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English disclosure processes and foreign blocking statues

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Abstract

The interaction of offshore confidentiality laws and onshore litigation disclosure obligations can pose significant practical issues for private client practitioners. The article considers how an English Court would approach such questions, and, in particular, objections to disclosure on the basis that the provision of documents or information would be a criminal offence under an offshore confidentiality statute. The starting point of the analysis is the English Court of Appeal decision in *The Secretary of State for Health and Others v Servier Laboratories Limited* [2013] EWCA 1234. The article continues to provide practical suggestions on how to deal with such issues should they arise.

Introduction

Most key offshore centres in the Caribbean and the Pacific have statutory provisions criminalizing the disclosure of confidential information whether in a general secrecy law or in specific provisions relating to companies, trusts, and trust-like structures. The recent Court of Appeal judgment in *The Secretary of State for Health and Others v Servier Laboratories Limited*[1] has reviewed the English law position when a party subject to a disclosure obligation claims that the provision of the documentation or information would be a criminal offence in another jurisdiction (the 'Blocking Statute Issue'). The judgment summarizes the established principles and confirms those principles at an appellate level. As is often the case, the objecting parties were ordered to disclose the documents in question. The principles in *Servier* are important for litigators who regularly deal with litigation parties who are connected to offshore jurisdictions.

This article reviews the principles set out in the leading cases. It also considers the practical issues facing a party when such an issue arises, the steps that can be taken domestically and abroad to protect the interests of clients, and the evidence which will be taken into account by an English Court. Specifically, while the results of the cases are generally that the English Court will order disclosure when met with opposition to disclosure based on a foreign blocking statute, this is not the inevitable result of the argument. Parties can take practical steps to address their clients' concerns, limit disclosure, and minimize the risk of being placed in a position of conflict between an English Court order and the criminal laws in another jurisdiction.

Specifically, the article considers:

i. The types of disclosure which raises the Blocking Statute Issue.
ii. Blocking Statutes: onshore and offshore varieties.
iii. The case law prior to *Servier*.
iv. *Servier*.
v. The Blocking Statute Issue and OFCs: The core principles and practical considerations.

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1. *Secretary of State for Health v Servier Laboratories* [2013] EWCA 1234 on appeal from [2012] EWHC 2761 (Ch) and [2012] EWHC 3663, both Henderson J and *National Grid Electricity Transmission Plc v ABB Ltd* [2013] EWHC 822 (Ch) (Roth J).

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What domestic disclosure and information gathering processes engage the Blocking Statute Issue?

The short answer is that the Blocking Statute Issue can arise in the course of any process whereby an English court exercises its powers to require a litigant to provide information or documentation.

The case law indicates the broad range of situations that have triggered issues:

i. Standard disclosure under CPR Part 31.[2]
ii. Specific disclosure applications.[3]
iii. Part 18 Requests for Information.[4]
iv. Product or process descriptions under CPR Part 63.9.[5]
v. Insolvency documentary gathering processes.[6]
vi. Oral examinations in insolvencies.[7]
vii. Oral testimony by witnesses.[8]
viii. Third party evidence gathering procedures such as Norwich Pharmacal proceedings and Bankers' Books Evidence Act applications.[9]

For third parties to the litigation, the final of these categories has territorial restrictions which generally limit documentary requests to documents located within the jurisdiction.[10] However this traditional limitation may become of decreased significance in modern cases since electronic information may be accessible from the United Kingdom regardless of where the server of the requested entity is based.[11]

If a party outside the UK does not have information or documents in the UK and does not participate in English litigation, either as a party or as a witness, the prospect of it being placed in a position of conflict between domestic and English legal obligations is limited. English litigation participants can use cross-border evidence gathering regimes to collate evidence in support of their case from non-participants, but since these processes would commonly involve determinations by courts which have a domestic blocking statute, the conflict of obligation problems associated with the Blocking Statute Issue would be avoided.[12]

What is a blocking statute?

A blocking statute is a statute which criminalizes the provision of information in the course of legal proceedings outside of the jurisdiction of the statute unless the provision is through a domestic legal gateway.[13]

Blocking statutes fall into two common categories:

i. European statutes drafted with a view to curbing the perceived encroachment of US litigation on domestic business (the 'European Model').
ii. Offshore statutes drafted with a view to strengthen confidentiality protections in respect of offshore banking, trust administration, and corporate vehicles (the 'Offshore Model').

Of the European Model statutes, the most well known is the French statue, Law 80-538, amending Law 68-678. Many of the leading cases, including

2. *The Heidberg* [1993] 2 Lloyd's Rep 324 (Creswell J).
3. *National Grid Electricity.*
4. *Servier* (n 1).
5. *Elmo-Tech v Guidance Ltd* [2011] EWHC 98 (Pat) (Lewison J) [2011] FSR 24.
6. *Morris v Banque Arabe et Internationale d'Investissement SA (No 1)* [2001] I.L.Pr. 37, Neuberger J.
7. *Re Casterbridge Properties Ltd* [2002] BCC 453 (Burton J) ('*Casterbridge 1*'); *Re Casterbridge Properties Ltd* [2003] BCC 724 (Jacob J) ('*Casterbridge 2*').
8. *Brannigan v Davison* [1997] AC 238, PC (NZ).
9. *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] 1 Ch 482 (Hoffmann J).
10. *Mackinnon*; Dicey, Morris and Collins, *The Conflict of Laws* (15th edn) at 8-072.
11. *United Company Rusal Plc v HSBC Bank* [2011] EWHC 404 (QB) Tugendhat J.; *Disclosure of Information, Bushell and Milner-Moore* at pp 234–35.
12. The problem may not be avoided completely. A party can owe confidentiality obligations under the laws of several jurisdictions in respect of the same information.
13. S 2 of the Protection of Trading Interests Act 1980 provides that the Business Secretary can prevent a UK party complying with foreign disclosure obligations.

