Neutral Citation Number: [2019] EWHC 249 (Ch)

Case No: HC-2015-001324

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Date: 12/02/2019

Before :

MR JUSTICE HILDYARD

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Between :

1) ACL NETHERLANDS BV
(as successor to AUTONOMY CORPORATION LIMITED)
(2) HEWLETT-PACKARD THE HAGUE BV
(as successor to HEWLETT-PACKARD VISION BV)
(3) AUTONOMY SYSTEMS LIMITED
(4) HEWLETT-PACKARD ENTERPRISE NEW JERSEY INC

Claimants

- and -

(1) MICHAEL RICHARD LYNCH
(2) SUSHOVAN TAREQUE HUSSAIN

Defendants

- -
- -

Patrick Goodall QC and Conall Patton (instructed by **Travers Smith**) for the **Claimants**
Robert Miles QC and Sharif Shivji (instructed by **Clifford Chance**) for the **First Defendant**
Andrew McIntyre (instructed by **Simmons & Simmons)** for the **Second Defendant**

Hearing dates: 23-24 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HILDYARD

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Mr Justice Hildyard :

Introduction

1. This judgment concerns an application by the First, Second and Fourth Claimants ("the Applicants")[1] for permission to provide to the United States Federal Bureau of Investigation ("the FBI") copies of the documents disclosed by the Defendants and the witness statements served in these proceedings (in which a nine-month trial is imminent). They submit this is in order to comply with a subpoena ("the US Subpoena") issued in the name of a Grand Jury of the US District Court for the Northern District of California (the "Grand Jury") dated 30 October 2018.

2. The US Subpoena is not in fact addressed to any of the Claimants but rather to "The Custodian of Records, Hewlett Packard Enterprise ("HPE")". HPE is incorporated and operates in the United States of America ("the US") and it is not a party in these proceedings. It is, however, the wholly-owning parent company (directly or indirectly) of each of the Applicants, and as such, if and to the extent that US corporate law is applicable, it would ordinarily be treated as having in its control all documents in their possession, custody or control. Further, and as later elaborated, the US Subpoena names all Hewlett Packard group companies as persons required to produce "all responsive documents" in their possession, custody or control. These include documents disclosed and witness statements exchanged in the present proceedings.

3. The permission of this Court is required because the material concerned is held subject to the provisions of CPR 31.22 (in the case of disclosed documents) and CPR 32.12 (in the case of witness statements). Those provisions stipulate that a party who receives such material by way of disclosure in proceedings here may use it only for the purpose of such proceedings unless and until (a) the material becomes public by being read or referred to in open Court (or in the case of a witness statement, it is put in evidence at a hearing held in public), or (b) the person who discloses the material and the person to whom the material belongs both agree (or, in the case of a witness statement, the witness gives consent in writing to some other use of it), or (c) the Court gives permission. The material concerned has all been disclosed (or, in the case of witness statements, served) in these proceedings, and CPR 31.22 and 32.12 apply to their release.

4. Put summarily, the Applicants contend that the Court should give its permission in this case because they should not be put in the position of being unable to comply with the US Subpoena, which they contend would put them in potential contempt of the US Court. They submit that any countervailing prejudice to the Defendants is of less severity and consequence.

5. On the other hand, the First Defendant contends that such permission should be refused, because the burden is on the Applicants to show both (a) special circumstances constituting "cogent and persuasive reasons" for giving permission and that (b) the release of the material will not occasion injustice or the risk of it, and, on

[1] I am told that the Third Claimant is no longer in the Hewlett Packard group, and that thus it is not caught by the US Subpoena. I should also record that with effect on 27 October 2018, all of the assets and liabilities of Hewlett-Packard Vision BV were transferred by operation of law to Hewlett-Packard The Hague BV, and a Consent Order has been prepared to effect the substitution of the Second Claimant accordingly.

the evidence before the Court, they have not discharged it. The Second Defendant has left the decision to the Court; but he has referred to authorities said to be supportive of the First Defendant's contentions.

6. The argument has ranged over a number of cases, in both this jurisdiction (as to the principles relevant in determining whether to give permission) and in the US (as to the role of the Grand Jury and the process and effect of a Grand Jury Subpoena). It is the Applicants submission that no case can be found where permission has been refused if its refusal would put the relevant applicant in the kind of jeopardy here asserted.

7. Accordingly, whilst they would accept that I have a discretion, they (at least implicitly) regarded its exercise as in substance pre-determined or mechanistic. Conversely, the First Defendant's position is that, even if there is no such case, that does not affect the principles set out in authority, and that, when such principles are applied, the rules and the balance of justice support refusal of permission.

8. I must therefore consider the relevant case law, as well as the evidence both as to the reality of the jeopardy which the Applicants assert, and as to the prejudice which the First Defendant submits might result, some of it (in each case) rather equivocal or vague. Before doing so, however, it is convenient to set the matter in its overall factual context, since the circumstances of the US Subpoena are also relevant to the exercise of my discretion.

Factual context

9. Both these proceedings, and the US criminal investigation which has given rise now to the US Subpoena, relate to the acquisition of the First Claimant, Autonomy Corporation Limited ("Autonomy"), by the Second Claimant, Hewlett-Packard Vision BV, a wholly owned subsidiary of HPE.

10. For reasons which are substantially in dispute, the acquisition and integration of Autonomy into the Hewlett-Packard group business ("HP") did not go smoothly, and it seems that HP soon reached the conclusion that Autonomy was not as its acquirer had perceived it to be. In the event, shortly after the acquisition on 20 November 2012, HP announced that it was having to write down the value of Autonomy by US$8.8 billion. This occasioned proceedings by HP's shareholders against HP in the US, or rather against its directors, for their failures in relation to the acquisition (which I understand were ultimately settled). The Claimants then brought the present proceedings.

11. The allegations made by the Claimants are of a serious nature. In essence, they are that the Defendants were the architects of the fraudulent manipulation of Autonomy's accounting information on a massive scale, across hundreds of transactions. The Claimants allege that this led to the Second Claimant paying approximately US$5 billion more for Autonomy than they would have paid had they known the true position. These allegations are denied in full by the Defendants. They contend that the asserted losses derived, not from any alleged fraudulent conduct by them, but from HP's own decision to pay over the odds for Autonomy in anticipation of synergies which were not really practicable, and from its own mismanagement of Autonomy's integration into the wider HP group, which further undermined the prospects of any material gain from any synergies.

12. The dispute has been accompanied by high-volume press reporting with some encouragement from both sides. It has generated interest and proceedings on both sides of the Atlantic over an extended period.

13. The US criminal investigation into the matters surrounding HP's acquisition of Autonomy commenced in late 2012. After a lengthy investigation, an indictment was issued against the Second Defendant, Mr Hussain, in late 2016. The trial commenced in February 2018 and the Second Defendant was convicted at the end of that trial in April 2018. There have been several postponements to the sentencing hearing and the Second Defendant is still awaiting sentencing. In the meantime, he has indicated the intention of appealing against his conviction, although I am told that the appeal has not yet been lodged as the time to appeal only arises upon sentencing.

