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Bilbo Baggins and Third Party Disclosure Orders

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June 2015

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A third party complying with a disclosure order made under a statutory regime is entitled to similar costs protection as established in Norwich Pharmacal disclosure applications, the Isle of Man High Court has ruled.

In satellite proceedings arising out of a Californian dispute as to alleged unlawful use of JRR Tolkien characters in online games, the Manx Court was asked to assess whether the local entity producing the disclosure was entitled to its costs. In Fourth Age Limited et al v Microgaming Software Systems Limited, the role of the Manx Court was limited to determining the remit of a search order required by its American counterpart. However, this issue being settled just prior to reaching the courtroom, the Deemster was then required to provide a ruling as to costs.

Facts

The proceedings originated in the USA and involved a claim that the Defendants used depictions of characters from the JRR Tolkien books in online gambling games, without the permission of the Claimant. The Claimants applied to give effect to a letter of request under the Evidence (Proceedings in Other Jurisdictions) Act 1975 as applied in the Isle of Man by seeking an order from the Manx court requiring the Manx entity to conduct a search of documents in its possession or power relevant to the use of Tolkien characters in gambling games. The letter of request required some 25 classifications of documents be searched for. Microgaming filed a response to the Claimant's application questioning the relevance of certain requested documents and submitting that the disclosure sought was too wide. Settlement was reached at the door of the court with the requirement only for the court to approve, which it did, making a substantive order in which Microgaming agreed to produce a quantity of material. The issue of costs was reserved to be considered on written representations.

Costs

Microgaming argued that it should be held harmless and compensated for the costs reasonably incurred in considering the application for production of documents where it is not a party to the principal proceedings. It argued that the original claim for disclosure was wider than reasonably necessary and therefore it was reasonable for it to argue that the scope be narrowed and indeed the matter was compromised by the Claimants in any event. There was, it was argued, no scope for the Claimants to argue unreasonable behaviour on the part of Microgaming.

The Claimants opposed paying the costs of the application, alleging unreasonable behaviour on the part of Microgaming. This included allegations of continuing to raise points resulting in delaying the resolution of proceedings, asking for further information when it ought to have known details of the proceedings and questioning the relevance of documents sought. The Claimants argued that the principle of an innocent third party being entitled to its costs in this type of satellite litigation only applied where that third party had

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conducted itself neutrally, which in this case it allegedly had not. Further, they argued that Microgaming using the Defendants' lawyers from the US action to negotiate the scope of the order on their behalf demonstrated an element of partiality and support for the Defendants' position.

Decision

The court held that it was not possible to conclude that Microgaming was wrong or unjustified in terms of the stance it took in dealing with the Claimants' application. Issues such as the seemingly wide scope of the request and why such documents were not already available through discovery in the USA were valid issues of potential concern. Further, the cautious and measured approach taken did not indicate partiality or that Microgaming was not a genuine innocent third party.

It is a well established principle that an innocent third party required to produce documents for use in proceedings in which it is not itself a party ought to have its costs for appearance at court and complying with the request met by the applicant for such information. This principle emanates from the English case of Norwich Pharmacal Co v Customs & Excise Commissioners [1974] AC 133. The Manx Court held that although the difference between the statutory regime of an American Letter of Request for production of documents and the Norwich Pharmacal type application is significant in terms of scope of disclosure allowed, the approach regarding costs should be the same and the usual position ought to apply, namely that the third party be entitled to costs unless it has acted unreasonably.

There being no unreasonable conduct found on the part of Microgaming, the Claimants were required to pay Microgaming's legal costs of and incidental to the claim, assessed on the standard basis in default of agreement. Such costs did not include work conducted by the Defendants' American lawyers nor management costs of staff preparing for Court hearings.

The author John Aycock is head of M&P Legal's litigation department.

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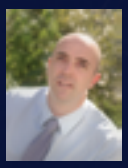

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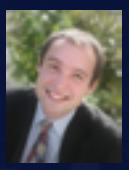

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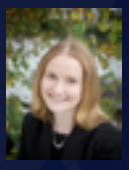

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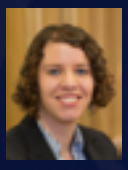

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