach this appeal on the basis that, first, the Senior Master's decision was clearly one of the exercise of discretion; secondly that that discretion is to be exercised in line with certain established principles, applicable to the approach of the English courts to letters of request (including those principles which I have discussed in the previous paragraphs), and thirdly that, if it can be seen that those principles have been erroneously identified or applied, this court might interfere and exercise the discretion afresh.

Article 6 ECHR

66. The court is bound, as a public authority, to respect Mr Hussain's rights under article 6(1) ECHR when exercising any discretionary power, such as that which it is granted under the 1975 Act. Article 6(1) ECHR provides, inter alia:

> *"in the determination of his civil rights obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

67. In *Dombo Beheer v Netherlands* (1994) 18 EHRR 213 at paragraph 33 to 35, the European Court of Human Rights held that the requirement of Article 6 of "equality of arms" "*implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent"*. Further, in defending a claim, a party *"should be entitled to seek and produce evidence "under the same conditions" as the prosecution"*: *Mirislasvili v Russia* ECtHR 11 December 2008 at §225. Thus, it has been held that a national rule which prohibits *a party* to proceedings appearing as a witness may violate Article 6 in circumstances where one party is able to offer evidence on a particular issue but the other could not, since that person was himself the party to the proceedings.

Grounds of Appeal

68. The Autonomy Parties essentially raise three grounds of appeal:

(1) the Senior Master was wrong not to conclude that to the extent that the examination would or might be oppressive, any such oppression would be neutralised by the Mr Hussain's rights under the Fifth Amendment;

(2) in any event, the Senior Master was wrong to conclude that the examination would be oppressive;

(3) further, the Senior Master erred in law in holding that an examination would involve a breach of Article 6 ECHR.

69. Mr Hussain seeks to uphold the Senior Master's order for the reasons set out in her judgment, and also for further reasons. In particular he challenges the Senior Master's conclusion at paragraph 77 of her judgment on the issue of "pointlessness" and contends that, in the event that Mr Hussain could and would invoke the Fifth Amendment in relation to every question, the examination would be pointless and therefore should not be ordered.

70. In summary, therefore, the issues on this appeal can be considered under the following heads:

(1) Oppression
   a. privilege against self-incrimination
   b. pointlessness;
   c. otherwise oppressive.

(2) Article 6 ECHR.

Issue (1): Oppression

71. Whilst logically the first question is whether the examination will or might be oppressive, in view of the grounds of appeal and the way in which the argument has proceeded, I consider first the issues arising in respect of the privilege against self-incrimination.

(a) Privilege against Self-Incrimination and (b) "Pointlessness"

72. I address these two aspects together, not least because Mr Hussain's arguments on each are closely intertwined.

The parties' arguments

The Autonomy Parties' case

73. Mr Patton, for the Autonomy Parties, submits that, even if it is accepted that the examination of Mr Hussain would or might be oppressive, any such oppression is effectively neutralised by Mr Hussain' ability to invoke the Fifth Amendment. Having recognised that this submission held true in relation to oppression arising from regulatory or criminal proceedings in the US (at paragraph 72 of her judgment), the Senior Master should have gone on to hold that the same applies in respect of any potential oppression arising from use of material in civil proceedings whether in the US or in England. However, at paragraph 73, the Senior Master appeared to have concluded that the Fifth Amendment would not offer Mr Hussain equivalent protection in the context of civil proceedings. That distinction was not justified, because the Fifth Amendment gave Mr Hussain the right to remain silent in response to any question, and where he exercised that right, there would be no answer at all to the particular question and so there would be nothing to be used, oppressively, in civil proceedings or indeed any proceedings.

