COMBAR NORTH AMERICA - NEW ORLEANS – MAY 2019

UNUSUAL THINGS WHICH CAN ARISE IN COMMERCIAL LITIGATION

COLLATERAL USE OF DOCUMENTS FOR OVERSEAS INVESTIGATIONS

1. I am going to speak on a topic that recently arose in the ongoing Hewlett Packard case being fought out in the Commercial Court in London.[1]

2. A preliminary skirmish took place in February when Hewlett Packard sought to obtain the court's permission to provide various documents disclosed by the Defendants to the FBI following service on the Hewlett Packard US parent company of a Sub-Poena.

3. This attempt to use documents and witness statements either by one's opponent or by a third party is the sort of unexpected and unwelcome event that can arise in commercial litigation, particularly where there are allegations that might attract the attention of others such as regulators and may, just possibly, lend a tactical advantage to one party.

4. Given the limited time available I am *not* going to discuss the wider question of access to documents at or following trials.[2]

5. Instead my focus is on the period *pre*-trial and relates to documents and witness statements disclosed by the other party which was the subject matter of the Hewlett Packard case.[3]

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[1] It also arose in the Bermuda Supreme Court in Athene Holding Limited v Siddiqui & Ors. [2019] SC (Bda) 20 Com argued successfully by Alex Potts QC.

[2] That has been the subject of a recent appeal to the Supreme Court in Cape v Dring with submissions heard in February. At the time of preparing this talk, judgment has yet to be handed down in that case. Submissions were heard on 18-19 February 2019. These can be viewed on the Supreme Court's website starting at - https://www.supremecourt.uk/watch/uksc-2018-0184/180219-am.html Perhaps this may be a topic for someone at next year's COMBAR North America meeting.

[3] ACL Netherlands, Hewlett-Packard The Hague and Others v Lynch and Hussain [2019] EWHC 249 (Ch) - https://www.bailii.org/ew/cases/EWHC/Ch/2019/249.html

THE HEWLETT PACKARD LITIGATION

The English Proceedings

6. I do not need to get into too much of the detail of the Hewlett Packard case. At issue are some very serious allegations and counter-allegations about quite how Hewlett Packard expended US$11 billion on acquiring Autonomy in 2011 and a year later wrote down the value of its acquisition by US $8.8 billion.

7. Hewlett Packard's case in England is being brought against Autonomy's former CEO, Mike Lynch and CFO Sushovan Hussain.

8. The trial commenced in March and is due to finish in December.

The US Criminal Investigation

9. Hewlett Packard was not the only entity that had shown interest in the defendants and others. The FBI had been investigating since 2012.

10. By the time the application in the English proceedings was heard, the US criminal investigation had resulted in:
    a. The conviction in April 2018 of the Second Defendant, Mr Hussain, on 16 counts of wire and securities fraud. Sentencing and a potential appeal were pending. Mr Hussain has since been sentenced.[4]
    b. The indictment in the US of the First Defendant, Mr Lynch and another individual, Stephen Chamberlain, Autonomy's vice president for finance.

11. Shortly before the issue of this latter indictment,[5] the Grand Jury of the US District Court for the Northern District of California issued a Sub-Poena to Hewlett Packard Enterprises, the US parent company, of the claimants in the English proceedings. The US Subpoena expressly referred to all the documents disclosed and witness statements served by Mr Lynch and Mr Hussain in the Commercial Court proceedings.

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4 Earlier this month Mr Hussain was sentenced to 5 years in prison and order to pay a US$4 m. fine. This was in addition to an agreed $6.1 m forfeiture deal.

5 There had been an earlier Sub-Poena seeking just the disclosed documents which had not been apparently pursued following an issue being taken on service.

12. Against that background, the Hewlett Packard entities involved in the English proceedings, being various subsidiaries of the US parent company, sought permission from the English Court to permit disclosure of those documents to the FBI pursuant to the US Subpoena.

The intrusive nature of disclosure and witness statements

13. Such an application while on its face straightforward raises the question of how we find ourselves in English proceedings in a position where a party has access to its opponent's documents and advance notice of its witnesses and their proposed evidence.

