



# Leasco Data Processing Equipment Corp. v. Maxwell

United States District Court, S. D. New York. | November 16, 1973 | 63 F.R.D. 94 | 18 Fed.R.Serv.2d 126

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63 F.R.D. 94

United States District Court, S. D. New York.

LEASCO DATA PROCESSING  
EQUIPMENT CORPORATION and  
Leasco International N.V., Plaintiffs,

v.

Robert MAXWELL, M.C.M.P., et al., Defendants,  
Saul P. Steinberg et al., additional  
parties with respect to the counterclaim.

No. 69 Civ. 4790.

|  
Nov. 16, 1973.

### Synopsis

Action alleging violations of Securities Exchange Act in regard to acquisition of corporate stock. The United States District Court, Lasker, J., [319 F.Supp. 1256](#), dismissed the complaint against one nonresident defendant and entered interlocutory orders. The Court of Appeals, Friendly, Chief Judge, [468 F.2d 1326](#), affirmed in part and reversed in part and remanded. On remand, the District Court, Robert L. Carter, J., held that plaintiffs were entitled to an order issuing letters rogatory to secure testimony of witness in England and to an order requiring defendants to produce and permit copying of transcripts of testimony they gave before British Department of Trade and Industry and that defendants were entitled to prepayment of expenses in attending deposition.

Order accordingly.

West Headnotes (4)

#### [1] **Federal Civil Procedure**

##### [Absence from the United States](#)

Letters rogatory will not issue to secure testimony of expert witnesses in foreign countries if adequate expert testimony is available in the United States.

[6 Cases that cite this headnote](#)

#### [2] **Federal Civil Procedure**

##### [Absence from the United States](#)

Plaintiffs, who brought action alleging violations of Securities Exchange Act in regard to their acquisition of corporate stock, were entitled to an order issuing letters rogatory to secure testimony of representative of London auditor, which reviewed corporate account after plaintiffs' termination of agreement to purchase corporate stock, having personal knowledge of investigation and auditor's report of corporate accounts and having custody of work papers of auditor in connection with investigation after disposition of individual defendant's pending motion to dismiss the action as to him. [Fed.Rules Civ.Proc. rule 28\(b\)](#), [28 U.S.C.A.](#); Securities Exchange Act of 1934, § 10(b), [15 U.S.C.A. § 78j\(b\)](#).

[2 Cases that cite this headnote](#)

#### [3] **Federal Civil Procedure**

##### [Depositions](#)

Defendants in action alleging violations of Securities Exchange Act were entitled to prepayment of travel expenses and reasonable counsel fees to be incurred in attending plaintiffs' deposition of witness in England; similar prepayment for plaintiff's attorney would be ordered if defendants planned to take depositions abroad. [U.S.Dist.Ct.Rules S. & E.D.N.Y., Civil Rule 5\(a\)](#).

[1 Cases that cite this headnote](#)

#### [4] **Privileged Communications and Confidentiality**

##### [Minutes of Meetings and Transcripts](#)

Plaintiffs who brought action alleging violations of Securities Exchange Act in regard to acquisition of stock of corporation were entitled to an order directing individual and corporate defendants to produce and permit the copying of transcripts of testimony which they or any of their officers or directors gave before British Department of Trade and Industry at closed investigation of corporation, despite claim by defendants, who were in possession and control

of transcripts sought, of attorney-client privilege.  
[Fed.Rules Civ.Proc. rule 37\(a\)](#), [28 U.S.C.A.](#)

### Attorneys and Law Firms

\*95 Willkie, Farr & Gallagher, New York City, for plaintiffs.

Nickerson, Kramer Lowentein, Nessen, Kamin & Soll, New York City, for defendants Isthmus Enterprises, Inc., Maxwell Scientific Intern. Inc., M. S. I. Publishers, Inc. and Robert Maxwell.

Curtis, Mallet-Prevost, Colt & Mosle, New York City, for defendants Robert Fleming & Co. Ltd. and Robert Fleming, Inc.