74. As regards Mr Hussain's alternative "pointlessness" argument, Mr Patton submits that there is a very high threshold for Mr Hussain to satisfy the Court that the examination is pointless. It must be clear that the witness both *could* and *would* refuse to answer all questions. Whilst Mr Hussain can invoke the Fifth Amendment, it may well be that in respect of some questions, he will not do so. First, questions relating to Mr Hussain's educational background or professional qualifications (in question 1) are not oppressive and there can be no objection to answering them. Secondly, in relation to the fraud, it does not necessarily follow that Mr Hussain will invoke the privilege and when confronted with a particular question, he may decide not to exercise his right. Thirdly, the US court, fully aware of Mr Hussain's Fifth Amendment rights – rights which arise under US law – did not take the view that the examination would be pointless. Mr Hussain could, and should, have made his "pointless" argument before the Magistrate Judge. Had he done so, that argument would have failed. In the US itself, as a matter of US law, it is not open to a witness to resist appearing at a deposition by asserting in advance of the deposition that he will invoke the Fifth Amendment in answer to all questions. Mr Hussain should be in no better position now before the English Court. It is not in accordance with comity for this Court to second-guess the US court's view that the examination would serve a purpose.

75. The *Philip Morris* case can be distinguished. There it was an English privilege and a privilege belonging to the client and one which the solicitor witness was bound to assert. Here Mr Hussain has a choice whether or not to assert his undoubted US law privilege.

Mr Hussain's case

76. Mr Lissack QC submits, in response to the "neutralising" effect of the Fifth Amendment rights, first that if the questioning is oppressive, it cannot be rendered unoppressive by the privilege against self-incrimination. If there are questions in respect of which Mr Hussain will not be able to invoke the Fifth Amendment, then the fact that there are others where that right can be invoked does not assist (because the examination will thereby be oppressive). Alternatively, if there are no such questions (i.e. the Fifth Amendment rights will be available for all questions) then the examination will be pointless, as there will be no question which Mr Hussain can be forced to answer.

77. Secondly, as regards paragraph 73 of the Senior Master's judgment, Mr Lissack referred to paragraph 77 (where the Senior Master was considering whether Mr Hussain *would* rely on the Fifth Amendment) to submit that he "may not be *able* to do so in relation to wider civil proceedings". Whilst the privilege against self-incrimination is engaged by much of the scope of the examination, it will or may not be engaged by all of it. There will or may be questions which are oppressive and yet which Mr Hussain's Fifth Amendment rights cannot neutralise. The Autonomy Parties themselves expect to be able to question Mr Hussain about something in respect of which he will not invoke his Fifth Amendment rights. Further, the question of the scope of any criminal exposure may of course crystallise or change at any moment and the scope of possible future US proceedings is entirely unknown. Mr Hussain has no way of knowing whether matters on which he would answer questions in the examination – if they were not covered by the Fifth Amendment – would impact on his position in such US proceedings.

78. Thirdly, and in any event, Mr Lissack submitted that, if, in fact Mr Hussain could and would invoke the Fifth Amendment in response to every question in the examination, then the examination would be totally pointless. Here it is clear that the privilege will be invoked in answer to every question, and thus the analysis of Moore Bick J at paragraph 21 of his judgment in *US v Philip Morris* applies. In the present case, the Fifth Amendment privilege is recognised both in the letter of request and indeed by the parties, and in that event neither the examiner nor the English court nor the US court has any power or process to go behind the invocation of that privilege in the examination: see s.3 of the 1975 Act and CPR 34.20. If Mr Hussain claims it, then that is the end of the matter.

79. Autonomy accepts that this case is about fraud and that the privilege is engaged on questions about fraud. There is nothing left. There is no basis to doubt that Mr Hussain could invoke the Fifth Amendment, because the allegations are all allegations about fraud; and moreover there is no basis to doubt the veracity of Mr Hussain's statement that he will invoke those rights in relation to all questions.

Analysis

"Neutralisation"

80. In this context, it is essential to bear in mind the distinction between the question whether Mr Hussain *can* invoke his Fifth Amendment rights and the question whether Mr Hussain *will* invoke those rights. In my judgment, at times the arguments made by Mr Lissack on this appeal have not sufficiently distinguished these two strands. This first aspect of the argument in relation to privilege against self-incrimination, relates essentially to the first of those questions and whether the Fifth Amendment right is *available* to Mr Hussain and thus *capable* of protecting him against potential oppression.

