

# U.S. Subpoena Fails to Secure the Production of Witness Statements and Disclosed Documents in English Proceedings

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On 12 February 2019, the English High Court issued a judgment in proceedings related to the takeover of Autonomy Corporation Limited (now ACL Netherlands BV) (“Autonomy”) by the Hewlett-Packard group (“HP”) in 2011.<sup>1</sup> The question before the Court was whether a U.S. grand jury subpoena served on Hewlett Packard Enterprise (“HPE”, the U.S. parent company of the claimants) required certain documents received by the claimants solely through disclosure in English High Court litigation, as well as witness statements exchanged between the parties to that litigation (together, the “Subpoenaed Documents”), to be produced to the U.S. Federal Bureau of Investigation (the “FBI”).

In summary:

- The Court refused to allow disclosure of the documents in response to the grand jury subpoena on the basis that the subpoena did not override English public policy considerations which seek to preserve a litigant’s right to privacy and confidentiality, nor were the parties to the English proceedings compelled to comply with terms of the subpoena.
- The decision illustrates the high threshold which needs to be met to obtain the court’s permission to make collateral use of documents disclosed in English proceedings, and demonstrates the level of scrutiny which subpoenas from U.S. authorities will be subjected to by the English courts where they relate to documents disclosed in English proceedings and protected by the English courts’ confidentiality rules.

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<sup>1</sup> *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch).



## Factual Background

In November 2012, shortly after HP's acquisition of Autonomy, HP announced it had written down \$8.8 billion of the value of Autonomy (or 80% of the purchase price) due to the alleged manipulation of Autonomy's accounts prior to the sale. As a result, civil proceedings were commenced on both sides of the Atlantic. A related criminal investigation was also launched in the U.S., which led to the issue of a subpoena on 30 October 2018 at the request of the U.S. criminal prosecutor, the U.S. Attorney's Office (the "USAO"). The subpoena was addressed to and served on HPE, and was cast in broad terms which demanded the production of "*all documents produced by any party*" to the English proceedings which were in HPE's possession, custody or control.

Several claimants in the English proceedings (the "Applicants"), subsidiaries of HPE, considered they were also bound by the terms of the subpoena. The Applicants took the position that they would be exposed to the risk of a criminal penalty in the U.S. if they did not comply with the terms of the subpoena, and applied to the Court for permission to produce the Subpoenaed Documents (which included documents disclosed by the defendants during the English proceedings as well as witnesses statements which had been served by the parties) to the FBI.

## Collateral Use

Under English law, the provisions of CPR 31.22 (in the case of disclosed documents) and CPR 32.12 (in the case of witness statements) require that a party may only use documents received through disclosure and witness statements served on it for the purpose of the proceedings in which they are disclosed or served. This is subject to certain exceptions where:

1. the document has been read, referred to or put in evidence at a hearing held in public;
2. consent has been given by the witness or by the party that disclosed the document (and, if different, the party to whom the document belongs); or

3. the court gives permission.

The issue for the Court was whether and how it should exercise its discretion to grant permission for collateral use of the documents (as neither of the other two exceptions applied on the facts).

## The High Court's Decision

The Court's guiding principle was the public policy rationale behind CPR 31.22 and CPR 32.12, namely:

1. the disclosure of documents and exchange of witness statements ensures all relevant evidence is provided to the court and increases the possibility of settlement, and
2. to promote compliance with the relevant rules requiring documents to be disclosed and witness statements to be exchanged and to preserve litigants' privacy, the court may control the use that may be made of such documents.<sup>2</sup>

The Court noted that it will 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 on use set out in CPR 31.22 and CPR 32.12.<sup>3</sup> The Court will relax the restrictions on the collateral use only where there are "*cogent and persuasive reasons*"<sup>4</sup> to do so, and where it would not give rise to any injustice to the person giving the disclosure.<sup>5</sup>

The Court did not accept that, when applying this test, it had limited discretion to consider the relevance and the scope of the Subpoenaed Documents, nor did it agree that it was for the U.S. court to control the risk of any abuse of the Subpoenaed Documents. Instead, the Court considered that its discretion should:

*"be exercised by reference to all the circumstances as they appear to the court... and on the basis that it is for the applicant to show that the public interest in making the documents available outweighs the public*

<sup>2</sup> *ibid* [23] – [24].

<sup>3</sup> *ibid* [33].

<sup>4</sup> *Crest Homes Plc v Marks* [1987] AC 829, 859.