### Memorandum Opinion

### Opinion

ROBERT L. CARTER, District Judge.

I

Plaintiffs move, pursuant to [Rule 28\(b\) of the Federal Rules of Civil Procedure](#) ('FRCP'), for an order issuing a letter rogatory to secure the testimony of a representative of Price Waterhouse & Co. in London, England having personal knowledge of an investigation of the Pergamon Press, Ltd. by Price Waterhouse, the latter's report of the 1968 and 1969 Pergamon Press accounts, and having custody of the work papers of Price Waterhouse in connection with these matters. Plaintiffs also move, pursuant to [Rule 37\(a\), FRCP](#), for an order directing defendants Robert Maxwell, Isthmus Enterprises, Inc., Maxwell Scientific International, Inc., MSI Publishers, Robert Maxwell & Co. Ltd., Robert Fleming & Co., Ltd. and Robert Fleming, to produce and permit the copying of transcripts of testimony given by them or any of their officer or directors concerning the affairs of Pergamon Press and its subsidiaries before the British Department of Trade and Industry (previously, British Board of Trade); for an order setting a date for the production by defendants of various promised documents; and pursuant to [Rule 37\(a\)\(4\), FRCP](#), for counsel fees, expenses and costs incurred in the making of these motions.

Defendants Maxwell, et al., allege that they have turned over to plaintiffs the promised documents and, therefore, the motion is, in this respect, moot. They oppose the motion in

respect of the issuance of a letter rogatory and the production of the transcripts of testimony of Maxwell and others before the British \*96 Department of Trade and Industry. In the alternative, in respect of the issuance of a letter rogatory, they urge that if that motion is granted, prepayment of travel expenses and reasonable counsel fees, as authorized by [Rule 5\(a\)](#) of the Civil Rules of this court, would be appropriate. Defendant Kerman urges that the determination of the letter rogatory issue be deferred until his motion to dismiss is decided.

This is an action under Section 10(b) of the Securities Exchange Act of 1934, [15 U.S.C. § 78j](#), and Rule 10b-5, [17 CFR § 240.10b-5](#) of the Rules of the Securities and Exchange Commission to recover some 22 million dollars alleged to have been lost through defendants' fraud. In 1969 plaintiff Leasco Data Processing Corp. ('Leasco') entered into an agreement with defendant Maxwell to acquire substantially all the stock of Pergamon Press. After purchase of over 5 million shares of this stock at a cost of approximately 22 million dollars, Leasco, alleging fraud, terminated the agreement.

II

As a result of Leasco's termination, trading in Pergamon Press stock was suspended and an investigation into its affairs was begun. In September 1969, Pergamon Press retained Price Waterhouse & Co. as independent outside auditors to review Pergamon's audited accounts from January, 1968 to September 30, 1969, to report any substantial adjustment to the audited figures and taxation changes during that period which Price Waterhouse deemed advisable and to report what additional information Pergamon might give to Pergamon shareholders. Price Waterhouse submitted its report on August 21, 1970.

Plaintiffs assert that Price Waterhouse & Co. has much information concerning the financial affairs of Pergamon Press and has evaluated financial statements of Pergamon Press which were relied upon by plaintiff and which induced them to enter into the now terminated agreement; that the testimony of Price Waterhouse & Co. will provide critical support to their contentions; and allege that there is no other source available from which the testimony expected of Price Waterhouse can be obtained.

Defendants argue that in seeking the testimony of Price Waterhouse & Co., plaintiffs are seeking to depose an expert witness, and they flatly assert that '[a] party is barred from seeking depositions in foreign countries 'for the purpose of

getting expert testimony.’ 4 Moore's Federal Practice at 1933 (1972 ed.); *Otis McAllister & Co. v. The S. S. Marchovelette*, 200 F.Supp. 695 (S.D.N.Y.1961).<sup>1</sup> We are assured that this rule is so firmly fixed that ‘no memorandum of law is needed.’