81. First, I accept Mr Patton's contention that, where Mr Hussain does choose to invoke the Fifth Amendment in respect of any question, that will result in there being no answer at all in response to that question, and therefore no evidence which could potentially be used, whether in criminal or civil proceedings. To this extent I agree that the availability of the Fifth Amendment right will neutralise oppression arising from any questions where that right is invoked by Mr Hussain.

82. In the unlikely event of the US court ruling, in respect of any particular question and answer for which Mr Hussain had invoked the privilege, that in fact there was no basis for such a privilege, then on that hypothesis there is no risk of that evidence incriminating Mr Hussain and therefore the evidence given will not be oppressive in the first place.

83. Accordingly, I consider that the Senior Master erred in her analysis and conclusion at paragraph 73 that the Fifth Amendment would not neutralise any possible oppression in relation to the use of incriminating evidence in *civil* proceedings.

84. Secondly, in fact, Mr Lissack struggled to support the distinction made, at paragraphs 72 and 73, between criminal proceedings on the one hand and civil proceedings on the other. His first argument on this aspect (see paragraph 77 above), is predicated on the assumption that there might be questions in the examination which were

oppressive but in respect of which the Fifth Amendment right is not available. However that is not the case here. All those questions which are potentially oppressive are questions which relate to the alleged fraud. This is common ground between the parties and indeed that is the basis of the oppression which it is said to arise by reference to the considerations in the *First American* case. Further it is common ground that in relation to all such questions relating to the alleged fraud, Mr Hussain could invoke the privilege against self-incrimination under the Fifth Amendment. Mr Lissack did not identify any such "oppressive, but non-Fifth Amendment" questions.

85. His further argument, addressed to paragraph 73 and civil proceedings, based on paragraph 77 of the judgment, failed to distinguish between the issue whether Mr Hussain *could* invoke the Fifth Amendment and whether Mr Hussain *would* invoke it. In my judgment, at paragraph 77 the Senior Master was addressing the latter issue, and not the former. This did not assist Mr Lissack in relation to the first ground of appeal. Paragraph 77 of the judgment is directed to the issue of "pointlessness". Moreover the suggestion that as matters developed, Mr Hussain might not be in a position to, or wish to, rely on the Fifth Amendment, was contradicted by Mr Hussain maintaining his position that he will rely on the Fifth Amendment in response to all questions. A further point that the US Department of Justice might not pursue Mr Hussain is met by the recent development referred to in paragraph 48 above.

86. On this "neutralisation" element of the argument, I consider that the Senior Master's analysis was incorrect and I conclude that the *availability* of the Fifth Amendment rights does neutralise any oppression arising from the examination.

"Pointlessness"

87. In the light of this conclusion, I turn to consider Mr Hussain's alternative case that, since he can invoke his Fifth Amendment rights in respect of all oppressive questions, the examination will therefore be pointless.

88. Here, the key issue is whether Mr Hussain *will* invoke the Fifth Amendment rights (rather than whether he *can* do so). I accept that in evidence to the Senior Master Mr Hussain has stated, via his solicitor, that he intends to rely on the Fifth Amendment "in response to all questions".

89. However, in my judgment, on this issue I agree with the conclusion of the Senior Master in paragraph 77 of her judgment. Mr Hussain's assertion is not sufficient to render the examination pointless.

90. First, accepting that it is a statement of Mr Hussain's present intention, it does not bind him. It is a statement of present intention as to future conduct. It is certainly at least possible that when it comes to the examination itself, Mr Hussain may decide to change his mind and, in relation to any one or more questions, not seek to rely on his Fifth Amendment rights. He may, at least, give answers which largely repeat the facts which he has asserted in his defence in the Chancery proceedings and there may be questions which are not oppressive relating to his background.