Servier and *National Grid Electricity*, consider the impact of this statute. The statute provides:

> Article 1 bis:
>
> Without prejudice to international treaties or agreements and laws and Regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto.
>
> Article 2
>
> The persons referred to in Articles 1 and 1 *bis* shall promptly inform the competent Minister, upon the receipt of any request concerning such communications.
>
> Article 3
>
> Without prejudice to harsher penalties provided for by law, any breach of the provisions of Articles 1 and 1 *bis* of the present law shall be punished by a six month imprisonment and a fine of 18,000 Euros or either one of these penalties only.

The gist of the European Model is that information provision in cross-border litigation should take place within the framework of the Hague Convention or other international co-operation regimes, rather than being a matter for the *lex fori*. The French statute was brought in as a response to what was considered the invasive and exorbitant US litigation and disclosure processes.

The Offshore Model grew popular in the 1970s as a reaction to increasing American attempts to obtain information in respect of offshore transactions involving American taxpayers. While often explained as an attempt to codify common law secrecy, these statutes in fact went much further, criminalizing the provision of information in connection with financial dealings with the jurisdiction's offshore business, usually without territorial limitation. Indeed not only was the provision of the information criminalized but also the act of asking for information was usually made subject to the confidentiality statute and hence criminalized. These statutes were seen as an integral part of the marketing of a jurisdiction's offshore product offerings.

The challenges of terrorism and organized crime, the global recession of 2007 onwards, and the desire of most blue chip OFC's to prioritize capital markets business has greatly increased the ability of government agencies to access information from OFC's in recent years in the context of criminal and tax investigations, through the extension of mutual legal assistance treaties and tax information exchange agreements. However, there has not been a material shift in the provision of information in the context of international civil litigation.

The classic template for the Offshore Model is the Cayman Islands Confidential Relationships (Preservation) Law ('CRPL'). Most of the other leading Caribbean and Pacific offshore jurisdictions have enacted confidentiality legislation which broadly mirrors the CRPL regime.

While Offshore Model statutes do generally permit dissemination of information in broadly similar terms to the exceptions to common law *Tournier* confidentiality obligations, disclosure of confidential information in connection with legal proceedings, whether domestically or abroad, cannot take place without Court sanction.[14] The statute typically sets out the process of obtaining sanction, which generally involves an application by the intended disclosing party for directions for the determination of the application,[15] the notification of the application to parties who may be affected by the application and then a second hearing to afford those parties the opportunity to address concerns if disclosure is made as requested.

Such domestic OFC Court applications often do result in orders which support the foreign

14. The process is summarized in *Casterbridge 1* and *Casterbridge 2*.
15. This process is commonly referred to in Cayman Islands' practice as a 'Section 4 Application'.

litigation processes. But this is not always the case,[16] particularly in pre-action processes.[17] Furthermore, these applications can take some time to be determined and can result in significant costs.

A third category of related statutes are becoming increasingly important in cross-border litigation, namely data protection legislation. Data protection laws can put a litigant in a position of conflict between foreign disclosure obligations and domestic data privacy rights. It is anticipated by some commentators that data protection laws of a relatively standard type will gradually replace Offshore Model legislation in OFC's. Jersey's Data Protection (Jersey) Law 2005 implementing the European Data Directive does not appear to have caused any harm to its offshore business, although as with the other Crown Dependencies, Jersey did not have a blocking statute in place prior to the data protection law coming into force, relying instead upon common law confidentiality.

The case law—a chronology

The majority of the leading English cases deal with the French statute. Without exception, the parties objecting to disclosure based on that law have been unsuccessful when they have tried to invoke the effect of the French legislation. In turn, this has tended towards a view from commentators that objections based upon blocking statutes will not assist litigants. This belief is too simplistic. Close analysis shows that the facts surrounding the application of the French statute, or more accurately the lack of its application, have been the major determinant in the cases.

The modern[18] starting point for the Blocking Statute Issue is the judgment of Hoffmann J in *Mackinnon v Donaldson, Lufkin and Jenrette*[19] which was not a blocking statute case. In *Mackinnon* the Claimant[20] brought an application against an American bank under Section 7 of the Bankers' Books Act 1879 to produce documents held at its New York office in respect of the accounts of a Bahamian company. Hoffmann J confirmed that save in exceptional circumstances the English Court would not require foreign non-parties to provide documentation located outside of the jurisdiction.