14. The obligations in English civil proceedings to provide standard disclosure and witness statements are not universally welcomed.

15. While international clients find huge attraction in having their litigation conducted in the English courts, not all of them are thrilled about these particular procedural rules. Leaving aside current concerns about the costs of complying with these rules, there is another point. The UK rules on disclosure and witness statements are intrusive. They interfere with a party's right to privacy and confidentiality.[6] These are not found in the legal procedure of countries applying civil law.

16. Yet, those provisions are there for good reason and serve an important public interest as the judgment of Mr Justice Hildyard explains:

    a. Rules of procedure requiring disclosure of documents relevant to the issues in the case ensure – or at least are intended to ensure - that all relevant evidence is provided to the court so that justice can be done; and

    b. The exchange of witness statements promotes the public interest: this alerts each party to what is going to be said at trial and promotes the prospect of informed settlement and avoiding unfair surprise at trial.

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[6] Tchenguiz v SFO [2014] EWCA Civ 1409 per Jackson LJ at [56] and per Lord Diplock in Harman v Secretary of State for the Home Department [1983] 1 AC 280 "*The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides, in its own distinctive fashion, through its rules about abuse of process and contempt of court.*"

17. That public interest of achieving justice on a level and open playing field, is a matter considered to be of substantial importance.

Protecting the litigants' position

18. In order to provide some protection to the parties' rights, the court controls the use that may be made of such documents.

19. This has the dual benefit of limiting intrusion while at the same time promoting compliance with the rules and the public interest they serve. The English procedural rules now explicitly provide that the court's permission or the consent of the other party is obtained before any use is made of documents disclosed (CPR 31.22) or witness statements served (CPR 32.12) other than for the purpose of those proceedings. They have been described as providing a complete code.[7]

20. CPR 31.22 provides:

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
(b) the court gives permission; or
(c) the party who disclosed the document and the person to whom the document belongs agree.
(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

21. CPR 32.12 provides:

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
(2) Paragraph (1) does not apply if and to the extent that–
(a) the witness gives consent in writing to some other use of it;
(b) the court gives permission for some other use; or
(c) the witness statement has been put in evidence at a hearing held in public.

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[7] SmithKline Beecham plc v Generics (UK) Ltd [2003] EWCA Civ 1109.

22. These provisions are, but the latest formulation of something that dates back to the 19th century when a party was required to give an express undertaking not to use[8] documents of a particularly confidential or sensitive nature other than for the purpose of the proceedings.[9]

23. That then evolved in to what was described as the 'implied undertaking'[10] recognised in the common law in respect of documents and information produced under compulsion by the court. In England and some other jurisdictions the matter is now subject to specific rules. These rules have in some instances gone beyond the position in the common law.[11] As such the extent of the rules and the previous common law are different.[12]

24. The extent to which expert reports are captured by the implied undertaking or CPR 31.22 and/or CPR 32.12 is also the subject of another talk.[13]

When will the court give access?

25. As can be seen where the documents have been referred to in open court and/or the witnesses have confirmed their witness statements at trial the restrictions do not apply. The open justice principle usually[14] prevails.

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8 For these purposes 'use' is now given a wide construction IG Index v Cloete [2015] ICR 254.

9 Richardson v Hastings (1844) 7 Beav 354 [49 ER 1102]; Hopkinson v Lord Burghley (1867) LR 2 Ch App 447. The rule is as Hollander explains 19.01 part of the wider principle that private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred.

10 Sometimes referred to as the Harman undertaking after Harman v Secretary of State for the Home Department [1983] 1 AC 280, but as to whether it was properly that or a rule or obligation imposed see Hearne v Start 2008 HCA 36 at [105]-[106].

11 The Athene Holding Limited case considers the position under the common law and examines how the implied undertaking can arise in situations beyond where the parties are compelled by court order to produce documents.

12 Before the rules, the court's permission to be released from the undertaking was needed even where consent from the other side had been given, albeit that was a strong factor in the exercise of the discretion. Harman. See too Hollander at CPR 19.17 et seq. and 19.30 et seq. for other differences.