91. Secondly, I accept that the US court, if it had been faced expressly with this contention, would not on that basis have declined either to order an examination in the

US, or to have made this Letter of Request itself. Mr Hussain did not raise this issue before the US court. Under US law, a witness who intends to take the Fifth Amendment in respect of all substantive questions is nevertheless required to attend for examination. Reminding myself of the presumption in favour of assisting the requesting court (see paragraph 50 above), I consider that it is appropriate for this Court effectively to allow the same approach to the examination, requested by the US court, to be taken here. Assistance to the requesting court was a significant factor in Brooke LJ's conclusion on the issue of "pointlessness" in the *Philip Morris* case (see paragraph 62 above).

92. Finally, the costs of the examination are to be borne by the Autonomy Parties and the detriment to Mr Hussain will be limited to the inconvenience of having to attend the examination for a few hours.

93. In conclusion, on the arguments relating to privilege against self-incrimination, I conclude that, in paragraph 73 of the judgment, the Senior Master erred in principle in her assessment as to how the Fifth Amendment rights operate in practice. I agree with her conclusion in paragraph 77 of the judgment that "the examination may be very limited in its usefulness but I cannot conclude that it would be entirely pointless such that this would persuade me not to make an order". Accordingly I conclude that, because of the ability of Mr Hussain to invoke his Fifth Amendment rights, the examination of Mr Hussain will not be oppressive.

(c) Otherwise Oppressive

The parties' arguments

The Autonomy Parties' case

94. Mr Patton submits that the present case is to be contrasted with *First American*. Here, in the Chancery proceedings, the Autonomy Parties have been prepared to commit to a pleading and that is sufficient. Secondly, in any event, their claim is adequately particularised. It always was; and certainly is now in the light of the draft Amended Particulars. The existing particulars have not been struck out nor has any order for further particularisation been made. There is a viable claim which is going to trial. Secondly, the draft Amended Particulars served since the hearing before the Senior Master provide essential details about the 9 MicroTech transactions in Schedule 3. Greater detail is given about the Vatican Library transaction and specific details about Mr Hussain's knowledge in relation to the HP transaction are given. These address the criticism on the issue of knowledge in paragraph 67 of the Senior Master's judgment. Further Mr Hussain himself sets out his defence in great length, particularly in relation to the Vatican Library transaction.

95. Secondly, the questions in the letter of request are adequately defined. If need be, limits can be placed on the examination.

96. Thirdly, Mr Hussain is plainly the most relevant witness. This was the view of the Magistrate Judge – a view to which considerable deference should be accorded. It is not oppressive not to seek evidence from other witnesses who are not central to the case being made in the US proceedings.

97. Fourthly, the seeking of the examination was not tactical. Neither it nor the counterclaim in the US proceedings go any wider than the specific MicroTech transactions. The Autonomy Parties had no option but to act in those proceedings in the way in which they have acted.

98. Finally, as regards the failure to give undertakings, in relation to proceedings in the UK the use of the examination is ultimately a matter for the assigned judge in the Chancery proceedings. As regards US proceedings, Mr Hussain has the right to seek designation of his evidence as confidential. There is no basis for a suggestion that the Autonomy Parties might bring civil proceedings in the US. They have chosen to sue him in England, and could have, but have not, joined him in the MicroTech proceedings in the US.

Mr Hussain's case

99. Mr Lissack QC submits that, in this regard, the Senior Master was correct in her assessment of the pleaded case and this Court should not interfere unless that was very fundamentally wrong. Her conclusion that the claims were not adequately particularised was one she was properly entitled to reach. There are no particulars of what Mr Hussain's specific involvement was in respect of each transaction. The pleading in relation to knowledge and the precise activity in which Mr Hussain was involved is desperately light and the Autonomy Parties are seeking to fill in these gaps by the examination under the Letter of Request.