However it was made clear that position was different for parties to litigation:

> I am not concerned with the discovery required by R.S.C., Ord. 24 from ordinary parties to English litigation who happen to be foreigners. If you join the game you must play according to the local rules. This applies not only to plaintiffs but also to defendants who give notice of intention to defend. The recent decision of the Court of Appeal in the *South Carolina Insurance Co.* case [1986] Q.B. 348 shows that adherence to local rules requires also forbearance from taking advantage of more advantageous rules available elsewhere. Of course, a party may be excused from having to produce a document on the grounds that this would violate the law of the place where the document is kept: compare *Société Internationale pour Participations Industrielles et Commerciales S.A. v. Rogers* (1958) 357 U.S. 197. But, in principle, there is no reason why he should not have to produce all discoverable documents wherever they are.[21]

The first modern case which considered the Blocking Statute Issue directly was *Partenreederei M/S Heidberg v Grosvenor Grain And Feed Company Limited (The Heidberg) (No1).*[22] *The Heidberg* involved a claim for general average contribution arising from damage suffered by the Claimant's vessel in a collision in France. Two of the defendants were French companies and they sought to rely upon the

16. *Re Ansbacher (Cayman) Limited* [2001 CILR 214] Smellie CJ.
17. *Re a request from the Superior Court of Ontario, Canada* [2006] CILR 460] (Levers J); *UJB Financial Corporation v. Chilmark Offshore Capital Fund* [1992–93 CILR 53] Schofield J.
18. *The Consul Corfitzon* [1917] AC 50, HL(Eng). is sometimes cited in chronological analyses.
19. [1986] 1 Ch 482, Hoffmann J.
20. Pre-CPR cases and non-CPR jurisdictions, the CPR terminology has been adopted.
21. At 494E-495B.
22. [1993] I.L.Pr. 718; [1993] 2 Lloyd's Rep 324 (Cresswell J).

French statute to set aside disclosure orders made against them.

Referring to Hoffmann J in *Mackinnon,* Cresswell J confirmed that issues of disclosure, as procedural matters, were properly a matter for the *lex fori.*[23] The Court reviewed detailed expert evidence on the French blocking statute[24] and found[25]:

i. The provision of the disclosure was not a criminal offence in France.
ii. There was no risk of the defendants being charged with a criminal offence.
iii. French companies had regularly given evidence in English civil litigation.
iv. There was no evidence anyone had ever been prosecuted under the French statute.

As a result of these findings the application to discharge the disclosure orders was dismissed.

The Privy Council considered the question whether an Offshore Model statute could give rise to a privilege against self-incrimination for witnesses in a New Zealand inquiry in *Brannigan v Davison.*[26] The case arose out the Winebox Inquiry which was a Commission of Inquiry into the responses of New Zealand regulators, specifically the Commissioner of Inland Revenue and the Director of the Serious Fraud Office, to allegations of tax fraud by New Zealand companies using a fraudulent scheme of tax credits issued by the Cook Islands government. The inquiry received its colourful name as the documents at the centre of the allegations were brought to the New Zealand parliament in a winebox.

New Zealand resident witnesses with close business links to the Cook Islands objected to providing evidence because it would expose them to the risk of prosecution for breach of Cook Islands' confidentiality laws, and specifically, Section 227 of the International Companies Act 1981-192. The witnesses sought to stress that the government of the Cook Islands had made plain its intention to enforce the local legislation.[27]

The advice of the Privy Council was that the privilege against self-incrimination could not be invoked when the criminal activity in question was only a crime in a foreign jurisdiction. Self-incrimination could only give rise to a privilege claim in respect of domestic crimes. Central to the decision is that the privilege was an absolute and unqualified right and the Court would have no discretion—'the privilege is rigid and absolute'.[28] The Committee noted that:

> different countries have their own interests to pursue. At times national interests conflict. In it simple, absolute unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings.[29]

It made no difference to the analysis that the act of giving evidence was the offence in question, rather than the evidence tending to incriminate the witness in respect of a pre-existing offence:

> The other unusual feature of the present case is that the feared criminality under the laws of the Cook Islands lies not in the previous conduct of the plaintiffs but in the fact of their giving evidence to the commission on what they know of the winebox transactions. Their Lordships consider this additional feature does not assist the plaintiffs. Certainly, if the privilege were available to excuse the plaintiffs from giving evidence of prior criminal acts, one would expect the privilege to be available equally, or more so, when to compel an answer would be to compel the

23. [42]. See also Dicey, Morris and Collins (n 10) 8R-067.
24. [23]–[34].
25. [36]–[40].
26. [1997] AC 238, PC(NZ).
27. 252A-C.
28. 249E-F.
29. 249H-250B.

> witness to commit a criminal offence. The objections to the use of the state's coercive power are as powerful in the latter case as the former. But when the privilege against giving self-incriminating evidence of prior conduct is not available because of the foreign law element, the privilege likewise cannot avail a witness where the crime under the foreign law would lie in the fact of giving evidence. The reason, already stated, why the privilege is not available in the former case (of prior conduct) applies also in the latter case.[30]

Having rejected the absolute privilege, the Privy Council expressly left open the question of the existence and scope of any discretion to excuse a witness because of the risk of foreign prosecution because the statutory framework for the Inquiry provided for wide discretion to excuse a witness.[31] While not formally deciding the point, the Judicial Committee strongly indicated that there should be such a discretion:

> if the unqualified application of the privilege to foreign law is unsatisfactory, so also Is the opposite extreme. The opposite extreme is that the prospect of prosecution under a foreign law is neither here nor there . . . This would be a harsh attitude. It would be a reproach to any legal system. One would expect the trial judge to have a measure of discretion.[32]

The discretion considered in *Brannigan* was reviewed in *Morris v Banque Arabe International d'Investissement SA (No1)*[33] which again involved the French statute, this time in the insolvency context. *Morris* was an application arising from the collapse of BCCI. The liquidators of BCCI sought disclosure against a French bank in an Section 213 action alleging that it had knowingly assisted BCCI's illegal activities. The defendant bank had provided lists of documents but objected to inspection on the basis of the French statute. It requested that the documents were sought through the Hague Convention instead.