13 The authorities on the implied undertaking considered expert reports as *not* being subject to the implied undertaking. Prudential Assurance Co v Fountain Page Ltd [1991] 1 WLR 756. The current position is unclear as to whether they come within CPR 31.22 or not at all – contrast Hollander on Documentary Evidence and Thanki on Privilege.

14 There are inevitably exceptions which permit a Court to seek for certain parts of a hearing to take place in private and other measures to preserve confidentiality in documents.

26. The more difficult questions arise in the period before, when a party has the benefit of sight of the other party's disclosed documents and witness statements, but they have not yet been exposed to the world at large by being referred to in open court.

27. That was the position in the Hewlett Packard case.

28. As I have said, the US Subpoena was addressed to Hewlett Packard Enterprises, the holding company. The US Subpoena sought all documents disclosed and witness statements served in the English proceedings.

29. Of course, Hewlett Packard Enterprises would have no difficulty in disclosing its own documents and witness statements, but it could not provide those documents received from Mr Lynch and Mr Hussain without the English Court's permission.

The competing arguments

30. The position of Hewlett Packard was that while the English Court had a discretion, the exercise of that discretion was in substance pre-determined or mechanistic where a party was - as it was contended the Hewlett Packard parties to the English proceedings were - under a legal compulsion in a foreign jurisdiction to disclose documents, particularly where that compulsion derived from a criminal investigation.

31. As it was submitted, they should not be put in the unenviable position of being between a '*rock and a hard place*' of being required to comply by the US Subpoena in the USA, but at the same time prevented from so doing by the English courts.

32. There were several points raised in response including:
    a. There were two US law points as to the scope of the US Subpoena:
        i. the US Subpoena was addressed to Hewlett Packard Enterprises, the parent company, and not to the subsidiaries involved in the litigation. Properly understood the underlying subsidiaries were not within the scope of the Order and they were not under a legal obligation to comply with the US Subpoena and Hewlett Packard Enterprises had not jointed the application;

ii. documents in the hands of a US parent company's subsidiaries were not in the 'control' of Hewlett Packard Enterprises – which was the phrase used in the US Subpoena - by virtue of its ownership and control of the subsidiaries. They were not under such control because of the limitations imposed by the English procedural rules preventing their collateral use.

b. It was contended that the documents were not immediately necessary to the US Grand Jury which had managed to get on just fine without them for some considerable time and served indictments etc;

c. It was also argued that permitting disclosure of the documents and witness statements to the FBI would cause Mr Lynch substantial prejudice in both the US and in the English proceedings.

The decision and the English test

33. Following a careful review of the authorities, the learned judge roundly rejected the suggestion that his discretion was constrained by some form of mechanistic approach.

34. Mr Justice Hildyard held that the test remained that laid down by the House of Lords in Crest Homes Plc v Marks [1987] AC 829:

a. There need to be special circumstances which constitute "cogent and persuasive reasons" for permitting collateral use of such documents;

b. Collateral use should not be permitted where it would occasion injustice to the person giving disclosure.

35. The burden is on an applicant to persuade the court to lift the restrictions and that burden is a particularly heavy one where the permission is sought by or for the benefit of a person who is not a party to the action in which the documents were disclosed.[15]

[15] This strict approach for use by third parties is long-standing. See Bibby Bulk Carriers v Cansulex [1989] QB 155. For a relatively recent decision for reliance in other proceedings between the same parties see Glaxo Wellcome UK Ltd & Anr. v Sandoz & Others [2018] EWHC 3229 per Chief Master Marsh where documents disclosed in passing off proceedings in England were permitted to be used in parallel proceedings between the parties in Belgium.

36. One of the interesting aspects of the judgment is the judge's view – correctly I would hasten to add - that the arguments for limiting collateral use should apply even more stringently to witness statements than to documents.

37. As the judge pointed out:

    a. A witness statement is not, prior to the witness being called at trial, evidence, but rather an indication of the evidence that the witness may give if the witness is called to give evidence; and
    b. Equally a witness statement is not otherwise available than through the court procedural rules.

38. There are additional reasons for not permitting the use of witness statements before the trial including that the witness may never give such evidence if called.

