The limits of comity: when a Grand Jury subpoena is not sufficient to justify 'collateral use'.

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Introduction

The English Court's willingness to assist foreign courts in the battle against fraud is unquestionable. However, the recent decision in *ACL Netherlands B.V & Ors* -v- *Lynch & Ors* [2019] EWHC 249 (Ch), saw the Court refuse permission to make collateral use of documents created for the purpose of English civil proceedings in a parallel US criminal procedure, and is a timely reminder that third parties cannot assume that the English Court will simply approve any application for the collateral use of evidence in the interest of judicial comity.

The case highlights the importance that the English Court will place on the actual involvement of a foreign court in framing such requests, rather than merely rubber-stamping the requests of foreign prosecutors masquerading as judicial imperatives. In light of the outcome of this case, practitioners will have to give very careful consideration to whether they have, on a proper analysis, a solid basis for bringing such an application in future. The detailed scrutiny brought to bear on the application, and the Court's ultimate disassembling of its merits will no doubt surprise many, given its potential consequences for the applicants.

However, the outcome may well have been different if some of the closely related third parties had intervened and pressed the case themselves before the Court.

Background

The 2011 purchase of Autonomy Corporation by Hewlett-Packard was controversial from the off. The ensuing dismissal of former Autonomy CEO, Dr Michael Lynch, and the write-down of approximately $8.8 billion of the $11 billion purchase price led, unsurprisingly, to global legal action including hard-fought litigation before the English Courts (the "Civil Proceedings"), and parallel criminal investigations on both sides of the Atlantic which have so far led to several indictments and one conviction.

The Civil Proceedings, brought by a number of HP Enterprise's subsidiaries, allege that the value of Autonomy was manipulated upwards to the tune of approximately $5 billion. The trial was heard last week before Hildyard J, who dealt with the collateral use hearing.

The Application for Collateral Use

The claimants applied for permission to provide material disclosed and witness statements served by the defendants in the Civil Proceedings pursuant to a subpoena requested by the United States Attorney's Office ("USAO"), and issued in the name of a Grand Jury of the US District Court for the Northern District of California ("the Subpoena").

It was accepted that such collateral use would contravene the rule in English litigation that documents created and disclosed in proceedings may only be used for the purposes of those proceedings, absent their being referred to publicly therein, or with the permission of the disclosing party or court order.

The claimants argued that such permission was essential for them to comply with the Subpoena, which purportedly required HP Enterprise – and all of its subsidiaries – *"to produce "all responsive documents in their possession, custody or control*". Failure to comply with the Subpoena, the claimants asserted, would be a contempt under US law, as well as a possible obstruction of justice.

In the meantime, and notwithstanding that the Subpoena had not yet been complied with, the USAO proceeded to indict Dr Lynch on a series of fraud charges that broadly mirrored those for

which the second defendant had already been convicted. It is understood that Dr Lynch will imminently be subject to an extradition request having not attended either of the two pre-trial hearings in San Francisco earlier this year. His legal team have indicated that they will resist such a request vigorously.

The Legal Test

Hildyard J noted that the collateral use restriction was a fundamental principle of English procedure, designed to preserve litigants' rights to privacy and confidentiality, and that it would be *"difficult if not impossible to obtain permission for collateral use… except where the Court is persuaded of some public interest in favour of… such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect."*

In striking the right balance, the Court applied the two-limb test from *Crest Homes Plc -v- Marks* [1987] *AC 829*:

(1) were there special circumstances which constituted *cogent and persuasive* reasons for the use, and;

(2) would that use occasion injustice to the person who had given disclosure.

The Applicants sought to heavily rely on *Marlwood Commercial Inc -v- Kozeny and Others* [2005] *1 WLR 104* and *Bank of Crete SA -v- Koskotas (No. 2)* [1992] *1 WLR 919*, in which the English Court reaffirmed the strong public policy interest in assisting foreign enforcement authorities in dealing with serious and complex fraud.

As a counterweight to these authorities, the Court was also referred to the decision in *Barry -v- Butler* [2015] *EWHC 447 (QB),* which emphasised that the existence of a criminal investigation will not give the applicant a "blank cheque" to make collateral use of documents and evidence produced in English proceedings, and instead such documents must be *"necessary for the investigation, as opposed to merely being of interest*".

Discussion

As to the first limb of the *Crest Homes* test, the judge accepted that the investigation and prosecution of serious crime might well provide justification for granting permission. However, such compulsion was not in itself a *cogent and persuasive* reason, and on these facts the judge was unmoved by the application before him.

It clearly troubled him that, although the Subpoena had been issued by a grand jury, its terms had been determined by the USAO itself with little or no input from the US Court. Further, its ambit was extremely wide, and it had been served on HP Enterprise rather than any of the applicants before him. He also noted that any penalties for non-compliance would apparently fall on HP Enterprise rather than the applicants.

