Be careful what you wish for—Part 18 requirements (Al Saud and an-other v Gibbs and another)

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Dispute Resolution analysis: This Commercial Court judgment relates to an application following an allegedly inadequate response to a Part 18 request for further information in advance of extant summary judgment applications being heard. The decision contains a helpful analysis and gloss on the test for such requests and their enforcement, which brings the Part 18 procedure back to its in-tended realm and warns the parties against deploying it strategically where it is not appropriate or proportionate. The judge in particular reminds litigants that Part 18 requests ought not be seen as an automatic or routine part of litigation. Written by Anastasia Tropsha, associate at PCB Byrne LLP.

Al Saud and another v Gibbs and another [2022] EWHC 706 (Comm)

What are the practical implications of this case?

Following the introduction of the modern disclosure regime, as well as the disclosure pilot, the costs and efforts needed to carry out this process have motivated parties to attempt settlement beforehand. In other cases, the costs of disclosure have driven litigants to find opportunities for forcing their opponents to open their cards without embarking on full-scale disclosure. One such route is Part 18 requests for further information. Given the comparative cost saving and the lack of a reciprocal obligation, this strategy has recently become almost routine in complex and high-value litigation.

This judgment aims to dispel this misunderstanding of the original purpose of Part 18, which was written with the intention of combatting unclear or incomplete pleadings to enable cases to proceed efficiently. Mr Richard Salter QC, sitting as a deputy judge of the High Court, examined the test for Part 18 and explained the circumstances, wherein these would be appropriate. He also highlighted that a recipient of such requests for information would only be required to comply if and to the extent that the details and documents requested were necessary and had a proper litigious purpose in light of all the circumstances of the given case at its current stage. For example, if as in these proceedings, there were extant summary judgment applications, it was not appropriate to demand of the respondent to carry out an exercise akin to disclosure without having reached that stage in the proceedings.

Litigants are therefore reminded against deploying tools such as summary judgment applications and Part 18 requests as instruments of aggression or intimidation as, where they are exploited inappropriately, the court will hold the parties to account.

What was the background?

The first defendant (Mr Gibbs), a former Linklaters' partner and later consultant for the first claimant, was by this action asked to account for moneys (some US$25m) put under his management and control by the claimants in 2018 and to compensate the claimants for any losses arising from this arrangement. Summary judgment applications were issued in September and October 2021 and have not yet been heard. This judgment relates to a Part 18 application by the claimants of Mr Gibbs' defence (the 'Application').

The request for further information (RFI) was made in May 2021 and Mr Gibbs responded in July 2021, while criticizing the RFI for not being concise or properly limited in scope. The claimants in turn were not satisfied with the partial response calling it 'a largely inadequate document', with which Mr Gibbs disagreed. Ten of the 35 requests eventually became the subject of a hearing in March 2022.

What did the court decide?

Mr Richard Salter QC reviewed the Part 18 test:

- RFIs prior to disclosure are not an automatic part of litigation and can only be ordered were appropriate, ie where statements of case do not already state clearly all the information necessary for the court to understand the issues and for the parties—the case they need to meet
- Part 18 provides for two threshold conditions to be satisfied by the party seeking information
    - the information sought must relate to a matter which is in dispute in the proceedings, and
    - any request must be strictly confined to matters which are reasonably necessary and proportionate for one or other of the stated purposes
- if these two requirements are not satisfied, the court has no jurisdiction to make any order under Part 18
- if those requirements are satisfied, the court has a discretion to use its powers under Part 18 and of general case management, subject to the overriding objective, and having regard to:
    - the likely benefit which will result if the information is given
    - the likely cost of giving it, and
    - whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order
- if there is no jurisdiction under Part 18, there may be other powers available to the court to assist in avoiding the waste of time and costs and in achieving the 'swift and .. proportionate and economical litigation' (per Mr Justice Irwin in Harcourt v Griffin [2007] EWHC 1500 (QB))
- should a party not respond satisfactorily, the correct approach would be to ask the court to specify the enquiries that party should carry out without conducting a mini-trial

The judge then held that it would not be reasonable and proportionate to order the provision of further in-formation beyond what is necessary (having a ‘practical litigious purpose’) for the extant summary judgment applications due to potential wasted costs and examined individual requests to rule accordingly in favour of two of the ten outstanding requests.

Case details:

- Court: Commercial Court (QBD), Queen's Bench Division.
- High Court of Justice Judge: Richard Salter QC (sitting as a deputy judge of the High Court)
- Date of judgment: 30 March 2022

Anastasia Tropsha is an associate at PCB Byrne LLP, and a member of LexisPSL’s Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysiscommis-sioning@lexisnexis.co.uk.