



WHEN IS CONTROL TOO REMOTE?

This briefing looks at the recent English Commercial Court judgment in *Pipia v BGEO Group Ltd* [2020] EWHC 402 (Comm)¹, which gives welcome clarity, for the purposes of disclosure, on the extent to which a parent company would have *control* over documents held by its subsidiaries.

¹ <https://www.bailii.org/ew/cases/EWHC/Comm/2020/402.html>

“The court held that the access arrangement was sufficient to come within...the control test.”

An issue arose between the parties in the context of Extended Disclosure under the Disclosure Pilot. The Defendant applied for a declaration that it did not have the requisite *control* over the relevant documents, which were held by its subsidiaries, and should not therefore be required to give disclosure of those documents. Whilst this case arose under the Disclosure Pilot, it has application to disclosure under CPR 31, and for more information on the Disclosure Pilot, please see our Client Guide².

As is common between parent companies and their subsidiaries, the Defendant had an access arrangement in place with its subsidiaries allowing it unfettered access to documents in their possession and which related to the claim.

The Commercial Court held this arrangement gave the Defendant *control* over the disputed documents, rejecting an argument that later correspondence altered the arrangement, and ordered the Defendant to disclose the documentation held by its subsidiaries.

In Depth

Duty of Disclosure

It is well established by the Civil Procedure Rules (CPRs) that “a party’s duty to disclose documents

is limited to documents which have been in that party’s control. For this purpose a party has or had a document in his control if –

- (a) it is or was in his physical possession;*
- (b) he has or had a right to possession of it; or*
- (c) he has had a right to inspect or take copies of it.”³*

Control is further defined in the Disclosure Pilot running in the Business and Property Courts, as “... [including] documents: (a) which are or were in a party’s physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies”⁴.

Facts

The Defendant applied for a declaration that, for the purposes of disclosure, it did not control documents held by either of its subsidiaries, over which it held a 100% shareholding in one and an indirect shareholding in the other.

The subsidiaries (who were at one time parties to the litigation) agreed that they would provide to the Defendant “all documents pertaining to the [claim] as requested by [the

Defendant] or [their] advisors”. This Defendant subsequently attempted to vary the arrangement, but this was rejected by the subsidiaries.

The Judgment

In determining whether the Defendant had the necessary level of control, the court turned to the principles established in *Lonrho Ltd v Shell Petroleum Co Ltd (No 1)*⁵, namely that a parent company:

- does not exercise *control* over the documents of or held by its subsidiaries merely by virtue of its shareholding in those companies; and
- a parent company has *control* over documents held by one of its subsidiaries in one of two circumstances:
 - where there is an existing arrangement or understanding, whether or not legally enforceable as a contract, which in practice provides the parent with a right of *access* to documents held by its subsidiary; or
 - where the parent company has a presently enforceable legal right to obtain the documents from its subsidiary.

² <https://www.hfw.com/Client%20Guide-The-new-English-Court-Disclosure-Pilot>

³ CPR 31.8

⁴ paragraph 1.1 Appendix 1 to CPR PD 51U

⁵ [1980] 1 WLR 627



The court held that the access arrangement was sufficient to come within the first limb of the control test – there was a *standing consent* by virtue of the agreement between the Defendant and its subsidiaries.

In determining access under a standing consent, the court identified and determined the following three points:

- **scope of the consent:** the court found that the relevant documents were covered by the standing consent;
- **type of consent:** the court found that the subsidiaries had agreed to provide the documents on request; and
- **quality of consent:** the court found that the Defendant had “free and unfettered access”, and therefore control of the documents.

The court also noted that:

- a *control arrangement* can be found where there is factual evidence that a parent has the consent of its subsidiary to inspect documents (where there is no reason to believe this position has changed)⁶; and
- an arrangement does not need to be legally binding to amount to control.⁷

HFW Comment

This decision is welcome insofar as it clarifies the position on the extent to which a parent company has *control* over the documents of its subsidiaries for the purposes of disclosure.

In summary:

- a parent does not have control over documents merely by virtue of its corporate relationship;
- an expectation that the subsidiary will comply with requests made by the parent is not enough to amount to control;
- look to see if there is evidence that the parent has unfettered access, an arrangement, or understanding by which it has the right of access;
- a party may have sufficient practical control if there is evidence of the parent already having had unfettered access to the subsidiary’s documents;
- a proposed new arrangement must expressly supersede an existing control agreement, however it is important to note any superseding agreement will only apply to newly created documents, as control extends to any document over which the parent company had control; and

- the extent to which the subsidiary will itself need to comply with the obligations of disclosure will depend on the arrangement with the parent company. The arrangement between the parent and its subsidiaries do not entitle it to impose obligations of Extended Disclosure, such as to retrieve or restore deleted files, or to conduct wide-ranging keyword searches as if they were party to proceedings.

As a result of the judgment, parent companies may wish to consider their current or future arrangements to ensure that they are happy with any exposure these agreements create in relation to the documents held by their subsidiaries.

⁶ Schlumberger Holdings Ltd v Electromagnetic Geoservices AS, [2008] EWHC 56 (Pat)

⁷ Ardila Investments v ENRC, [2015] EWHC 3761

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