

# Disclosure of Work-Related Content on the Personal Devices of Employees

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**Introduction.** In *Republic Of Mozambique V Credit Suisse International And Others* [2022] EWHC 3054 (Comm), the High Court (the “Court”) had to determine the extent to which a party (in this case a state) may be required to provide disclosure from the personal email accounts and devices of its current and former employees. The Court accepted that it will have jurisdiction to make disclosure orders in respect of materials held on employee’s personal devices in circumstances where the employer has “control” of those documents.

This case establishes that in circumstances where the question of “control” is contested, the court can nevertheless make orders which ask a party to explain what steps have already been taken to seek consent from current and former employees on their personal emails and devices and whether consent has been given. These orders can be made exercising the court’s broad case management powers in order to ensure that litigation is managed efficiently and at proportionate cost.

The judgment illustrates the complexities that will arise in cases where the question of “control” is governed by foreign law and the practical difficulties in achieving such disclosure orders. The judgment is one in a series of recent cases which show that litigants are increasingly seeking disclosure from employee personal devices. Companies should therefore ensure that they have clear policies on the use of personal devices for business communications in the event of future litigation.

**Background.** This case concerns the disclosure obligations of the Mozambique state (“the Republic”) which arise in the context of a case concerning bribery and corruption allegations against Credit Suisse (“CS”), former CS employees and five UAE and Lebanese companies (together the “Defendants”). CS alleged that the system of correspondence which operated within the Republic included a large proportion of its electronic communications through its officials, being conducted using devices or email accounts in personal names. CS sought several orders relating to those communications, namely:

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- an order that the Republic identify from a list of 33 named individuals, each individual from whom the Republic had already sought consent to search and give disclosure of relevant documents on that individual's personal email accounts or devices;
  - an order that the Republic identify the response of each such individual to the request where made; and
  - if the first two orders were made, a third order that the Republic should request consent to secure access to relevant documents on that individual's personal email accounts or devices from individuals from whom it has not previously sought consent.

The Republic argued that the next step in determining this application must be to permit evidence of Mozambique law on the question of control. Under Mozambique law, the Republic says it does not have control of communications held on personal devices, and, therefore, the court has no jurisdiction to make the orders sought by CS.

However, from CS's perspective, the first two orders would help illuminate whether it would be proportionate in the context of the litigation to justify the time and expense of preparing expert reports and a hearing on Mozambique law. It would ultimately be a waste of time and expense if the Republic had already asked employees about their personal devices, and their responses indicated an unwillingness to comply or an absence of relevant documents.

**The High Court Decision.** The Court accepted that the starting point in determining whether it has jurisdiction to make disclosure orders in respect materials held on employee's personal devices will depend on whether the employer has "control" of those documents.

Where English law applies to the relationship between the party (*i.e.* an employer) and the "non-party" (*i.e.* the past or present employee or office holder), the court noted that it will readily find that the party has "control" in the form of a right to possession or to inspect or take documents. Where a law other than English law governs the relationship (which may be a different law to that which governs the underlying dispute), the situation may be more complicated.

The Court accepted that where control is required to make the orders sought, that issue will need to be determined as a first stage. However, the Court is also able to make orders under its general case management powers (CPR 3.1(2)(m)) which would "*help illuminate what would and would not be just and proportionate in dealing with the litigation.*"

The Court determined that, pursuant to its broad case management powers, it could (1) grant the first order identifying individuals from whom the Republic had already sought consent to search and give disclosure in the litigation and (2) grant part of the second order in that CS was entitled to know which individuals had given their consent. The difference from the order sought is that the Defendants would not be entitled to know whether, for the individuals who did not give their consent, that request had been expressly refused (and on what grounds) or whether the request had simply been ignored.

Depending on the responses, if CS wanted to pursue the third order, which would require the Republic to make a request to secure access to relevant documents on individual's personal email accounts or devices, the court indicated that it would expect to make directions for expert and other evidence necessary to deal with the question of control as a matter of Mozambique law.

**Conclusion.** Company communications held on the personal devices of employees are becoming an increasing target of disclosure orders in large litigation. Getting access to these communications can pose both legal and practical hurdles for employers.

Where foreign law governs the relationship between an employer and employee, the situation can become even more complex. This case determines that the court is willing to exercise its broad case management powers to give directions that may assist a party in assessing whether it is a reasonable and proportionate use of party and court time to pursue orders for disclosure from employees. Providing expert evidence on foreign law is an expensive and time-consuming process, and it can therefore be beneficial to explore what a party has already asked of its employees before seeking further orders.

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Please do not hesitate to contact us with any questions.

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