14. Turning to the US Subpoena itself, it appears from the correspondence that there was an earlier subpoena issued, in or around mid-October 2018, by the Grand Jury against HPE at the request of the United States Attorney's Office ("USAO"), the US criminal prosecutor. The precise terms of that first subpoena are unclear (as the document has not been produced by the Applicants) but it appears to have sought from HPE "*all documents produced by any party*" in the present civil proceedings and did not request any witness statements. This first subpoena was served on HPE's lawyers, Morgan Lewis & Bockius LLP ("Morgan Lewis"), who did not accept service. This first subpoena does not appear to have been pursued further by the USAO.

15. The present and extant US Subpoena was issued on 30 October 2018 and served on HPE on 6 November 2018. The date for compliance stated within it was 15 November 2018. There is no dispute that the US Subpoena was validly issued, and under US law compels both attendance on the part of the 'Subpoena Recipient' for the purpose of giving evidence and disclosure by that person of "all responsive documents" in its "possession, custody or control." It is, however, in dispute whether persons other than the named addressee, HPE, on which the US Subpoena was served, are also under compulsion to attend and produce documents. I address this dispute later.

16. HPE appears to have explained to the USAO that, as a matter of English law, the Applicants were prohibited from providing the documents absent an order from the English Court. On that basis, the USAO agreed to extend the date for compliance to allow the Applicants to apply to the English Court for permission. The present date for HPE to comply with the US Subpoena is not apparent from the evidence: it appears to have been left uncertain, though it is stated in the eighth witness statement of Mr Andrew Anthony King, a partner of Travers Smith LLP as solicitors for the Claimants, dated 26 November 2018 ("King 8"), that it was hoped that "the USAO will agree to extend the Subpoena return date further".

17. The US Subpoena is cast in broad terms. It describes the documents requested as follows:

> "All documents produced by any party in…Claim No HC-2015-001324; and
>
> All witness statements produced by any party in such case."

18. On 16 November 2018, the parties in the present proceedings, having previously exchanged witness statements and mutually disclosed documents, served supplemental witness statements. The First Defendant served a supplemental witness statement for himself and 20 other witnesses. On 27 November 2018 the USAO requested through HPE's US Counsel (Morgan Lewis) the immediate production of these supplemental witness statements, stating that they were required to be produced that very day (27 November being the date to which a first extension of the time for compliance had been granted by the USAO).

19. In the meantime, on 20 November 2018, it was agreed, apparently in a telephone call between Ms Susan D. Resley of Morgan Lewis and Mr Adam Reeves of USAO, that at the USAO's request

> "HPE should sequester and exclude from production: (i) the transcript of Mr Hussain's FRC interview; and (ii) the FRC documents that Mr Hussain produced in the UK civil action which are referred to as the "Confidentiality Ring Documents" in a September 12 2018 Order in that action. This is out of an abundance of caution given Judge Breyer's[2] prior statements and conclusions concerning the implications of *United States v Allen*, 869 F.3d 63 (2d Cir. 2017). HPE will identify those documents in the form of a "privilege log" and will produce that log to the government."

20. On 29 November 2018, the Grand Jury issued an indictment against the First Defendant, charging him with one count of conspiracy to commit wire fraud and 13 counts of wire fraud. The maximum custodial sentence for each allegation is 20 years. The indictment also charges Mr Stephen Chamberlain, Vice-President of Finance at Autonomy, on the same counts.

21. At a preliminary hearing before the United States District Court on 19 December 2018, the First Defendant indicated that, in the light of the indictment, he was considering applying (at this hearing) for a stay of these proceedings. On 10 January 2019, having heard nothing further from him in this regard, the Claimants sought clarification of the First Defendant's intentions. On 14 January 2019, he indicated that he was "*still considering his position with respect to an application seeking a stay of the English proceedings*". Then, on 18 January 2019, he confirmed that he is not currently intending to seek a stay of these proceedings:

> "As is apparent, [Dr Lynch] has not to date issued a stay application nor is he currently preparing one. Whilst our client is entitled to consider his position in light of the US developments, we will promptly advise the court should the circumstances or his intentions change".

[2] Judge Charles R. Breyer of the United States District Court, Northern District of California, being the judge overseeing the criminal case in the US. In King 8 Mr King explained that he was "informed by [Morgan Lewis] that the USAO had requested that these documents may be withheld from production in light of statements made by the Judge overseeing the US criminal case that the Second Defendant's FRC [Financial Reporting Council, a UK regulatory body] testimony may constitute compelled evidence, the use of which is prohibited in US criminal proceedings in light of the constitutional protection of privilege against self-incrimination."

22. The application notice presently under consideration was issued on 26 November 2018. The need for up to a two-day slot for the hearing occasioned a small delay in listing the matter for hearing before me (as the assigned judge).

Relevant case law and legal principles

23. The rules of procedure in the CPR requiring (a) the disclosure of documents relevant to the issues in the case and (b) the exchange of witness statements setting out the evidence to be given by each witness at trial are fundamental features of almost all litigation in this jurisdiction involving a serious contest of fact. Disclosure reflects and promotes "the public interest in ensuring that all relevant evidence is provided to the court" (*per* Jackson LJ in *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 at [56]). The exchange of witness statements alerts each party to what the opponent's witnesses are going to say at trial and thereby both promotes the prospect of informed settlement before trial and avoids unfair surprise at trial. Both thereby promote the overriding objective at the apex of the CPR.

24. However, both to seek to preserve as far as possible the litigant's right to privacy and confidentiality (of which these rules do constitute an invasion in the public interest) and thereby also to promote compliance with these rules, the court has controlled the use that may be made of such documents. In particular, it has insisted that, without its leave or the consent of the disclosing party (or the witness in the case of a witness statement), no use should be made of them for a purpose other than for the purpose of the proceedings in which they were disclosed or exchanged unless and until they become public by being read in court.

25. In the nineteenth century, the court would require an express undertaking to prevent such collateral use. Over the course of time, this became so standard that it came to be implied. Now the prohibition is expressly and exhaustively set out in the CPR, in CPR 31.22 (as regards the use of disclosed documents) and in CPR 32.12 (as regards the use of witness statements).

26. I stress these matters and their long history by way of emphasising the substantial importance attached to the prohibition against collateral use, and the public interest in its observance. The rules, in other words, may be procedural in form: but they give effect to important public policy, and in exercising its discretion to give permission for collateral use, the Court must be circumspect and protective of that policy. I would stress also that the obligations that the relevant rules impose are owed to the court.

27. Having described their purpose, application and effect, I do not think it necessary to set out the relevant rules in full. All parties before me accept, as they must, that the restrictions in those provisions prevent them from producing to the FBI the documents requested in the US Subpoena (as well as producing a log of the 'Withheld Documents'[3]), unless one of the exceptions applies. Subject to a very limited exception for the purpose of assessing whether the rules apply (see *Tchenguiz v Grant Thornton UK LLP* [2017] 1 WLR 2809 at 2815), none of the parties disputed that for the purposes of the restriction on 'use' that the rules express, the word "use" is to be

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3 In circumstances where the restrictions are construed broadly and include showing the documents to a third party, using the information contained in them, or even referring to them or their characteristics or provenance: *Tchenguiz v Grant Thornton UK LLP* [2017] 1 WLR 2809.

given a broad meaning. As Christopher Clarke LJ (with whom Barling J and Arden LJ agreed) put it in *IG Index plc v Cloete* [2015] ICR 254 at [40]:

> What the rule precludes is the use of the document(s) disclosed. 'Use' is a wide word. It extends to (a) use of the document itself e g by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard 'use' as extending to referring to the documents, and any of the characteristics of the document, which include its provenance."