[1] [2] I am persuaded to the contrary. The plaintiffs present precisely the kind of situation that [Rule 28\(b\)](#) was designed for, that is, to give assurance to the courts that issuance of letters rogatory would be appropriate. Plaintiffs cannot secure from any domestic expert the testimony it hopes to elicit from Price Waterhouse in London. Defendants' contention that letters rogatory will not issue to secure the testimony of expert witnesses in foreign countries is correct, but only if adequate expert testimony is available in the United States. See [American Infra-Red Radiant Co. v. Lambert Industries, Inc.](#), 32 F.R.D. 372, 374 (D.Minn.1963); 4 Moore's Federal Practice, 1933 (2d ed. 1972). I do not read *Otis McAllister*, *supra*, as enunciating a contrary principle. Moreover, there is reason to believe that a failure to grant plaintiff's motion could constitute an unwarranted abuse of discretion. See [Zassenhaus v. Evening Star Newspaper Co.](#), 131 U.S.App.D.C. 384, 404 F.2d 1361 (1968).

It should be added, parenthetically at least, that I am not altogether confident that the testimony which plaintiffs seek from Price Waterhouse can properly be \*97 characterized as expert testimony. Finally on this point, defendants' contention that under English law Price Waterhouse will be barred from giving the testimony sought provides no basis for refusing to issue the order sought. See [Uebersee Finanz-Korporation, A. G. Liestral, Switzerland v. Brownell](#), 121 F.Supp. 420, 426 (D.D.C.1954).

[3] The request for prepayment of expenses to attend the deposition of Price Waterhouse & Co.'s representative in London and for reasonable counsel fees is granted. A per diem of \$100 for each day in attendance at the deposition, including travel time, plus cost of first class plane fare to London is ordered prepaid as covering expenses and reasonable counsel fees for one attorney for each of the separately represented defendants, pursuant to Civil [Rule 5\(a\)](#) of this court. Of course, if defendants plan to take depositions abroad, similar prepayment for plaintiff's attorney will be ordered. Therefore, nothing will be gained by counsel's failure to seek to schedule all foreign depositions at the same time, on one trip, if possible, thus eliminating the need for prepayment of counsel fees and expenses.

Defendant Kerman has pending a motion to dismiss as to him. There is no valid reason to require his counsel to go to

London to attend the deposition of Price Waterhouse when he may subsequently be no longer involved. Issuance of the letter rogatory, therefore, is to be deferred until disposition of Kerman's motion to dismiss.

### III

The British Department of Trade and Industry, after trading in the Pergamon Press stock had been suspended, undertook an investigation of Pergamon Press. During the course of this investigation the testimony of defendant Maxwell and, I gather, of other officers and directors of Maxwell Enterprises, was taken. The investigation was closed to the public; the testimony received was regarded as confidential and was not to be used by the department for any purpose other than in whatever report it issued. See opinions of Lord Denning and Sachs, L. J., in *In Re Pergamon Press Ltd.*, [1971 C.H. 388 (Court of Appeals, July, 1970)]. It is my understanding that each witness was given a copy of the transcript of the testimony he gave. Therefore, defendants Maxwell are in possession and control of the transcripts sought.

[4] Defendants resist plaintiff's motion arguing attorney-client privilege. That contention has no merit either under English law, see *Salangor United Rubber Estates Ltd. v. Cradock*, 4 W.L.R. 319 (Chancery Div. 1968) or more importantly under our law, see [La Morte v. Mansfield](#), 438 F.2d 448 (2d Cir. 1971). There is no basis for contending that the testimony is inadmissible in this court. See [Herbst v. Able](#), 63 F.R.D. 135 (S.D.N.Y.1972). Plaintiffs' motion in regard to the transcripts of testimony before the British Department of Trade and Industry is granted in all respects.

### IV

Finally, on the plaintiffs' motion requesting the court to set a date for defendants' production of the promised material, defendants advise the court that the matter has been settled to all parties' satisfaction. On that assurance the court will not act on that portion of plaintiffs' motion and denies the motion for counsel fees, expenses and costs incurred in bringing on the motion.

So ordered.

### All Citations

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