<sup>5</sup> *ibid* 860.

*interest in honouring the promise of privacy which the rules reflect.”<sup>6</sup>*

The Court rejected the argument that the obligations imposed by the subpoena were a “*trump card*” that rendered its exercise of discretion “*mechanistic*”.

### **Were there “cogent and persuasive reasons” for collateral use?**

On the facts, the Court found that the Applicants were not under any obligation to produce the Subpoenaed Documents in response to the grand jury subpoena. This was because:

- It was clear that the USAO, and not the U.S. court, dictated the scope of the subpoena.
- The Subpoenaed Documents were not necessary for an indictment. Before attempting to obtain the Subpoenaed Documents, the USAO had already indicted one defendant to the English proceedings (in November 2018), and had conducted a full trial in the U.S. against the other defendant in the English proceedings. Equally, the U.S. criminal investigation had been ongoing since 2012 and the USAO already had access to millions of relevant documents.
- The document request in the subpoena was “*enormously broad*” and the USAO failed to tie it to any of the issues or areas of further investigation. There was also no indication that the USAO had considered the relevant restrictions in the CPR when drafting the subpoena.
- The Applicants were not the addressees of the subpoena, and HPE was the only entity named as the “Subpoena Recipient” within the body of the document.
- In the Court’s judgment, as a matter of U.S. law, HPE did not have control of the Applicants’ documents (and was not obliged to produce them). “Control” under U.S. law entails the legal right to obtain the relevant documents on demand, and the restrictions on the collateral use of documents in the CPR meant this was not the case.

— The subpoena contained express wording which limited criminal prosecution to those persons who “*unjustifiably*” refused to produce any demanded document.

— Parts of the Subpoenaed Documents which had been given to HPE’s legal function were held by HPE subject to the restrictions in the CPR (a fact the Applicants had implicitly acknowledged by seeking the Court’s permission for collateral use).

As a result, it was not clear that it was in the public interest to produce the Subpoenaed Documents in response to the grand jury subpoena for the purposes of assisting the investigation and prosecution of a fraud. There was therefore no “*cogent and persuasive*” reason for the collateral use of the documents which could outweigh the public interests protected by CPR 31.22 and CPR 32.12.<sup>7</sup>

### **Would collateral use give rise to injustice?**

The absence of “*cogent and persuasive*” reasons was sufficient for the Court to withhold its permission for the collateral use of the Subpoenaed Documents, but it also considered whether collateral use could have caused injustice in the U.S. or English proceedings.

The Court found that, in the case of the U.S. proceedings (where Mr Michael Lynch, the first defendant in the English proceedings, was to stand trial), the release of witness statements would give the USAO a substantial amount of information about the defendant’s case, whilst it had no obligation to provide him with corresponding detail about its prosecution. The Court was less concerned that other documents which the defendants disclosed in the English proceedings would cause injustice if released.<sup>8</sup>

As for the English proceedings, the Court held that the release of both disclosed documents and witness statements for collateral purposes would unsettle preparations for trial (which was imminent).<sup>9</sup> There was therefore a likelihood of injustice in both the U.S. and the U.K. proceedings.

Having concluded that permission to produce the documents should be refused, the Court affirmed its

<sup>6</sup> *ACL Netherlands BV v Lynch* [53].

<sup>7</sup> *ibid* [80].

<sup>8</sup> *ibid* [84] – [85].

<sup>9</sup> *ibid* [89].

confidence that the U.S. courts would appreciate the Subpoenaed Documents were:

*“in a sense held to this court’s order and subject to its protection [and]... 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.”<sup>10</sup>*

It remains to be seen whether, if compliance with the grand jury subpoena is sought to be compelled before a U.S. court, the U.S. court will adopt the same outlook. It is also worth noting the English High Court’s criticism of the USAO’s approach to the subpoena. This suggests that if such subpoenas are to surmount the restrictions on collateral use, document requests need to be focused and linked to issues of further investigation, and served without substantial delay and prior to the issue of indictments. The decision also leaves a question regarding the relevance of territorial considerations in relation to its analysis. While the English High Court’s analysis was agnostic as to the physical location of the requested documents or the Applicants, a U.S. court asked to enforce a grand jury subpoena would be more likely to do so if either the documents sought or their custodian were located physically within its jurisdiction and thus subject to direct compulsion. Whether the prospect of such enforcement could overcome the restrictions on collateral use in a particular case remains to be considered in the future.

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<sup>10</sup> *ibid* [95].