28. So much as to the scope of the rules. The real point in issue in this case is as to the scope of the exceptions, and, in particular (since none of the other exceptions applies presently), as to the practice and case law governing the exercise of the Court's discretion to give permission for some other use.

29. Although it was decided (in the House of Lords) before the CPR and thus concerned the implied undertaking which was the precursor of the relevant rules, the leading case in this context, at least as regards the overall approach required of the Court, is still *Crest Homes Plc v Marks* [1987] AC 829.

30. That case made clear that the Court will only release or modify the restrictions where (a) there are special circumstances which constitute "cogent and persuasive reasons" for permitting collateral use and (b) the release or modification will not occasion injustice to the person giving disclosure: *ibid.* at 859G and 860, *per* Lord Oliver. Further, the burden is on an applicant to persuade the court to lift the restrictions (see 860, again *per* Lord Oliver). In a later case, *Bibby Bulk Carriers v Consulex Ltd* [1989] QB 155, Hirst J (at 163C-D) drew on another case in the House of Lords, namely *Home Office v Harman* [1983] 1 AC 280 at 326, in stating that the 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.

31. So far, I have treated the same principles as being applicable to both the collateral use of disclosed documents and the collateral use before trial of witness statements. However, certain differences should be noted also which suggest, in my view, that a more restrictive approach should be taken to the collateral use of witness statements prior to trial, especially (as it seems to me) when the trial is imminent. These differences are the consequence of the peculiar status of witness statements prior to their deployment in evidence at trial. Thus:

    (1) A witness statement is not, prior to the witness being called at trial, either (a) evidence but rather an indication of the evidence that the witness may give if the witness is called to give evidence, or (b) available as a public document, see Leggatt J (as he then was) in *Blue v Ashley* [2017] EWHC 1553 (Comm) at [14] and [15]:

        > "[14] It is, however, important to notice that it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case: see

> CPR r 32.5. Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person's statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all - in which case it never becomes part of the material on which the case is decided.
>
> [15] When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement—in just the same way as they would have been entitled to hear the evidence if it had been given orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR r 32.13 to inspect a witness statement once it stands as evidence-in-chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason why a member of the public or press should be entitled to obtain copies of witness statements before they have become evidence in the case. Conducting cases openly and publicly does not require this. Nor is it necessary to enable the public to understand and scrutinise the justice system. The advance notice that a witness statement provides of what evidence its maker, if called as a witness, will give is provided for the benefit of opposing parties (for the reasons I have indicated), not the public. The trial is an event which must (save in exceptional circumstances) be conducted in public so that justice can be seen to be done. But preparations by the parties for the trial for the most part are not, and do not need to be, public".

(2) This echoed earlier observations by Colman J in *Hollywood Realisations Trust v Lexington Insurance Co* [2003] EWHC 996 (Comm), at [8]:

> "Such documents having been provided to the opposite parties to the litigation in order to facilitate the smooth and efficient running of the trial and to encourage settlement before trial by providing information as to the content of a witness's evidence, it is an abuse of their function for them to be used for any other purpose or to be disclosed to anyone who is not a party to the trial or its representative. This limitation on use

> does not rest merely on the limited purpose for which the statement is disclosed, but upon the wider policy that such documents should not be exposed to any wider use until made public in the course of a trial because the document may be seriously harmful to any party whose witness has made the statement if it is relied on for other purposes than the trial in question. For example, it may be used to found a claim not previously made. It may be said to be defamatory. It may be used by a third party to intervene in the trial. Further, it may never be used at the trial and may therefore never enter the public domain, except, perhaps, as a basis for cross-examination of witnesses by those representing other parties."

(3) As Hobhouse J said in *Prudential Assurance v Fountain Page* [1991] 1 WLR 756, at 775 (a case cited in *Hollywood* (above), albeit one that arose under a pre-CPR regime):

> "Circumstances under which [the] relaxation [of the restriction on collateral use of a statement] would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party".

32. The real question in this case is whether the Applicants have discharged the burden on them of showing both sufficiently "cogent and persuasive reasons" for permitting collateral use, taking into account any injustice to the person giving disclosure, and having regard, in the case of the witness statements sought, to their peculiar status and the understandings on which they can be taken (by virtue of the rules) to have been provided.

33. In my view, the burden is such that, in reality, 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.

34. The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences.

35. *Marlwood Commercial Inc v Kozeny and others* [2005] 1 WLR 104 is a good example. It was much relied on by the Applicants since the case also had a transnational context in that in seeking permission of the Court for collateral use the litigant was acting in response to a notice under section 2 of the Criminal Justice Act 1987 which had been served by the Serious Fraud Office ("the SFO") in response to a request from foreign prosecutors for assistance, and ultimately for the use of the documents by those prosecutors. Moreover, the litigant who had given disclosure was a foreign defendant brought compulsorily before the court in the exercise of its 'long-

arm' jurisdiction, who had only brought the documents into this jurisdiction for the purpose of the disclosure mandated under the CPR.

36. The Court of Appeal, affirming the decision of the judge below, gave permission. In its reasoning in a single judgment of the court, delivered by Rix LJ, he observed as follows (at [50] to [52]):

> "[50] On balance, however, we are firmly persuaded that, in the absence of other factors, the court's discretion should, as a matter of principle, prima facie be exercised in favour of compliance with the section 2(3) notice: that is to say that, by itself, the additional factor that the documents have been brought here for the purpose of disclosure by a foreign litigant himself brought compulsorily before the English court should not be regarded as a reasonable excuse for non-compliance with the notice, and the courts should be prepared to grant permission under CPR 31.22 for their collateral use in production to the Director of the SFO, even following the request of a foreign authority to the Secretary of State under the [Criminal Justice (International Co-operation) Act 1990]. We say this for the following reasons.
>
> [51] Ex hypothesi, there is suspicion of serious or complex fraud…The Secretary of State can only refer the request to the Director of the SFO if he is satisfied…The Secretary of State also has to be satisfied…Moreover, [the Director of the SFO] can only exercise his section 2 powers, even on a referral of a request from foreign authorities by the Secretary of State, if it appears to the Director that there is good reason to do so for the purpose of investigating the affairs of a particular person; and if he wishes documents to be produced he must specify them.
>
> [52] In such circumstances, and in the absence of any other factors argued to constitute some injustice, it seems to us again that the public interest in the investigation or prosecution of a specific offence of serious or complex fraud should take precedence over the merely general concern of the courts to control the collateral use of compulsorily disclosed documents. If such an offence had been suspected of having been committed in this country, the public interest would be in seeing that it could be investigated here if this is where the relevant documents were. And if the offence had been committed abroad, the same interest in the comity of nations and the same respect which one sovereign has for another, which in the general context of long-arm jurisdiction might operate in favour of the foreign resident, in such a case operate against him. In such circumstances the public interest in proper disclosure in civil litigation does not require that documents necessary to the investigation or prosecution of serious fraud should be unavailable. Moreover, as Moore-Bick J reasoned below, the court's exceptional permission for relaxing the rule against collateral use in cases of serious fraud in the international context does not give cause for thinking that proper disclosure in the general run of cases will be undermined."