100. Even on the draft Amended Particulars, apart from the Vatican Library transaction, there are no particulars as to Mr Hussain's involvement in, or knowledge of, the 9 MicroTech transactions nor as to the precise relationship between Autonomy and MicroTech and what Mr Hussain knew about that.

101. In any event, this clear dispute between the parties as to the adequacy of the particulars in the Chancery proceedings is not something which this court can adjudicate upon, when that is a matter ultimately for Mr Justice Hildyard in the Chancery proceedings.

102. Further there is no basis for this court to interfere with the Senior Master's conclusions (which she had been entitled to reach) on the other three factors which she took into account (at paragraphs 69 to 71 of the judgment) in reaching her conclusion on oppression.

103. As regards undertakings, Mr Lissack submits that, as a matter of law, it is oppressive not to give an undertaking even if the case in England is properly pleaded. Further given this refusal to give undertakings, it is legitimate to question what exactly is driving this request.

104. The Senior Master was perfectly entitled to come to the conclusion that the Autonomy Parties were pursuing a tactical approach. There is no basis to interfere with her view on this issue, based as it was on a number of factors.

Analysis

105. In my judgment, the Senior Master was entitled, based on all the relevant factors, to reach the conclusion that, leaving aside the issue of the Fifth Amendment privilege, an examination of Mr Hussain would be oppressive.

106. In this regard, as the Senior Master held (at paragraphs 66 to 68) the key issue is to assess the pleaded case against Mr Hussain in the Chancery proceedings. This approach is based on Sir Richard Scott's view in *First American* that, even once fraud proceedings are brought against the witness, the request to take evidence is to be *"assessed in the light of the particular pleaded allegations made against"* the witness. It is not entirely clear what level of detail of pleading Sir Richard Scott had in mind in considering this question, once the claimant has come "off the fence" and brought proceedings against the witness, as in this case. Nevertheless I do not consider that the Senior Master's approach to this issue was arguably wrong. It is necessary to look at the adequacy of the pleading. She concluded that, at least in respect of 8 of the 9 MicroTech transactions, the allegations of fraud had not been sufficiently particularised.

107. First, looking at the pleadings as they currently stand – the unamended Particulars of Claim – in my judgment, on the basis of the matters set out in paragraph 67 of the judgment, the Senior Master's conclusion (at paragraph 68) that the claims in respect of the MicroTech transactions (other than the Vatican Library transaction) were not adequately particularised is one she was entitled to reach.

108. Secondly, the further particulars set out now in the draft Amended Particulars of Claim do provide more details of the allegations made against Mr Hussain in relation to his specific involvement in, and knowledge of the contrived nature of, specific VAR transactions, including the Vatican Library transaction and, now, the HP transaction. As regards the other VAR transactions more generally, including the remaining 7 MicroTech transactions, apart from a general inference to be drawn from knowledge in relation to the specific transactions, the draft Amendments do not take matters much further.

109. However, first, Mr Hussain maintains his position that the particulars provided remain inadequate; and secondly, whilst the draft amendments are supported by a statement of truth, permission to make those amendments is resisted by Mr Hussain and has not yet been granted in the Chancery proceedings and will be contested at a hearing in January. In these circumstances, it is not appropriate for me, in the course of these 1975 Act proceedings, to reach a conclusion on the adequacy of Autonomy/HP's pleaded case of fraud against Mr Hussain in the, different, Chancery proceedings, where that is a disputed issue. Thirdly, particulars of knowledge and involvement in the other 7 MicroTech transactions remain somewhat slim.

110. I add however that if, in due course, permission were to be granted in respect of the draft Amended Particulars of Claim in their present form, then in my judgment, the pleaded case in respect of the Vatican Library transaction and the HP transaction would be sufficiently pleaded and an examination limited to those two transactions would not be oppressive. On the other hand, absent any further particulars, an examination in relation to the other 7 transactions could be used in order "to fill in the gaps" on the key issues of Mr Hussain's personal knowledge and participation

sufficient to found the case in fraud against Mr Hussain personally. On that basis, for those transactions, the examination would continue to be oppressive.