39. All in all the view of the judge was that it will usually be difficult, if not impossible, to obtain permission for collateral use, especially in the case of witness statements, except where the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect.

The public interest of investigating and prosecuting serious fraud and criminal offences

40. So what of the public interest arguments to justify departing from the primary position.

41. There are many instances where the courts have found that the public interest for investigating and prosecuting serious fraud and criminal offences has prevailed over that preventing the collateral use of documents.

42. However as the judgment makes clear the applicant needs to show, this does not follow as a matter of course:[16]

[16] There may be other issues that militate against such disclosure even where the parties who disclosed the documents consent to reliance on them particularly in the context of compelled interviews. The subject of the compelled interview is normally given the opportunity to object and there are statutory protections under s. 348 of the Financial Services and Markets Act 2000 – see Property Alliance Group v RBS [2018] EWCA Civ 1202 for a recent case in which both points arose.

a. The relevance of the documents sought to the particular investigation; and

b. The immediate need for the disclosure of those documents.[17]

43. These points told against the application for various reasons.

a. While it was recognised by the court that the specific use of each document need not be identified in the evidence some evidence was expected;

b. The US Attorney's Office had been investigating for some 6 years and already had many documents;

c. The US Grand Jury had managed to issue indictments and secure a conviction of one of the Defendants without sight of the documents;

d. There was no evidence of a pressing need for these documents.[18]

Prejudice

44. While prejudice will depend on the facts in any particular case, the material relied on in this case is such that it may well arise in other such applications.

45. As to the prejudice in the US proceedings, as I have mentioned, the First Defendant made the point that the disclosure would give the USAO a substantial tactical advantage by having information relating to the First Defendant's defence in the English proceedings.

46. The judge did not have much time for the suggestion that this would apply to documents[19], but agreed that in terms of witness statements, if given permission to rely on the documents, the USAO would know:

a. The identity of the people who were prepared to give evidence; and

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[17] The authorities considered included Marlwood Commercial Inc v Kozeny and others [2005] 1 WLR 104; Sita UK Group Holdings Limited and another v Andre Paul Serruys and others [2009] EWHC 869; and Barry v Butler [2015] EWHC 447. The applicant needed to show 'actual and immediate necessity' for obtaining collateral use of the documents.

[18] Leaving aside the arguments on whether the Applicants were truly under a compulsion, the Court concluded that on the Applicants' evidence, it was '*unclear also whether there is any real need, still less any pressing need immediately, for these documents for the purposes generally avowed, but not particularly explained, of assisting in the investigation and prosecution of fraud*'.

[19] Save to the extent that third parties might be implicated and thereby exposed to investigation, speculation or prosecution than would otherwise have been the case.

b. The substance of the evidence they were prepared to give.

47. In the judge's conclusion, this was not something that could be addressed by reliance on the rules as to the admissibility of evidence under the US Process.

48. Once the genie was out of the box, there was no putting it back in, or as the learned judge more prosaically put it '*the prejudice is in the advantage gained by peering into the [defendant's] case and brief, and cannot be erased or nullified*'.

49. Secondly, in terms of the English proceedings there were two aspects of potential prejudice:

    a. First, it was said that some of the witnesses might refuse to testify in the English proceedings if their witness statements were provided to the USAO. While they were willing voluntarily to provide evidence in civil proceedings they did not want to become embroiled in a criminal investigation. One has some sympathy for that stance, as the judge accepted, albeit that the risk was ever present given the public knowledge of the ongoing criminal investigation

    b. Second, there was a more general point, given the imminence of the trial. The required focus on consulting witnesses, collating documents, and seeking advice as to confidentiality would be distractions in the court process and amount to an interruption and distraction from the ordinary preparation for the trial and would be prejudicial and might work injustice.

50. By contrast, and of equal interest to those resisting such applications, the learned judge dismissed as inappropriate the suggestion that the First Defendant was '*trying to impede or hinder the ... investigation*' on the basis that it had no evidential foundation and so should not have been made. As the learned judge pointed out, a defendant is entitled to rely on the restrictions, whether or not they impeded the US process, unless and until the Court considers the public policy balance favours their release.