37. Further illustration of the approach of the Court in a purely domestic context is provided by *Sita UK Group Holdings Limited and another v Andre Paul Serruys and others* [2009] EWHC 869 (QB). In that case, the claimants in the proceedings sought permission pursuant to CPR 31.22 to disclose documents and information they had

obtained in the course of the proceedings to Her Majesty's Revenue and Customs ("HMRC"). Their apparent objective (see [24(c)]) was to give HMRC information about possible tax frauds arising during the time of the first defendant's management of the companies to which the proceedings related, and connected to the allegations made by the claimants in the proceedings. Jack J refused permission, principally (as it seems to me) because HMRC did not themselves press or even support the request at the time, and had the means of pursuing the matter as and when they saw fit. But Jack J, basing himself primarily on the *Crest Homes* case (see above), emphasised (see [23]) that the principle there stated is that "for permission to be given there must be special circumstances, and the release must not occasion injustice to the person giving the disclosure". He stated further (at [25]):

> "It is apparent from the cases which I have cited that the court should not give permission to use or disclose information or documents obtained from another party without a careful examination of the circumstances and need. In short, the disclosure must be properly justified."

38. That test of actual and immediate necessity, which was crucial to Jack J's decision, has found further echo recently in the domestic context in *Barry v Butler* [2015] EWHC 447 (QB), in which Warby J refused an application, *inter alia*, on the basis that (see [59]):

> "It is not even said that the documents are necessary for the investigation, as opposed to merely being of interest."

39. More recently, HHJ David Cooke, sitting as a High Court Judge, considered that the test of immediate necessity does not require a detailed explanation of why each individual document for which permission is sought is relevant to a particular issue identified as arising in the investigation or proceedings said to justify its grant. He also noted (see [15] and [18]) that

> "[15] …the public interest in the proper conduct of criminal proceedings will be a material, and often a decisive, factor in favour of allowing disclosed documents to be used by a prosecuting authority…"
>
> [18] …no counsel cited a case in which permission to use documents in criminal proceedings was refused, and the special features in the reported cases which may have been said to provide greater than normal weight against permission did not outweigh the public interest in effective prosecution."

40. But it is important to note as regards that case that the learned judge was concerned to be satisfied (as he was) that the grant of permission "would not cause any injustice whatever to any of the defendants" (see [31]), and that indeed the defendants in that case had in effect accepted this. The following other features of importance may also be noted:

(1) The permission sought was to use 203 specifically identified documents (being all the documents disclosed by the defendants in that action);

(2) The use for which permission was sought was in a private prosecution (in which the Crown Prosecution Service had not sought to intervene) brought by the same person who was the claimant in the civil proceedings, which the defendants had not sought to stay.

(3) The application did not seek permission to use witness statements provided to him in the course of the civil proceedings.

(4) In that case, the documents sought had been identified for use and were intended to be used in the criminal trial, thus observing the general rule that (and see Matthews & Malek, Disclosure, 5th Ed, para 19.40)

> "it is inappropriate to seek a release from the collateral use restriction in respect of disclosed documents wholesale…".

(5) HHJ Cooke accepted that the court must be satisfied "that there is no injustice to the party compelled to give disclosure" (see [21]).

41. As to transnational considerations, HHJ Cooke observed in the above case that all the cases to which he had been referred "all seem to have some special feature taking them out of the norm, such as a foreign element" (see [18]). That serves both to emphasise that some special feature is usually required and to invite analysis as to whether, and if so why, a foreign element provides it.

42. In addition to the *Marlwood* case, the Applicants emphasised especially in this context the decision of Millett J (as he then was) in *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919. There, the claimant bank obtained (pursuant to an order made under the *Norwich Pharmacal* jurisdiction[4]) disclosure against an English bank and several foreign banks with branches in England in connection with allegations of large-scale fraud against the defendant. The Bank of Greece appointed a special investigator to inquire into the affairs of the claimant bank, so that misappropriated funds could be traced. The claimant bank applied for permission to use the disclosed material to enable it to comply with its duties under Greek law for the purposes of the investigator's report. In granting permission, Millett J stated (at 926C-927B, emphasis in the original):

> "Save in exceptional circumstances, it would not be right to authorise the bank voluntarily to make use of the material for any other purpose ... However, *voluntary* disclosure is one thing; disclosure under compulsion of law is another. By enabling the bank to obtain information which it needs for the successful prosecution of its civil remedies, the court should not place the bank in an impossible position in which it must either infringe its undertaking to this court or find itself in breach of its duties under Greek law ... If the governor [of the Bank of Greece] obtains them, it will be a matter for Greek law to determine whether or not he should provide them to the examining

[4] *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133 is the well-spring of the jurisdiction to grant orders to disclose documents against anyone involved, however innocently, in the commission of a tort, such as a bank unwittingly involved in the dishonest misappropriation of funds using its facilities.

> magistrate and what use if any the examining magistrate should make of them. Such questions involve considerations of public policy, but in my judgment, they are questions of Greek public policy, and they should be determined accordingly without the restraining hand of this court. If, under Greek law, either the governor of the Bank of Greece or the examining magistrate can compel the production of the audit reports, so be it. It is frequently the case that material obtained by a party to English civil proceedings may be required to be produced in criminal proceedings in England. By a parity of reasoning, I see no reason why the English court should be astute to prevent a party who has obtained material in this country by the use of the coercive powers of the English court from producing such material in a foreign jurisdiction if compellable to do so."

43. The Applicants submitted that precisely the same position applies in the present case. As it was put in their skeleton argument:

> "Unless the court grants permission, the Relevant Claimants will be placed in an invidious position, as they will be unable to comply with their US law obligations and will face the very real prospect of sanction in the United States. It would be wholly unjust to place the Relevant Claimants in what Millett J recognised was an "*impossible position*" between a rock and a hard place, with competing obligations owed to the English court and under US law. That is all the more so when the obligation arises in the United States as a result of a criminal investigation by the state authorities."

44. However, the following features of that case, which the Applicants tended to overlook, were crucial elements in the balance required to be struck:

(1) The special investigator (a Mr Stefanides), for whose report the documents were requested, was under an obligation under Greek law to provide an audit report to the Bank of Greece to record the result of his and his team's investigations on its behalf of the affairs of the Bank of Crete; and he was insistent that unless he could refer to the documents and information in question which he had obtained pursuant to a disclosure order against various other banks (both here and abroad) earlier granted by Morritt J (as he then was) the audit report would be "worthless and even misleading" (see page 921G).

(2) The use of the information and documentation obtained pursuant to the order of Morritt J for the purposes of civil proceedings in Greece by the Bank of Crete had already been permitted by further orders of Morritt J and Millett J (see pages 921B and H).

(3) The examining magistrate appointed and responsible under the Greek judicial system to investigate whether to bring criminal proceedings had already brought criminal charges, and the first defendant had been extradited from the USA and was awaiting trial in Greece. In the criminal proceedings, as in the civil proceedings, the use of the information and documents was considered to be

"essential" in order to demonstrate the frauds alleged, and were just as central for the purposes of the report.