The Court reviewed again expert evidence on French law and again found the evidence that the French statute was an impediment to English disclosure unpersuasive. There had been no prosecutions under the law. It was accepted that disclosure by list did not infringe the law but that provision of inspection was a criminal offence. However the Court went on to comment that the experts had considered the chances of prosecution were 'weak', 'very low', 'purely theoretical', and 'nil, practically speaking'.[34] The Court also noted that French companies regularly gave disclosure in English litigation without the issue being raised.[35]

Applying *Brannigan,* Neuberger J rejected any right to refuse inspection. The importance of *Morris* lies in the detailed analysis of the scope of the discretion under the CPR to limit disclosure by reason of a blocking statute. *Morris* was the first CPR consideration of the Blocking Statute Issue.

Neuberger J noted that CPR Rule 31.3(1)(b) permitted a party to withhold inspection if the disclosing party had a right or duty to withhold. He found that the ordinary language of the ability to claim that disclosure should be withheld pursuant to a right was wide enough to include a right or duty under the laws of a foreign jurisdiction[36] and that there existed a discretion to limit disclosure on that basis:

> [I]t appears to me that this construction of rule 31.19 is in accordance with the overall objective stated in rule 1.1(2) which is to be applied when considering the effect and meaning of rule 31.19 in light of rule 1.2. In a case such as this, I would expect the court to be able to balance the competing interests of parties;

30. 250D-F.
31. 251D-F.
32. 251B-D.
33. [2000] I.L.Pr. 718.
34. [27]–[33].
35. [39].
36. [61]–[62].

> namely, one party's reasonable desire to inspect documents self-evidently relevant to the proceedings and the other party's concern about committing a crime abroad[37] .... [W]here, as here, there is another procedure whereby the Documents can or may be capable of being obtained, without involving the party otherwise ordered to give inspection being in breach of foreign law, it would be surprising if the Court had no discretion to refuse inspection with a view to that alternative procedure being undertaken in an appropriate case.[38]

In considering the discretion, the evidence of the low risk of any prosecution, balanced with the importance of the requested disclosure to the claim before the Court left the Court with 'little hesitation' to order inspection, save for the single issue of whether the Hague Convention procedure should be adopted. Neuberger J agreed with the suggestion of counsel that 'the Court should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved'.[39]

On the facts of the case, the Hague Convention argument was rejected.[40] The French entity had known of the disclosure process for some time as disclosure lists had been ordered some eleven months previously. The French entity could have engaged the Hague Convention process as soon as it knew which documents were to be disclosed. While the liquidators could have applied under the Convention once lists had been served the indications of the defendants that they would be taking steps to advance their ability to provide documents meant the liquidators could not be criticized for inaction. It was not certain that the Hague Convention route would result in the provision of documents and there had been enough delay. Disclosure was ordered without restriction.

The focus returned to the Offshore Model in two important, but often overlooked judgments *Re Casterbridge Properties (No 1)*[41] and *Re Casterbridge Properties (No 2)*.[42] Casterbridge was a company registered in St. Vincent and the Grenadines. It had a corporate director, CDL, another St Vincent company, and CDL had 9 directors including a Mr Jeeves. Casterbridge carried on business running a time-share development in Hever, Essex. The Secretary of State for Trade and Industry petitioned for the winding-up of Casterbridge on a public interest petition on the basis that it had committed time share fraud.

The Official Receiver obtained an order that Mr Jeeves ('J') attend for a public examination under Section 133 of the Insolvency Act 1986. J objected to the examination on the grounds that the St Vincent Confidential Preservation (International Finance) Act 1996 and the International Trusts Act prevented him giving evidence until and unless the St Vincent court had sanctioned his participation. The St Vincent statute was in the classic Offshore Model, it was almost a word-for-word copy of the Cayman statute. J made a Section 4 application to the St Vincent Court for permission to provide information in the course of the public examination.

The public examination was adjourned to allow the St Vincent Section 4 application to be determined. The examination was originally listed in April and J applied to the St Vincent court in May. The application was adjourned in May, June, July, September, October (twice), and early November. The restored English application was listed on 21 November and the St Vincent hearing was listed on 23 November. The Official Receiver cross-applied for a private examination in the event that the Court was not minded to allow the public examination to proceed.

J was resident in Liechtenstein but visited St Vincent several times a year on business. He was concerned with three St Vincent trust companies and had

37. [63].
38. [65].
39. [73].
40. [75]–[82].
41. [2002] BCC 454 (Burton J).
42. [2003] BCC 724 (Jacob J).

interests in seven other companies registered there. The Official Receiver's position was that the vast majority of information and documentation sought had nothing to do with St Vincent and was concerned solely with UK-based activities. It was also pointed out that in common with many OFC's requirements for international business companies Casterbridge was not permitted to conduct its business in St Vincent.