The wider implications

51. So much for the decision, what are the wider points of interest?

Extra-territorial reach

52. First, the addressee of the Subpoena. One of the factual questions for the English court to address by reference to US law was whether the Hewlett Packard entities involved in the English proceedings were under any obligation under US law to produce the documents.

53. This arose because, as I have mentioned, the addressee of the US Subpoena was Hewlett Packard Enterprises, the parent company of the group and not the parties to the English proceedings.

54. It will be interesting to see whether this will in future lead to a focus on the US Subpoena being on specified parties in foreign proceedings.

55. However I suspect, and this may be a point our US colleagues have informed views on, that the Grand Jury may have difficulties issuing a US Subpoena against foreign entities without any connection (other than a US domiciled parent) with the US.

Focussing the request

56. The second issue that may influence the focus of such matters was the apparent absence of any discrimination in the identification of the documents in the US Subpoena. The request was a blanket one for all documents in the proceedings. The evidence did not address this or explain why the documents were sought.

57. That was not satisfactory. Or as the judge put it somewhat more politely:
'*some confirmation of due consideration and some explanation of perceived need surely could have been offered ... without compromising to the slightest degree the confidentiality of' that process.*'

58. This desire for necessity and focus on the need for particular documents rather than a wide-ranging investigation may reflect a different approach of the English courts to the US approach. The desired for direct relevance and need as opposed to a blanket approach is a point that arises in other areas, a point that Mrs Justice Cockerill spoke on when

considering the different approaches in jurisdictions to Letters of Request in her COMBAR lecture last week in London.

Comity

59. The third point is how the decision has been or will be perceived by the US Attorney's Office. Will there be a perception that the English courts may not be assisting in investigating international fraud quite as much as they could?

60. In terms of Hewlett Packard Enterprises' 'rock and a hard place' difficulty and potential implications in the USA, Mr Justice Hildyard provided a helping hand as well as seeking to explain why he had not acceded to the application.

61. He said that he felt '*sure that the relevant US courts will appreciate and take into account that [he] must apply [English law] in accordance with the public policy considerations which underlie it; that in accordance with that law and policy the documents are in a sense held to [the English] court's order and subject to its protection; and that in denying to their parent what under US law they are obliged to provide, but which under English law they are not in a position or bound to deliver to it, the Applicants, having quite properly sought directions, are not flouting the US Court's will or jurisdiction; rather they are being required to abide by the laws and rules of court to which they have submitted in bringing these proceedings and in obtaining the advantages of this court's rules and processes, including disclosure to them of documentation and statements they would not otherwise have had.*"

62. The learned judge also sought to stress his high regard for the US Court process and that nothing in his judgment should be taken to suggest or imply any concerns as to the proper treatment of evidence and the fair safeguard of the rights of an accused by the US Court.

63. In this context the learned judge noted that while the US Subpoena had been issued by the Grand Jury of the relevant District Court, it had not in truth benefited from any judicial scrutiny. He made clear that he would not have wished to refuse to accede to a considered request by a US Court for necessary assistance in the investigation and prosecution of alleged fraud.

64. However how this could be done is unclear. The Hague Service Convention does not assist because of its focus on civil and commercial matters. There is the 1994 Mutual Legal Assistance Treaty[20] which provides for such requests via diplomatic channels, but that is extremely long as a process.

65. It would be interesting to understand from those with direct experience as to how this might otherwise be tackled. In any event, hopefully there is something here of interest and to prompt further discussion.[21]

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23 MAY 2019

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20 https://fas.org/irp/world/uk/us-uk-mla.pdf

21 The USAO may note with interest the decision of Mr Justice Hildyard in the previous month where a party to civil proceedings was required to disclose within those proceedings (so CPR 31.22 was nothing to the point) documents provided confidentially as part of negotiations with the Serious Fraud Office – Omers Administration Corp & Others v Tesco Plc [2019] EWHC 109 (Ch). See too Tchenguiz v Grant Thornton UK LLP [2017] EWHC 310 on the question of a party's disclosure obligations in respect of documents disclosed in earlier proceedings.