Autonomy v Lynch: confidentiality of English proceedings trumps an FBI subpoena

Published 1 May 2019

A slew of recent cases has illustrated the English court's approach to evidence sought in the context of multi-jurisdictional proceedings and investigations – and especially at the intersection of the civil and criminal law. See, for instance, our articles on cases where:

- the need for disclosure in English civil proceedings overrode Iranian Sharia law on privacy
- the English court assisted its US counterpart despite arguments this would expose an individual to risk of criminal liability
- the English court ordered a third party corporate to produce privileged material in an investigation into its auditor, with concomitant concerns that this material could become public or be passed to a regulator in another jurisdiction

These cases are accompanied by a recent interlocutory decision in ACL Netherlands BV (As Successor to Autonomy Corp Ltd) v Lynch concerning the circumstances in which the English court will allow a party to disclose confidential information disclosed in litigation (documents and witness statements) for a collateral purpose – in this case, to assist an FBI investigation in the US.

Autonomy v Lynch

This case forms part of much larger fraud proceedings relating to the sale of Autonomy to Hewlett Packard, itself the highest-value fraud claim ever brought against an individual before the English court. Simultaneously, criminal proceedings and investigations are underway in the US. (Indeed, the Second Defendant to the fraud claim has already been convicted.) As part of this wider context, the FBI is investigating the same alleged fraud which forms the basis of the wider English proceedings.
The Claimants argued they were subject to a subpoena issued by a Grand Jury of the US District Court for the Northern District of California. The subpoena required the Claimants to deliver up all relevant documents to the FBI, including those in the English litigation. It was common ground that the Civil Procedure Rules (CPRs) require a party to obtain the English court's permission before using documents disclosed in the litigation, or witness statements, for any purpose other than that litigation (a 'collateral purpose').
The subpoena cast its net wide, requiring production of "All documents produced by any party in…[the claim]" and "All witness statements produced by any party in such case." The English court is generally wary of a 'fishing expedition' such as this (described by the judge as a 'trawl' at one point in his decision), and has a duty – enshrined in the CPRs – to protect confidential material in litigation unless and until it is put into evidence in open court, or some other pressing reason overrides this. Conversely the English court is bound by comity to give due care and attention to the needs of a foreign court, and a serious fraud investigation is clearly a matter of considerable public interest. Moreover, the Claimants argued that they would be 'between a rock and a hard place' if the English court.

CPR 31.22 and 32.12 contain the relevant restrictions, and required the Claimants to seek the English court's permission to use disclosed documents and witness statements for a collateral purpose. The Court's starting point is that disclosure obligations in legal proceedings are necessarily an invasion of litigants' privacy and confidentiality, which the Court overrides for the purpose of effective litigation – and for this purpose only. The Claimants therefore needed to prove that the collateral use to which they intended to put the documents was a legitimate exception to this general rule.

1. There must be special circumstances constituting "cogent and persuasive reasons" to permit collateral use.
2. Overriding the general rule must not cause injustice to the person who gave the disclosure.
3. The burden is on the party seeking to override the general rule, and this burden is a particularly heavy one if the purpose of overriding the general rule is to benefit a person not a party to the action in which the disclosure was made.
4. The burden is even heavier when it comes to witness statements (rather than simply disclosed documents). Technically a witness statement is not, prior to trial, 'evidence' so much as an indication of what the witness would say if actually called to give evidence. And a court is even less likely to allow collateral disclosure of witness statements when trial is imminent and parties should be preparing with a minimum of distraction.

The Court therefore starts from the proposition that there is a significant public interest in not permitting collateral use of disclosed documents / witness statements. However, the Court may be willing to override the general rule if there is a pressing public interest which trumps the public interest in keeping such material confidential. The public interest in the

investigation of serious fraud is one such interest. The court therefore weighs up the justification for collateral disclosure on the one hand, and potential prejudice on the other. These considerations are cumulative, and neither trumps the other. This will always be a discretionary balancing exercise for the English court, and nothing can mechanistically 'trump' the Court's duty to exercise this discretion, no factor will automatically oblige the English court to grant permission for collateral disclosure.

In this case, the judge came down firmly on the side of protecting the documents / witness statements from disclosure.

- The Claimants failed to prove they were actually under compulsion by reason of the subpoena. Crucially, the subpoena only exposed the respondent to risk of sanctions for unjustifiably refusing to produce relevant document. Arguably, respecting the rules of the English court justifies non-disclosure.
- Arguably, it was not the Claimants who were under compulsion, but their parent company to which the subpoena had actually been addressed. The parent company was not a party to the English proceedings.
- As a matter of US law, it was not clear that the documents sought were actually in the claimants' 'control'. The relevant US court has a slightly different definition of 'control' of a document from that in the CPRs. The distinction was important on these facts – for the US court, control meant "the legal right to obtain documents upon demand". Arguably, the need to seek the English court's permission meant that this test was not met.
- The English court did not accept that there was any pressing need for the documents in the US. The US authorities had obtained a conviction of the Second Defendant (Mr Hussein) without these documents. The US authorities already had access to millions of documents anyway. Above all, the US authorities had already obtained an indictment without the need for the documents which they now sought.
- The US Court had not turned its mind to why the relevant material might be needed. The document requests constituted a general 'trawl' for 'all documents produced'. The US authorities had given no thought as to the specific issues on which they needed evidence, and the English court was reluctant to give effect to a so-called 'fishing expedition'.
- The Defendants also claimed that giving up witness statements to the FBI would have a chilling effect on the willingness of witnesses to give evidence. The English court did not find this entirely convincing. After all, upon a witness giving evidence, their statement would become public anyway and available to any regulator who sought it. However, the English court did accept that a sweeping disclosure exercise would prejudice the parties' preparation in the run-up to trial.

It is interesting to read this decision in light of the English court's jurisdiction to give effect to a simple 'Letter of Request' under the Hague Convention, which seeks evidence in support of civil proceedings in a foreign jurisdiction. In Letter of Request cases, the English court typically refrains from looking behind the foreign court's assessment of the evidence it needs for trial – the foreign court should, after all, know its own case better than the English judge. However, the English court usually also looks out for some indication that the US court has actually turned its mind to whether the evidence sought really is needed for trial (an element of the test for giving effect to such a Letter). There was no such indication in this case, and – given the breadth of the requests – the judge was more than usually blunt in his conclusions that the evidence sought was not necessary. Of course, the facts in this case were unusually clear. Why should the English court override its own rules to assist a US authority in obtaining an indictment when that indictment has in fact already been obtained?

Above all, this case emphatically demonstrates that the English court has – and will use – discretion when deciding whether to permit collateral disclosure, and will exercise that discretion according to all the circumstances. This is not a mechanistic exercise, and there is no 'trump card' that will always win out, even compulsion in another jurisdiction. This can put litigants into an invidious position vis-à-vis their own regulator. But then, siding mechanistically in favour of collateral disclosure in all circumstances could similarly prejudice other litigants. Fundamentally, this is a 'balance of harms' exercise.

Of course, the complications don't cease with the court's decision not to permit collateral disclosure. The judge took pains to emphasise the distinction between a witness statement before and after it has been put into evidence in open court. The Claimants will, we presume, still need to disclose material from the English proceedings to the FBI on a rolling basis, as and when it becomes a matter of public record by reason of its use in the trial.

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