111. As regards the other factors taken into account by the Senior Master (at paragraphs 69 to 71) – witnesses other than Mr Hussain, the so-called tactical approach, and the absence of undertakings - for my part, I do not consider that these are, or would be, self-standing (or supporting) reasons to find the examination oppressive. As to other witnesses, I accept the submission that, since the allegation in the counterclaim in the *US proceedings* is directed specifically at *Mr Hussain's* breach of his own fiduciary duty, then he is the person by far best placed to give evidence as to his own knowledge and involvement. In this regard, proper reliance can be placed on the view of the US Magistrate Judge on this point. As regards the tactical approach, it is the case, again as observed by the US Magistrate Judge, that the Autonomy Parties have not commenced the US proceedings of their own volition, but were required to respond to a claim brought by MicroTech. As regards undertakings, as far as the US is concerned, since the Autonomy Parties have chosen to commence proceedings against Mr Hussain in this country, the likelihood of them bringing parallel proceedings in the US in respect of the same matters seems remote. As regards use in the Chancery proceedings, first, if the pleaded case is inadequate, then the examination is oppressive anyway; and if the pleaded case is adequate, there is no bar upon the use of evidence obtained under a letter of request in those proceedings, even where fraud is alleged: see paragraph 56 above. Moreover, whether such evidence can ultimately be deployed in the Chancery proceedings is a matter which can be determined by the assigned judge in those proceedings.

112. Nevertheless for the reasons given in paragraphs 107 and 109 above, I conclude that as matters currently stand, the claim in fraud in the Chancery proceedings is not adequately pleaded so as to avoid the conclusion that, but for the Fifth Amendment rights, the examination sought would otherwise be oppressive of Mr Hussain.

Issue (2): Article 6 ECHR

The parties' arguments

The Autonomy Parties' case.

113. Mr Patton submits that the issue under Article 6 is a question of law and not one of discretion. The facts of the *Dombo* case relied upon by the Senior Master are completely removed from those in the present case. Here the relevant proceedings for the purposes of Article 6 are the Chancery proceedings. The trial will not start for at least two years and there will be six months of evidence. The idea that one can say that the proceedings will be unfair so as to breach Article 6 is fanciful.

114. First, Mr Hussain will be entitled to decline to answer any question where he really believes that the answer may incriminate him. That, in itself, safeguards his right to a fair trial of the Chancery proceedings.

115. Secondly no breach of Article 6 arises merely because one party to litigation may be required - in the context of other litigation - to answer questions in advance of trial. There are many examples where one party may be so required to answer questions in advance.

116. Finally, and in any event, at the trial Mr Hussain can correct or even change his mind as regards any evidence he may have given at the examination.

Mr Hussain's case

117. In addition to the cases cited above, Mr Lissack QC also relies upon the case of *Wynen v Belgium* ECtHR 5 November 2002 at paragraph 32 relating to different time limits for pleadings. On the basis of the authorities, he submits that it is clear that ordering the examination would put Mr Hussain at a substantial disadvantage in the Chancery proceedings, as compared to the Autonomy Parties. Requiring one party to give evidence earlier than the witnesses for the other party in litigation and to give evidence before disclosure is contrary to the principle of equality of arms. Mr Hussain would be cross-examined before disclosure is complete and over a year before any other witnesses would be required to submit their witness statement and over two years before he or anyone else would ordinarily be cross-examined at trial.

118. The Fifth Amendment does not neutralise the problem particularly where Autonomy Parties do not accept that Mr Hussain can invoke the Fifth Amendment in answer to every question.