Burton J came to the following conclusions:

i. It would be unlikely that the St Vincent court would prevent the information being provided, and if the statute did have such a wide effect as prevent disclosure it would be disregarded by the English Court as exorbitant.[43]
ii. The risk of exposure to criminal sanction in St Vincent was relevant to the exercise of the Court's discretion but that risk was much less than J had contended.[44]
iii. The information sought was important to allow the Official Receiver to conduct his investigation into the affairs of a company which was the subject of an English public interest winding-up.[45]
iv. Considering the low risk of a negative order in St Vincent and the case made out by the Official Receiver for the need for a public examination, the Court would refuse to set aside the order for the public examination.[46]
v. It was hoped that following the order of the English Court to refuse J's application, the St Vincent court would grant the Section 4 relief and permit J to give evidence so that there was no conflict between the jurisdictions.[47]

Casterbridge did not end there. First, after the first English judgment, the St Vincent Court refused to grant J Section 4 permission to provide information and documents in the English proceedings. It appeared the St Vincent court was not impressed by the English concept of a local winding up in respect of a St Vincent company. Second, the St Vincent blocking statute was repealed.

Following the Section 4 determination, J applied to have the earlier order rescinded. Had the subsequent argument been based solely upon the impact of the refusal to permit disclosure by the St Vincent court, *Casterbridge (No 2)* might have provided important guidance. But the repeal of the blocking statute made the decision quite straightforward. The Court took the view that there was very little risk of J facing sanction for breach of the statute, 'The English law court is looking for a real risk, not formalities'.[48] The repeal meant that it was no longer illegal for J to provide the information[49] and it was 'wholly unrealistic' to regard J as subject to real risk of prosecution in St Vincent.

What if a party breaches a disclosure order of the English court but is subject to an order of another Court not to do what the English court ordered? This was considered by Christopher Clarke J in *Masri v Consolidated Contractors*.[50] Following litigation in England a receivership order was made over the assets of a Lebanese judgment debtor. That order included disclosure obligations. After the English order, the Lebanese court issued orders blocking the directors of the Lebanese company providing the information sought under the receivership order. Contempt proceedings were initiated in England.

The Court expressed the view that there was no authority on this issue.[51] The Court had contempt jurisdiction over the Lebanese parties. There was no

43. [35(i)].
44. [35(ii)] and [50(i)].
45. [35(iii)] and [50(ii)].
46. [50].
47. [35(iii)].
48. [6].
49. [8].
50. [2011] EWHC (Comm).
51. [252].

'primary allegiance' test which ousted any contempt jurisdiction. Rather the English court was regulating the enforcement of its own orders which it had jurisdiction to make. Furthermore in many cases the 'other' jurisdiction was merely a jurisdiction of convenience which had been chosen 'to save tax or avoid the need to produce information or file accounts or for other reasons not all of which may be creditable'.[52]

Reviewing *Brannigan* and *Morris,* Christopher Clarke J. found that the Court had a flexible discretion on contempt applications just as it did when making the underlying disclosure order.[53] Accordingly the risks associated with the sanctions of the court and the reasons for non-compliance which were derived from parallel inconsistent foreign obligations were relevant matters to take into account when determining any contempt process. As in *Casterbridge (No 2)*, the Court was clearly influenced by the view that the alleged contemnors had taken deliberate steps to put themselves in a position of conflict and they could easily take steps in the other jurisdiction to resolve the conflict.[54]

The French statute was again raised unsuccessfully in *Elmo-Tech Ltd v Guidance Ltd.*[55] An English company was ordered to provide a product or process description ('PPD') instead of standard disclosure pursuant to CPR Part 31.6. The patent dispute raised issues relating to the defendant's dealings in a contract with the French Ministry of Justice. The document served by the defendant did not disclose how the product of system worked and it was argued that such disclosure could not be provided because of French legal obligations of confidentiality.[56]

The PPD was considered the most important document in the case and there had been a clear legislative 'steer' in favour of disclosure of information through this process.[57] On the authorities these factors provided a strong indication that disclosure should be ordered.

The Court found that there was no evidence that compliant disclosure required access to documentation in France or that the defendant company had made any real effort to persuade the Ministry of Justice to allow it to comply with its disclosure obligations.[58]

Lewison J was faced with a new strand to the French statute argument, as there had now been a successful prosecution under the French blocking statute. In 2007 a French lawyer was convicted in 2007 in what was known as the *Christopher X* case. However this did not trouble the Court which did not consider that this prosecution materially increased the risk of prosecution if the defendant complied with the order.[59] The defendant company's objections to providing a more detailed PPD were accordingly rejected.

Servier—the French statute's last hurrah?

Servier involved two separate appeals that were dealt with in a single judgment.[60] Absent any further future active enforcement of the French blocking statute by French authorities, which is unlikely, the Court of Appeal's judgment may be the last word on that statute.[61] The Supreme Court refused the defendant parties permission to appeal.

Servier and *National Grid* were both competition law cases. Two arguments were run at before the Court of Appeal. First, the traditional argument that the French blocking statute was an impediment to the

52. [258].
53. [261].
54. [429]; See *Casterbridge (No 2)* at [9].
55. [2011] EWHC 98 (Pat); [2011] FSR 24 (Lewison J).
56. The defendant argued it was barred from providing the information under the French Defence code as well as the blocking statute.
57. [46].
58. [50].
59. [48].
60. For practical reasons the appeals could not be heard at the same time and were argued separately (*Servier* at [2]).
61. Amendments to the French statute which would narrow its application have been proposed.

provision of information or disclosure. Second by reason of the CJEU decision in *ProRail BV v Xpedys NV*,[62] the English court had to use the Taking of Evidence Regulation rather than order party-to-party disclosure.