(4) Though duly notified the defendant did not appear; but there could not have been sustained any realistic suggestion of material prejudice to him flowing from the use in the report of material already sanctioned to be deployed in the civil proceedings and the criminal proceedings. Nor was there any risk of denying any privilege against self-incrimination, since none could be asserted: see pages 925H to 926C. There was no conceivable unfair disadvantage to the defendant in any of the proceedings on foot in giving the permission requested.

(5) It was the duty of each of the banks from whom the documents and information had been obtained, each of whom was notified of the application, to obtain the instructions of its customer (the underlying account holders in each case of the account the subject of the orders made by Morritt J). None of the banks objected to permission being granted. Each of the account holders had also been notified of the application. None had responded and none had appeared to oppose it: see page 922H. There was no evidence or even suggestion of any prejudice to third parties, or to the conduct of the English proceedings.

(6) The Bank of Crete's predicament flowed from the fact that it had been enabled by English court order to obtain information which it undeniably needed for the successful prosecution of its civil remedies, but was precluded without permission from supplying the same documents or information for the purpose of complying with its obligations to the Bank of Greece under Greek law, and thus at risk of fundamentally misleading its regulator and failing in its obligations.

45. Put shortly, the circumstances were such as to present an overwhelming case for permission to be granted, with little, if anything, left in the balance to support the public policy objectives underlying the prohibition against collateral use, except the infringement of a right of privacy which none of the account holders had sought to assert, and the amorphous concern that other persons in other cases might perceive the protections ordinarily available to have been undermined. The tests of "cogent and persuasive reasons" and necessity on the one hand, and, on the other hand, of there being apparently no material injustice to the person giving disclosure or otherwise, were clearly and obviously satisfied.

46. Thus, although on behalf of the Applicants Mr Patrick Goodall QC (leading Mr Conall Patton) submitted that the *Bank of Crete* case turned on the point that it would have been unjust to place the Bank between a "rock and a hard place", and that the same considerations dictated the giving of permission in this case accordingly, that is, in my view, to give inadequate weight to the other circumstances of the case, which in the exercise of its discretion the court is bound to consider. Put another way, in the *Bank of Crete* case the factor that the Bank was in effect under compulsion to disclose made it unnecessary for Millett J to decide whether the circumstances were sufficiently "exceptional" to warrant permission even had the Bank sought to disclose voluntarily; but it did not of itself dictate the result. The case does not, in my view, qualify the principle established by *Crest Homes* and echoed in such cases as *Marlwood* that all the circumstances are always relevant, and for permission to be granted the Court must be satisfied that the tests of cogency, persuasive reasons and

necessity, and of there being no material prejudice to the person giving disclosure, must be satisfied.

47. As Mr Robert Miles QC (leading Mr Sharif Shivji) on behalf of the First Defendant emphasised, and I agree, that latter consideration (prejudice to the person giving disclosure) is not an afterthought but a vital factor, based on the rationale of the rules as I have explained, which may of itself preclude permission.

48. Thus, in another case cited and much relied on by the Applicants, *Attorney-General for Gibraltar v May and others* [1999] 1 WLR 1000 (in the Court of Appeal) the decision whether to release the Attorney-General of Gibraltar from his implied undertaking not to use an affidavit of assets sworn by the first defendant in the proceedings other than in those proceedings turned primarily on the issue of prejudice. Although it is to be noted that the evidence in the affidavit was characterised by the court as "an important part of the prosecution's case, but not a pivotal one" (page 1003D), at first instance, Evans-Lombe J had been persuaded that the first part of the test was satisfied (see page 1004A). He had refused permission, however, because he considered that the second part of the test was not satisfied because the use of the evidence would have "the effect of overruling or getting round the privilege that the first defendant would otherwise have had against self-incrimination in Gibraltar", giving rise to "the possibility – indeed the probability – of injustice to him" (page 1008B). The Court of Appeal was not troubled by the first limb of the test (that having been decided as matter of discretion by the judge, and it being clear that the evidence was of a quality such that it should be available in the criminal trial in Gibraltar). But on the second part they considered the judge had plainly erred because, the law of Gibraltar being identical to English law both (i) in applying the privilege against self-incrimination and (ii) in "clothing the trial judge in a criminal trial with common law powers to exclude evidence if its prejudicial effect outweighs its probative value, or if the admission of the evidence would be unfair" (pages 1003A-B), the trial judge there (in Gibraltar) would be (see page 1009H-1010A)

> "in a much better position than we are to give appropriate weight to all relevant considerations, telling either way, including not only the full and proper protection of the first defendant against any injustice, but also the importance of ensuring, subject always to fairness, that all relevant material is available to the jury in the criminal trial."

49. What *A-G for Gibraltar v May* affirms, as it seems to me, is that in every case the court must be concerned to weigh the balance of public interests, which requires it to take all the circumstances of the case, including the justification and present necessity of having the documents made available, and any prejudice which would thereby be caused and cannot otherwise be prevented or remedied. The first and second limbs of the test are cumulative and neither trumps the other. I think it is also important to note that in that case, there was no suggestion of any specific prejudice to the first defendant otherwise in relation to the privilege against self-incrimination, which the Court was entirely satisfied could fully be protected in Gibraltar as well as in England. No irremediable or irreducible prejudice was suggested, either to the first defendant himself or to any third parties.

50. At times, Mr Goodall seemed to me to seek to rely on the cases he cited as demonstrating a mechanistic approach which gave little room for the exercise of discretion according to all the circumstances of the case, and having regard to the burden being on the person seeking permission to justify departure from the usual rules. Thus, for example, when in oral argument I asked whether it was permissible or perhaps even requisite for me to consider such matters as (a) the evidential quality of the material sought (b) the necessity for its production now, given the imminence of trial when all truly material documentation would be likely to become public, and witness statements would become real evidence and also public (rendering then the permission sought now unnecessary), he answered that

> "In circumstances where there is an extant subpoena seeking that class of documents which has not been impugned in the foreign jurisdiction, then we say, yes, compulsion trumps."

51. Similarly, when I asked what would be the position if the English court took the view that the documents were not, in its own eyes, of much relevance but that there was little risk of material prejudice, Mr Goodall suggested that compulsion would once again "trump". Likewise, he argued, the English court should not be concerned about the scope of the documentation sought: the foreign court should be trusted to control any abuse.

52. I do not accept that the discretion of this court is so limited or its exercise so mechanistic, whether in the context of a foreign subpoena or otherwise. I do not think it is the message of the authorities, for the reasons I have sought to draw out in my analysis of them. More particularly, I do not think that the fact of compulsion of itself establishes a "cogent and persuasive reason" for giving permission: the test is whether the use for which permission is sought justifies any exception to or erosion of the public interest which lies behind the rules.

53. The message of the cases, echoing down from *Crest Homes* and even before then, is that the discretion is to be exercised by reference to all the circumstances as they appear to the court whose permission is sought, and on the basis that it is for the applicant to show that the public interest in making the documents available outweighs the public interest in honouring the promise of privacy which the rules reflect. Careful observance of the restrictions against collateral use, and circumspection accordingly in permitting any departure from them, is important in encouraging compliance with fundamental obligations in contested English proceedings of full and proper disclosure (including of confidential material, save in exceptional circumstances) and the exchange of witness statements which to a greater or lesser extent provide a glimpse behind the curtain into the other side's brief.