Given that the collateral use restriction was imposed by the CPR, the documents sought were in fact, as far as collateral use was concerned, under the control of the English Court, and not HP Enterprise (or its subsidiaries). As such, it could not be said that HP Enterprise had *"the legal right to obtain documents upon demand"*. Such a demand was subject to the permission of the English Court, which the judge felt the US Court would understand he could only grant *"apply*[ing] *the law of this jurisdiction in accordance with the public policy considerations which underlie it*".

The judge continued to impugn the application, stressing that no explanation had been given as to the specific matters for which the documents were required. Moreover, the USAO had already successfully prosecuted the second defendant, and shown sufficient cause to indict the first, without the benefit of any documents from the Civil Proceedings, undermining the suggestion that their provision was essential for the US proceedings. In such circumstances it was hard to see how

the Subpoena could be said to be seeking documents which were necessary, rather than merely of interest.

The judge also distinguished the important *Bank of Crete* precedent from the present application. In that case the applying bank had been the subject of a request for the documents from the Greek banking authorities. As in this case, the applicant asserted that it was between "a rock and a hard place" in that if it was held to the collateral use restrictions of the English Court, then it would suffer regulatory or criminal penalty abroad. In contrast to this case, however, in the *Bank of Crete* case collateral use permission had already granted for civil litigation in Greece, the documents were specifically sought for a clearly specified purpose (cf. the generality of the request contained in the Subpoena), and the respondents either did not attend or were broadly neutral to the collateral use. In such circumstances it was much easier for the English Court to find *"cogent and compelling reasons"* for collateral use, especially when no injustice was asserted by the respondents.

The applicants therefore failed on the first limb of the test. Nevertheless, the judge went on to consider the second limb. The applicants fared no better here. The judge considered both the potential disruption to the trial in the Civil Proceedings, and the potential withdrawal of witnesses if their statements were to be put to such collateral use, weighed heavily against the grant of permission. Moreover, if permission were granted, the USAO would be able to identify who was prepared to give evidence on behalf of the First Defendant, as well as finding out what they would say. This would allow the USAO *'the advantage gained by peering into the First Defendant's case and brief,* [which] *cannot be erased or nullified*'.

Indeed, the judge considered that a particularly high bar would need to be met for collateral use of witness statements to be ordered. In addition to the risk of witnesses withdrawing such statements, a weight of English authorities establish that they are not public documents before trial. They are a mere indication of what a witness will say if called to give evidence, and, as such, special care must be taken as to their potential disclosure.

Finally, Hildyard J was clearly displeased with the applicants' suggestion that the first defendant was attempting to impede the USAO investigation by resisting the collateral use application, concluding that this allegation had *'no evidential foundation and should not have been made'*. This is an important rebuke to those who say that the use of civil procedural safeguards is inappropriate in the face of criminal investigations. To the English Court, a respondent to such applications has every right to assert those protections against disclosure and collateral use, and this is particularly so when that resistance is found to be justified, as in this case.

Conclusion

This decision is a reminder that the fact of purported compulsion by law enforcement will not reduce the English court to simply rubber-stamping collateral use applications. Given the current trend of prosecutors, on both sides of the Atlantic, pushing for more documentation and fewer procedural protections in alleged fraud cases, this is encouraging to those concerned about the erosion of the collateral use restriction, and the principles that underlie it.

That said, the respect with which the English Court typically treats such US requests, where they have been shaped under full oversight of the federal judiciary, is readily discernible from numerous cases, including the request from the District Court for the Southern District of New York in *Atlantica Holdings, Inc & Anor -v- Sovereign Wealth Fund & Ors* [2019] *EWHC 319 (QB)*. Indeed, the judge was at pains to make clear that he harboured no concerns as to the proper treatment of evidence and safeguarding of an accused's rights by the US Court, and would not refuse a considered request by a US Court for necessary assistance in the prosecution of fraud. As such, it seems likely that it seems that the prospects of success of the application may have been improved had the USAO sought more than merely cursory judicial input on the Subpoena. However, the substance of the Subpoena before the judge did not outweigh the public policy and private interests which the restrictions against collateral use were intended to safeguard. Indeed, given the material

defects underpinning the Subpoena, it seems unlikely that it would have survived serious judicial scrutiny on the other side of the Atlantic either.

This judgment and others like it, such as in the case of legal professional privilege in *ENRC -v- SFO* [2018] *EWCA Civ 2006*, send a strong message that the English Court will defend the safeguards afforded to litigants from encroachment by enforcement agencies, foreign and domestic. In light of this, parties to litigation (and more importantly, their advisers) need to give careful consideration to the prospect of a request for collateral use of disclosed documents being made by a foreign prosecuting body, and should make an early assessment of whether the *"difficult, if not impossible"* barrier to permitting collateral use can be met in the circumstances of the case.