Servier came before Henderson J at first instance in April 2012.[63] The French defendant companies in the competition proceedings resisted Part 18 requests. The blocking statute and the cases dealing with that statute were reviewed in detail, including the impact of potential amendments to the statute.[64] Henderson J was not persuaded that the risk of prosecution was more than theoretical[65] and continued

> I cannot believe that the French authorities would even contemplate prosecuting Servier for complying with a standard set of directions for disclosure in litigation brought in the public interest by the English health authorities alleging serious breaches of EU competition law.

However as there were Commission competition proceedings pending which covered the same ground as the English litigation, the Court stayed the English action until the conclusion of the oral hearing before the Commission.

National Grid involved specific disclosure applications against French companies in the course of competition proceedings. The blocking statute was raised in objection to the application, as was the *Prorail* issue (it was not raised at first instance in *Servier*). Detailed expert evidence of French law was before the Court. Roth J found that the provision of documents would infringe the blocking statute.[66] However that was not the critical issue. The main issue was the risk of prosecution. Nothing appeared to have changed to improve the defendants' case on that point since *The Heidberg*.[67]

Moreover since the claims were based upon EU rights and obligations, it was 'virtually inconceivable'[68] that a member state would rely upon domestic law to impede proceedings.

Roth J then turned to the impact of *Prorail*. He did not consider that the Regulation was concerned with disclosure in civil litigation[69] and the EU authorities indicated that resort to the Regulation was not mandatory in any event.[70] Invoking the Regulation process might not result in the production of disclosure, on the basis that the Regulation was focused on the taking of evidence rather than facilitating documentary disclosure. That would cause delay, as would the potential need to engage the Regulation for any further disclosure required in the course of trial preparation. For these reasons, direct disclosure processes were preferable.

The cases progressed to the Court of Appeal. The majority of the Court of Appeal's judgment is concerned with the scope of the Taking of Evidence Regulation. The Court rejected the argument that the Regulation had to be invoked. Challenges to the exercise of the discretion to order disclosure (pr more accurately not to refuse disclosure) were dealt with quite shortly on the basis that the Court could not see any basis upon which the first instance exercises of discretion could be challenged once the appellants failed on the *Prorail* question.

However there are parts of the *Servier* judgment which are of wider impact to the Blocking Statute Issue, particularly as this was the first time the issue had been considered by the Court of Appeal:

i. It was confirmed that the English court had jurisdiction to order disclosure in the face of a

62. (C-332/11) [2013] I.L.Pr. 18.
63. [2012] EWHC 2761 (Ch). There was second hearing shortly before the Court of Appeal [2013] EWHC 822 (Ch).
64. [38].
65. [55].
66. [41].
67. [43].
68. [47].
69. [50].
70. [54]–[56].

foreign blocking statute but could limit disclosure in the exercise of its discretion.[71] It was legitimate to take account of the 'real risk of prosecution'.[72]

ii. Given the evidence on the French statutes, the exercises of discretion by Henderson and Roth JJ were 'unimpeachable'[73] as there the French parties could not establish a sufficient risk of prosecution.

iii. When considering whether to proceed by way of ordinary party-to-party disclosure or engage a court-to-court evidence gathering process, the party-to-party procedure was 'plainly the more appropriate course'.[74] Court-to-court processes are likely to be 'slow, cumbersome and an inadequate alternative'.

> It is obvious that the just and efficient disposal of National Grid's disclosure application required a conventional order directly against the French defendants.[75]

The decisions at first instance to order disclosure was 'manifestly correct'. This indicates a strong rejection of the 'alternative process' argument which caused Neuberger J difficulty in *Morris*.

The blocking statute issue and OFCs: the core principles and practical considerations

On a first impression review of the case law, a conclusion could be drawn that a party objecting to disclosure because of the Blocking Statute Issue connected with OFC legislation faces insuperable hurdles before the English court. A closer reading indicates that this may not be a fair summary.

The vast majority of the decisions involved the French statute. The evidence of French law that has been considered in the cases indicated that the risks associated with a breach of the statute were insufficient to engage a meaningful challenge to ordinary disclosure processes. The evidence was consistent that any risks were 'theoretical' (see, for example, *Morris* and *Servier*).

However implicit in the cases which consider Offshore Model statutes was a greater regard for the problems facing litigation participants by reason of their confidentiality obligations. In *Brannigan*, the Privy Council gave a clear indication that upon the issue of the scope of evidence being remitted to the New Zealand commission, the impact of the Cook Islands legislation on participating witnesses should be taken into account. It was also noted that the Commission was not seeking to obtain documents which were located in the Cook Islands:

> [T]heir Lordships recognise that the contradictory commands of different states can give rise to acute problems for individuals. The resolution, or alleviation, of these problems is one object of the principles of foreign state compulsion, which have been developed particularly in the USA. For its part New Zealand has observed these principles. The commission has recognised that KPMG Peat Marwick cannot reasonably be expected to produce documents currently in the Cook Islands. Likewise their Lordships see no reason to doubt that, should occasion arise, the courts of the Cook Islands will give proper recognition to the validity of the compulsion exercised in this case by New Zealand law over acts done by New Zealand residents in New Zealand.[76]

Similarly in *Casterbridge (No 1)*, the English court was willing to defer to the public examination to allow the St Vincent court to determine Mr Jeeves's Section 4 application. On the facts, the English court's patience appeared to have run out by the time of the

71. [99]–[100] and [117].
72. [117].
73. [102].
74. [104].
75. [104].
76. 253D-F.

restored hearing, but even at the stage it is clear from the ruling that the Court did not consider it was going to order disclosure which it considered would be subject to ongoing St Vincent confidentiality restrictions. By *Casterbridge (No 2)* the repeal of the St Vincent statute meant that the problem had disappeared.