Application of the required approach in the present case

54. I turn to discuss the application of the guidance in the exercise of my discretion which seems to me to emerge from the case law to the facts and circumstances of the present case. In doing so, I first consider factors applicable to all the documents sought; I then consider factors applicable only to the (unusual) request for the release of witness statements.

The Applicants' case

55. As will already be apparent, the Applicants relied principally on the fact of the US Subpoena as constituting what they contended was the 'trump card' of compulsion.

56. By reference to the evidence of Mr Michael Li-Ming Wong ("Mr Wong"), who is a partner in the firm of lawyers retained by HPE in connection with the criminal and regulatory investigations relating to Autonomy (Gibson, Dunn & Crutcher LLP), they contended, more particularly, that

(1) There can be no dispute that, under US law, the US Subpoena creates a non-voluntary obligation to comply.

(2) Any failure to comply with the US Subpoena would be a contempt under US law as well as a possible obstruction of justice.

(3) The collateral use restrictions applicable to disclosure and witness statements in the English proceedings would not serve – in the eyes of the US court – as a valid excuse for failing to comply with the US Subpoena, nor would they constitute a basis on which to challenge the US Subpoena before the US court.

(4) The fact that the US Subpoena pre-dated the First Defendant's indictment but cannot have been necessary for the purpose of determining whether to issue such indictment has no impact on its validity as a matter of US law: this court must take it that the US Subpoena is not being used for an improper purpose.

(5) The obligation of compliance on pain of sanction falls not only upon HPE but also the other "*Recipients*" specified in Attachment A to the Subpoena, including each of the Applicants; and thus, the Applicants are each obliged to produce the requested documents, which are within their possession, custody or control.

(6) Accordingly, unless permission is given the Applicants will be exposed to the risk of criminal penalty in the US: and the English Court should give permission to avoid such an invidious and undesirable consequence of its own rules.

(7) Further (and Mr Goodall insisted that this was a separate and independent point from that of compulsion) this jurisdiction recognises that there is a strong public interest in the investigation and prosecution of fraud, and that the English court should give considerable weight to the needs of a foreign jurisdiction for documents needed for those purposes.

(8) As against this, Mr Goodall submitted, no material injustice would be occasioned to the First Defendant in the US proceedings by the grant of permission in circumstances where the US Courts could and should be relied on to protect the interests of a disclosing party against any "undue prejudice".

57. Further, Mr Goodall sought to dismiss any suggestion of any risk of prejudice in the proceedings here, describing as "perplexing" the suggestion that third persons who had provided documents or witness statements had expressed concerns about the use of their witness statements outside these proceedings and that some of the First Defendant's witnesses might refuse to testify in these proceedings if their witness statements are provided to the USAO, and as "irrelevant" the suggestion that

disclosure had been provided and witness statements exchanged in reliance upon the collateral use restrictions in the CPR.

Issues to be addressed

58. In relation to the first part of the *Crest Homes* test, these contentions seem to me to invite consideration first of the Applicants' case that the US Subpoena places them personally under compulsion to produce the requested documents, and to that end an examination of (a) the genesis and nature of the US Subpoena; (b) whether it can be right that the Applicants are themselves properly to be treated as recipients of the US Subpoena and exposed to the risk of criminal penalty for non-compliance; (c) whether the Applicants' documents are to be treated for these purposes as in the control of HPE; (d) whether this Court should assume that the Grand Jury has itself considered the relevance of and necessity at this time for the documents requested and, if so, for what immediate or imminent purpose. At this interlocutory hearing, and given the difficulty of determining disputed facts at such a stage, it is of some relevance that the burden of persuasion lies on the Applicants. For the same reason I shall seek to confine myself in my examination of the Applicants' contention that they are under compulsion to facts and matters which appear to me to be agreed or plainly and obviously apparent from the evidence filed.

59. I must then consider, in applying the first part of the *Crest Homes* test, whether having regard to any element of compulsion, the Applicants have discharged the burden upon them of satisfying the court that in all the circumstances there are sufficiently "cogent and persuasive reasons" for permitting the collateral use sought to be made of the documents and statements.

60. As to the second part of the *Crest Homes* test (whether permission could result in injustice) there are two broad considerations raised: (a) whether any question of injustice in the US can simply be left to the US Courts and (b) whether there is any real risk of injustice in the present proceedings.

Have the Claimants established compulsion and necessity?

61. As to (a) in paragraph [58] above, in my view it emerges from the sequence of events preceding the issue of the US Subpoena and the correspondence thereafter with the USAO with respect to its scope and time for compliance that:

    (1) It is in reality the USAO which determined the scope and subject-matter of the US Subpoena, restricting it (to exclude FRC documents) as it thought fit.

    (2) Similarly, it is the USAO which appears to have determined the length of any extension of time for compliance and in effect controls the process.

    (3) It would not appear that the USAO considered the documents it now seeks to be necessary to determine whether or not there should be an indictment: the indictment was issued before the date due for the documents after the first extension of time.

    (4) Given the fact of the existing indictment, demonstrating that the USAO and the Grand Jury have determined that it is likely that a crime has been

committed (and see *US v. R. Enterprises, Inc et al.* 111 S. Ct. 722), the USAO can only want the documents either (a) to explore further evidential issues for which it has already been satisfied of 'probable cause' (which would not be a proper use of a Grand Jury summons (see *ibid.*)) or (b) with reference to any future or further indictment which despite the length of the investigation (some six years), the previous indictment and conviction of the Second Defendant, and the recent indictment itself, it has not yet determined is justified.

(5) There is no evidence of any actual involvement of the Grand Jury itself in determining whether to pursue the Subpoena after the indictment (or for that matter, before it).

(6) For the avoidance of doubt, it was not in dispute that, although issued in its name and on a Court form, the US District Court has no involvement itself in the formulation of the scope of a subpoena: it is for the USAO to complete the form which delineates its scope and to whom it is addressed, and the USAO did so in the case of the Subpoena in this case.

(7) There is nothing to suggest that the USAO had been directed, before issuing the Subpoena (or causing it to be issued), to the particular status, under English laws of procedure, of material disclosed or served under mandatory process under the CPR. Although subsequently to its issue the USAO requested HPE to exclude and withhold from production documents obtained or which came into being further to the exercise by this jurisdiction's Financial Reporting Council ("FRC") under compulsion since their deployment in the US criminal proceedings might violate the Second Defendant's rights under the US Constitution, no attention to protections afforded under English law is apparent.

(8) The terms of the US Subpoena are drawn in the widest possible terms; they seek literally "all documents produced by either party" in the present proceedings. There has been no attempt to tie the request to any issues or areas of further investigation: the net has been cast as widely as semantically possible. There is no evidence of any thought being given to need: the firm impression is of a trawl.

(9) There is no evidence or even any indication which might guide this Court as to when the existing indictment, let alone any future or revised indictment, might come on for trial.

62. As to (b) in paragraph [58] above, as already mentioned, the US Subpoena is addressed to 'Custodian of Records, Hewlett Packard Enterprises, c/o CT Corporation, 818 W 7th Street, Los Angeles, CA 90017'. There is no other addressee named. The only addressee, HPE, is not, of course, an applicant before me. Neither is the USAO: nor has any evidence been filed by or on behalf of the USAO.