119. Thirdly there is no comparison with regulatory investigations or examinations in relation to assets. Here the questions are being asked by Mr Hussain's opponent in the Chancery proceedings on matters directly relevant to the allegations in those proceedings. As regards the suggestion that in other cases evidence is exchanged sequentially, that is not comparable to the present case where there will be a gap of more than two years between the examination and the Autonomy Parties' witnesses giving evidence. Finally this inequality would be removed or reduced if the Autonomy Parties were prepared to give the undertakings not to use the evidence in the Chancery proceedings; but they are not prepared so to do.

Analysis

120. First, the question whether an order for examination would infringe Mr Hussain's rights under Article 6 ECHR is a question of law and not one for the discretion of the Court as to whether to give effect to a letter of request under the 1975 Act.

121. Mr Hussain's case here, and the Senior Master's decision, relied upon the decision in *Dombo Beheer*. Whilst the principle there stated is one of general application, the facts of that case are far removed from those in the present case. That was concerned with the evidence that could be definitively called at trial; one party could rely on witness evidence whilst the other could not. In the present case, what is in issue is the giving of some evidence by one party in advance of evidence given by the other party.

122. Further the case of *Wynen* does not assist. There, the infringement of Article 6 arose because of the consequential effect of the different time limits for pleadings upon the ability of the applicant to respond to the respondent's pleadings – each party must be given the opportunity to have knowledge of and comment on the observations and evidence of the other party. That is not the issue that arises in this case.

123. In my judgment, an order for examination of Mr Hussain does not breach his rights under Article 6.

124. First, the ability of Mr Hussain to rely upon the Fifth Amendment, should he choose to do so, protects him against any unfairness which he contends arises. In my judgment, this itself is sufficient to dissipate any possible unfairness.

125. Secondly, the overall fairness of the Chancery proceedings as a whole is a matter for the trial judge in those proceedings to monitor and control. It is not for this court to rule specifically on the unfairness of those proceedings and at this stage. There is an objective justification for him being examined in relation to what is a small subset of what is in issue in the Chancery proceedings. Mr Hussain has already set out his stall in pre-action correspondence and in his defence. Further there can be no objection arising from the fact that the giving of evidence will be sequential.

126. Thirdly, as regards other examples where a party may be required to give evidence prior to or at an early stage in proceedings (for example in response to a regulatory inquiry or in the context of pre-trial relief), whilst the context of these examples may be different, the content of evidence given in those cases is not necessarily different and may be equally relevant to substantive issues in the case.

127. Fourthly, if it turns out at trial that, in the light of further documents and information available by that time, his evidence given in the examination is incorrect, Mr Hussain will be at liberty to explain any inconsistency or discrepancy with evidence given in the course of the examination, by referring to the fact that he made a mistake or he had subsequently seen different documents. The trial judge can take that into account, and, what is more, can, in his discretion, exclude anything that is regarded as unfair.

128. For these reasons, I conclude that as a matter of law, an order for examination pursuant to the Letter of Request does not infringe Article 6 ECHR. In this regard, the Senior Master erred in law.

Conclusions

129. In the light of my conclusions at paragraphs 93 and 128 above, I conclude, first, that if and in so far as the examination of Mr Hussain pursuant to the Letter of Request would be otherwise oppressive, his ability to rely upon the Fifth Amendment privilege will prevent any such oppression arising; secondly, that the examination sought will not be pointless, since it cannot be ruled out that Mr Hussain will answer at least some of the questions posed in the examination; and thirdly, that an order for examination will not infringe Mr Hussain's rights under Article 6. To this extent, I consider that the Senior Master exercised her discretion on a basis that was wrong in principle, in her conclusions at paragraphs 73 and 79, and that therefore I am entitled to interfere with the Senior Master's conclusion. In my judgment, this is a case where the Court should exercise its discretion to make an order, in principle, for examination under the 1975 Act.

130. This appeal is accordingly allowed. I will hear submissions as to the appropriate course to be taken regarding the making the order for examination and any further points arising.

131. Finally, I am grateful to Mr. Patton, and Mr Lissack QC and Mr Jones for the assistance that they have provided to the Court in the presentation of oral and written argument in this matter.