An English Court's approach to the Blocking Statute Issue will be driven by a client's litigation interests, and balancing competing interests in determining the strategy to be adopted. Is the client's aim simply to limit disclosure? Does the client wish to avoid being placed in a position of conflict between the OFC and the English Court? Does the client want protection from criticisms from third parties in the event that confidential information is disclosed, or, more significantly avoid the risk of civil litigation or a criminal investigation instigated by such third parties? Are there commercial or reputational issues at stake?

An obvious preliminary issue will be to determine the precise scope of the OFC restriction on disclosure arising from any blocking statute as a matter of the domestic law of the OFC. In the French statute cases it was found that the provision of disclosure lists was not a breach of the statute but that the provision of inspection of listed documents located in France was a breach.[77] In Offshore Model cases the issue is likely to be engaged at an earlier stage than at the French cases, because the listing of documents is likely to involve the disclosure of information which falls within the confidentiality regime.

On the face of the French cases, the critical threshold issue is 'What is the risk of prosecution?' In *Servier* Beatson LJ noted that 'it is legitimate for the court to take into account a *real risk of prosecution*'[78] (emphasis added). While strictly only one of the factors to be considered in the exercise of the discretion to limit disclosure, it is clear that the identification of the risk is the gateway to the wider consideration of the discretion.[79] Unless there is an identified real risk there will be very limited, if any, scope for a party objecting to disclosure to raise effective blocking statute arguments.

But how would a party address the 'risk of prosecution' the correct test in OFC cases? In the French cases it was common ground that the provision of documents located in France as part of an English civil disclosure process was a breach of the broad obligations under the blocking statute. The real issue the court was considering was whether the technical breach of the statute presented any practical problems or risks for French litigation participants.

The English decisions gave substantial weight to the fact that French litigation participants regularly provided disclosure in English litigation without the blocking statute ever being raised.[80] The evidence was that despite there being judicial acknowledgment of many instances of French parties which would constitute a crime under French law there was no evidence of the French authorities taking steps to enforce the statute. There was only one prosecution known to experts and that involved extreme facts.

The question should be whether the blocking statute has real normative effect on parties subject to its obligations. The evidence in the French cases really shows that the French statute had no normative effect. The French law was on the statute books but the conduct of French parties to English litigation, or any litigation, was not affected by the law.

A useful domestic comparator would be UK data protection legislation. This legislation has had considerable and provable impact on the behaviour of English entities since its introduction. One can identify behavioural changes which indicate the normative effect. But does a party need to go further in a blocking statute case, into the criminological and sociological question as to whether the statue itself drives the change of behaviour or whether the real risk of prosecution in the event of

77. *Morris* at [30]–[31].
78. [117].
79. *Casterbridge (No. 2)* at [10] applying *Re Mid-East Trading Ltd* [1998] BCC 726, EWCA, (esp. Chadwick LJ) 754.
80. *Heidberg* at [39]; *Morris* at 582; *National Grid* at [43].

non-compliance is the reason for altered conduct? Surely the objective evidence of compliance with the law must go a long way towards establishing a risk of prosecution?

This distinction between blocking statutes which affect behaviour and those that do not may have been reflected in the only one of the cases which had to directly consider an Offshore Model statute, namely *Casterbridge (No 2)*, when Jacob J stated that 'The English law court is looking for a real risk, not formalities'.[81]

It can be shown that Offshore Model blocking statutes have measurable normative effect on the conduct of foreign litigation participants, and indeed on domestic litigation participants. Behaviour is altered by reason of the statute, although the extent of that activity may vary from jurisdiction to jurisdiction. Take the example of CRPL. Section 4 applications are common in the Grand Court, both in respect of domestic and foreign court processes. A review of the reported decisions on Section 4 applications in the Cayman Islands Law Reports shows that there is a substantial body of case law which considers the scope and effect of the statute. It would be relatively straightforward to provide evidence that CRPL has significant normative impact. The counter-argument, superficially consistent with the French statute case law, is that there is no evidence of prosecutions for breach of CRPL, but the measurable normativity approach must be evidence of the real risk of prosecution for non-compliance. If there is no evidence of prosecution because the parties do not breach the statute, how can the absence of prosecutions be relied upon to dismiss the relevance of the blocking statute?

Other than in *Casterbridge,* there is limited evidence of the effect of Offshore Model statutes on English disclosure processes. But there must be good arguments that in the case of OFC's where compliance with the blocking statute is the norm and can be proved to be the norm the English court will gave more weight to the arguments of a party seeking to proscribe ordinary disclosure processes. The party has more likelihood of providing evidence of a meaningful risk of prosecution in the event of knowing non-compliance with the foreign statute so that the discretionary factors considered in the case law will be engaged.