63. The US Subpoena requires both appearance at the US District Court to testify before the Grand Jury and the production of the documents described (in very broad terms) in the Attachment A to the US Subpoena. It is not suggested that the US Subpoena

was to be or was in the event served on any other person. Nor is there any suggestion that it was to be served overseas.

64. Attachment A of the US Subpoena likewise identifies the 'Subpoena Recipient' as above. Neither the US Subpoena nor its Attachment A otherwise defines the 'Subpoena Recipient'. The rest of Attachment A explains the scope of the documentation required, and how and when it is to be provided.

65. For that purpose, on the last page of Attachment A, under the heading 'Special Instructions', it is stated that any references (which I consider can only sensibly mean references in that Attachment A) to

> "'Recipient', 'You' or 'Hewlett Packard Enterprise' shall mean Hewlett Packard Enterprise, HP Inc, The Hewlett-Packard Company, Hewlett-Packard Vision BV and/or any of their group companies, parents, subsidiaries, divisions, affiliates, employees, agents, representatives attorneys, consultants, or other persons acting on their behalf."

66. Further, just above, under the heading 'Notice Concerning Obstruction' is a warning in these terms:

> "Any person who withholds, alters, or destroys documents demanded by this subpoena, removes documents to outside the jurisdiction of the United States, or unjustifiably refuses to produce any demanded document that is within such person's possession, custody or control may be subject to criminal prosecution for obstruction of justice, contempt of court, or other federal criminal violations. Conviction of any of these offences is punishable by substantial fine, imprisonment, or both." [Emphasis supplied]

67. In his first witness statement on behalf of the Applicants in these proceedings, Mr Wong has stated that the effect of the US Subpoena is to place all those described as "Recipients", including the Applicants, under a "non-voluntary legal obligation" to produce the requested documents that are within their possession, custody or control on pain of criminal prosecution.

68. Against this, in her first witness statement on behalf of the First Defendant, Ms Celeste L.M. Koeleveld ("Ms Koeleveld"), a partner in Clifford Chance LLP, New York, the First Defendant's solicitors, has stated her view that

> "it is only HPE which is subject to the legal obligation under the subpoena".

69. Whilst I can make no finding at this interlocutory stage, that seems very likely to be right; and I note that Mr Wong has accepted that

> "In practice, the U.S. Courts impose sanctions for non-compliance with a subpoena on the primary recipient, without making distinctions about fault within the broader corporate

> group. Accordingly, in the event of non-compliance with the Subpoena by the Relevant Claimants, it is HPE which would be subject to potential sanctions…; all relevant entities within the HPE group would be deemed punished through HPE."

70. As to (c) in paragraph [58] above, Mr Wong states in his first witness statement that, under US law, a parent company "controls" the documents held by its subsidiaries by virtue of its ownership and control of the subsidiary itself. He goes on to explain that in fact the documents sought have already "been made available to personnel within HPE's legal function as they have responsibility for the conduct of the English proceedings on behalf of the Claimants". On either or both of these bases he submits that HPE controls the documents and they must be produced accordingly, presumably by the Applicants (HPE not being a party to the application).

71. Ms Koeleveld disagrees. She has also made the point, as regards the scope of the US Subpoena, that HPE's "obligation to comply with the [US Subpoena] will be limited to documents in its possession or control" and that since for these purposes it is established by case law in the Ninth Circuit Court of Appeals where the Grand Jury is sitting that "control" means "the legal right to obtain documents upon demand" it is unlikely, having regard to the restrictions to which the documents are subject under the CPR, that even under US law the documents in question are within the "control" of HPE as distinct from that of the Applicants.[5] As to the fact that, in circumstances which are not altogether clear, documents have been passed to "HPE's legal function" (which is stated to have responsibility for the conduct of these proceedings on behalf of the Claimants), I think I must take it to be accepted that they are held by that "function" subject to the restrictions stipulated by the CPR: both the Applicants' acceptance of the need for this application, and the fact that, though no application is made by HPE, the USAO itself appears to have accepted that the permission of this court is require to enable HPE (and the Applicants) to comply[6], seem to me to be consistent only with that.

72. Accordingly, it does seem that, through the lens through which this Court must look at the matter, HPE does not in the relevant sense have legal control of the documents requested, in that the permission of this court is required to enable their use otherwise than for the purposes of these proceedings.

73. As to (d) in paragraph [58] above, and the question whether this Court should take it that the Grand Jury itself has considered the relevance and necessity of the documents requested to carry forward its investigations, I have already noted that it appears plain that the USAO have dictated the terms and process of the US Subpoena at every stage. I have also noted that the US Subpoena cannot have been necessary to inform the decision whether to issue the indictment, since it was issued before the date due for production of the documents after the first extension of time.

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[5] Ms Koeleveld cites *In re Citric Acid Litig.,* 191 F.3d 1090, 1107-08 (9th Cir. 1999) where it is explained that the "legal control" test does not "focus…on the party's practical ability to obtain the requested documents" but rather on whether the party "could legally – and without breaching any contract – continue to refuse to turn over such documents". Here, the CPR provisions effectively mandate refusal without permission of this Court.

[6] In this context, in a letter dated 14 November 2018 from Morgan Lewis to the USAO, it was recorded that the USAO had agreed to extend the date for compliance with the Subpoena in order to enable the Applicants "to seek permission from the UK court for HPE to comply with the subpoena" [my underlining].

74. It remains theoretically possible that the Grand Jury determined to issue an indictment in anticipation of the receipt of documents which would enable greater definition or extension of the charges, or some further indictment. But the dearth of any evidence as to any consideration of the matter by the Grand Jury itself, and the absence of any explanation at all as to why the trawl now sought is necessary at this stage and with the trial in this jurisdiction imminent, is remarkable in circumstances where it is accepted that in this jurisdiction the burden is squarely upon the Applicants. Even taking full cognizance of the fact that in *US v R. Enterprises, Inc.* the US Supreme Court determined that a Grand Jury subpoena cannot be set aside unless there is no reasonable possibility that the documents sought will be relevant to a pending Grand Jury investigation, some confirmation of due consideration and some explanation of perceived need surely could have been offered in this jurisdiction without compromising to the slightest degree the confidentiality of the Grand Jury's process.

75. As it is, on the evidence that the Applicants have chosen to put forward, it is by no means clear that the Applicants are truly under compulsion; and it is 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. This is far from the position established or taken to be required in cases cited by the Applicants such as, for example, the *Bank of Crete* case.

76. It is also especially notable in this case, where in addition to an indictment already having been issued the USAO has (a) already conducted a full trial against the Second Defendant without there ever having been any suggestion that it might need to consider the documents disclosed in these proceedings; (b) already had access, or could have access, to literally millions of documents available from different sources or in different ways; and (c) produced an enormously broad request and entirely failed to tie the request to any issues or areas of investigation to enable this Court to strike a balance between the competing public interests as above described.

77. Returning to the first limb of the *Crest Homes* test in the round (and see paragraph [59] above) I have already noted (see paragraph [56(7)] above) that the Applicants were careful to emphasise (especially in their submissions in reply) that "independently of compulsion" there is a strong public policy factor in favour of permission, being the public interest in the investigation and (if appropriate) prosecution of fraud, both in domestic cases and also in cross-border cases (where general principles in favour of mutual international assistance also are in play). Mr Goodall, in his reply, submitted that the weight to be given to this would be sufficient "even in a voluntary situation".