The discretionary test was best summarized by Neuberger J in *Morris*. The court is asked

> to balance the competing interests of the parties; namely, one party's reasonable desire to inspect documents self-evidently relevant to the proceedings and the other party's concern about committing a crime abroad.[82]

The other key factors considered in exercise of that discretion are:

i. There is a presumption in favour of disclosure. That is a strong presumption, the Court should 'lean heavily in favour of disclosure'.[83]
ii. The English court should seek to avoid conflict with other jurisdictions.[84]
iii. The importance of the documents in the English litigation and the number of documents.[85]
iv. The link between the litigation party and the issues in the litigation to the UK and to the OFC. The closer the link to the OFC the greater the importance of the confidentiality obligation. If the OFC is merely a jurisdiction of convenience and the practical affairs of the entity or its business were in the UK or elsewhere than the OFC then this will weigh heavily in favour of disclosure.[86]

81. [6].
82. [63].
83. *Morris* at [73]; *Elmo-Tech* at [46].
84. *Casterbridge (No 1)* at [35(iii)].
85. *Morris* at [73]; *Elmo-Tech* at [46].
86. *Casterbridge (No 1)* at [32]; *Elmo-Tech* at [50]; *Brannigan* at 254D-F.

v. The previous factor is closely to another important matter. In the event that the Court considers that the foreign statute is seeking to impinge improperly on the scope of internal UK affairs, that statute is likely to be disregarded as being exorbitant.[87]
vi. The impact of the resort to foreign or court-to-court information gathering processes on the English litigation timetable.[88]
vii. The availability of other document gathering processes,[89] although the importance of this factor has been considerably weakened by the Court of Appeal's decision in *Servier*.[90]

A final discretionary factor, and an important one, is the behaviour of the party seeking to limit ordinary disclosure. Specifically has that party evidenced a willingness to take steps which would limit the scope of problem and have they done this timeously? If the Court takes the view that the problems facing the litigant can be attributed to their own conduct[91] or their own lack of conduct[92] then it will be unlikely that disclosure will be restricted.

To maximize the prospects of positive outcome on this issue, a party faced with an OFC confidentiality problem must be seen by the English court to have reacted promptly and positively once it was aware of the issue arising. When faced with disclosure obligations simply stating that disclosure cannot be provided because of a blocking statute will be unlikely to suffice—litigation parties know disclosure is a requirement from the start of their involvement and must act accordingly.

Most of the Offshore Model regimes provide for applications to the OFC court for directions and declarations defining the scope of permissible disclosure. A party who engages in that process promptly and actively will be in the strongest position when the matter comes before an English court.

i. First, the party will be less open to criticism for inactivity as part of the discretionary balancing exercise.
ii. Second, the scope of the Blocking Statute Issue will be more specifically defined in terms of the documents or information which cannot be provided to the English litigant without risking a breach of the OFC obligations.
iii. Third, and most importantly, any specific restrictions ordered by the OFC court will be evidence of an increased risk of prosecution for the provision of the restricted information or documentation. The risk will be more tangible, less hypothetical. Given that the domestic Court has ruled on disclosure which would constitute a criminal act. As this is the critical 'gateway' issue the party resisting disclosure will be able to provide much stronger arguments in favour of restricting disclosure.

An important factor to bear in mind, and which has been given limited consideration in the case law considering the Blocking Statute Issue, is that disclosure is not a binary concept. The OFC and English courts are not restricted to simply ordering full disclosure of a document or accepting that the information is not disclosed. There are range of important safeguards which can be put in place in order to limit the negative impact of the provision of information and parties involved in disputes about blocking statutes would be well advised to consider carefully whether

87. *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1953] 1 Ch 19; *Casterbridge (No 1)* [35(iii)];
88. *Morris* at [80]; *National Grid* [57]; *Servier* [104].
89. *Morris* at [65].
90. [104].
91. *Casterbridge (No. 2)* at [9]; *Masri* at [429].
92. *Morris* at [77]–[78] and [80]; *Elmo-Tech* at [80].

any of these limiting techniques would provide a satisfactory middle ground. The Grand Court has regularly used restrictions on the use of documents,[93] restrictions on access to documents[94] and redaction[95] as condition of granting permission to disclose information.

Conclusion

Litigation parties with OFC connections must take care not to prejudice their interests whether in the OFC or in the litigation to which they are a party. However simply doing nothing until disclosure is due in English litigation is a very dangerous tactic, and one which could prejudice the litigation party's interests.

A superficial review of the case law would indicate that blocking statutes are unlikely to affect a party's English disclosure obligations. However a close reading of the decisions, and in particular the factors considered by the Courts when applying the discretion under CPR Rule 31.3(1)(b), shows that the position is not that simple or negative.

A party facing problems associated with the Blocking Statute Issue should consider taking steps early in the litigation process both in England and in the OFC, and certainly it would be prudent to do so no later than the close of pleadings. Identifying the issue to the English Court or the parties to the English litigation at an early stage and taking steps to determine or narrow the problems will result in the concerns of the litigation party being more closely aligned with the discretionary factors set out in the cases and reduce the risks of a party being in the invidious position of having to chose between two conflicting legal obligations.

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93. *UBS (Bahamas) Limited v Weybridge and Barclays Bank PLC* (unreported, 1998).
94. *Phoenix v Lyxor* [2009 CILR 153].
95. *In re Ansbacher (Cayman) Limited* [2001 CILR 214].