78. I accept of course the importance of that public policy in both its aspects (domestic and international): and see the *Marlwood* case, especially at [46]. However, in this case the fact is that the justification can only be that the documents in question are really needed to enable the Grand Jury to perfect a course already set (by amending or replacing an indictment they have already caused to be issued) or to investigate whether other persons than those thus far identified as (in its view) the main culprits should also be brought to trial.

79. I agree with Mr Miles's submissions that I must take into account in this regard that:

(1) No evidence has been provided to me, either by the USAO, HPE or the Applicants themselves, as to the asserted importance of the material sought or as to why the material is *needed* by the USAO or the Grand Jury (as opposed to being materials which may merely be of some interest to them).

(2) The criminal investigation has been on foot since 2012. The USAO and the Grand Jury have been provided with millions of documents. They have scarcely been deprived of material, and they have not considered it deficient in the past, having already brought the Second Defendant to trial (and conviction) and concluded that there is already sufficient evidence, without access to the material sought by the US Subpoena, to warrant the issue of an indictment in respect of the First Defendant.

(3) The US Subpoena is couched in such broad terms as to make it difficult, indeed impossible, to tie the request to any identified issue or area of investigation.

(4) As previously noted, although the Applicants sought to present the request as having been made by the US Court, I must bear in mind that the reality is that the US Court has had no substantive input into it: the USAO has devised and driven the request.

80. In all the circumstances, I have not been persuaded that in this case sufficient "cogent and persuasive" reasons in favour of collateral use now (so close to the English trial commencing in March) have been established to outweigh the public interests protected by CPR 31.22 and 32.12.

Might permission give rise to injustice in the US proceedings or in these proceedings?

81. That is sufficient to cause me to refuse the permission sought. But I should for comprehensiveness, and so as fully to explain my approach, also address the issue as to whether the grant of permission might occasion injustice in the US proceedings or in the proceedings before me in this jurisdiction.

82. As to potential prejudice in the US proceedings, the primary point advanced on behalf of the First Defendant was that (to quote Mr Miles's skeleton argument)

> " the practical consequence of granting permission… would be, by a side wind, to give the USAO a substantial advantage over [him]…a tactical advantage they would not otherwise enjoy…[and] significantly rebalance the US trial procedure in favour of the USAO [since] the USAO would have substantial amounts of information about [his] defence whilst having no obligation to provide [him] with the same level of detail in relation to their prosecution."

83. In other words, the prejudice contemplated is inherent in the making available of documents and statements that would not be available but for the happenstance of a

parallel process in the UK, and by its nature is not capable of being neutralised by any protections available to the US Court.

84. The position is particularly easy to see in the context of witness statements. In oral argument, Mr Miles gave as an obvious example that the USAO would know the identity of the people who are prepared to give evidence for the First Defendant and the substance of the evidence that they are prepared to give, whereas in the ordinary case and according to ordinary US process they would not have any such knowledge. As Mr Miles explained, this is not a point addressed, as the Applicants sought to address it, by reliance on the rules as to admissibility of evidence. The prejudice is in the advantage gained by peering into the First Defendant's case and brief, and cannot be erased or nullified.

85. In the case of witness statements, this seems to me to be a fair point. The release of documents, if they were necessary, seems to me less objectionable in terms of prejudice in the US proceedings, unless third parties might be implicated and thereby exposed to investigation, speculation or even prosecution there when otherwise they would not have been so. The argument was put; but there was little or no evidence or basis for it. I would not have been disposed to refuse permission in the case of documents on that basis alone had the first limb of the *Crest Homes* test been satisfied.

86. What then about the risk of prejudice or injustice in the proceedings here? Again, in this context the First Defendant's arguments largely related to the risk inherent in the provision to the USAO of witness statements. The Applicants made much of the lack of any detail as to the First Defendant's contention that (again to quote the skeleton argument on his behalf)

> "some of [the First Defendant's] proposed witnesses have expressed concern about the use of their witness statements outside these proceedings and a number of those witnesses may refuse to testify in the present civil proceedings if their witness statements are provided to the USAO. Mr King…says that it is unclear why the witnesses might be reluctant, but the reasons should be obvious. The witnesses are attending on a voluntary basis. It is natural for witnesses to wish to avoid becoming embroiled in a criminal investigation."

87. I agree that the evidence is unspecific. I would agree also that the point about embroilment in a criminal investigation is weak: for that possibility is inherent in their giving evidence at trial when their statements will become public and the fact of the US indictment, and the threat of embroilment is already public. But there remains residual force in it, since some might simply now withdraw their witness statement, and if permission is not granted, any use would be prohibited.

88. To be added to it is the basic point lying behind the restrictions against collateral use: those providing witness statements for use only at trial must be taken to do so on the basis that they will not be released for use for any other purpose in the meantime. That is the premise and purpose of the restriction: it requires no evidence to establish it. The same applies to documents, though unless especially confidential (which is not suggested here) the factor carries less weight.

89. It seems to me also that there are amorphous reasons why the giving of permission might unsettle the imminent trial: even the required focus on consulting witnesses, collating documents, and seeking advice as to confidentiality will be distractions. In the absence of pressing necessity, I think this interruption in and distraction from ordinary preparation is of itself prejudicial and may work injustice.

90. Lastly, I should record, if only in order to dismiss as inappropriate, the suggestion that the First Defendant is "trying to impede or hinder the [Grand Jury/USAO] investigation". The suggestion has no evidential foundation and should not have been made. Furthermore, the First Defendant is entitled to rely on the restrictions, whether or not they impede the US process, unless and until the Court considers the public policy balance to favour their release: and I am not persuaded that it does.

Conclusion

91. In my judgment, this application should be dismissed. The Applicants, fighting HPE's battle in its absence, have not carried the burden upon them. They have failed to show that the disclosure of documents and witness statements is necessary for the purpose of the US process; and I am not persuaded they have shown compulsion either, even accepting that the US Subpoena is entirely regular.

92. In reaching this conclusion, I wish to stress my high regard for the US Court process. Nothing I have said should be taken to suggest or imply any concerns as to the proper treatment of evidence and fair safeguard of the rights of an accused by the US Court. Nor would I wish to refuse to accede to a considered request by a US Court for necessary assistance in the investigation and prosecution of alleged fraud. But as it seems to me, and in agreement with Mr Miles's submission to that effect, it appears from the evidence that the US Subpoena has received no material judicial input; and there has simply not been demonstrated any sufficient necessity or urgency to outweigh this jurisdiction's public policy and interest which the restrictions against collateral use are intended to promote, nor even any clear compulsion on the parties before this court to even the balance.

93. Furthermore, in my judgment, though the evidence is to some extent amorphous, that conclusion is further supported by what I perceive to be the risk of prejudice and/or injustice, both here and in the US which might be the consequence of releasing the restrictions now.

94. Finally, I appreciate, and have taken into account, Mr Wong's evidence that to the best of his knowledge,

> "neither the Supreme Court, the Ninth Circuit Court nor any lower US court…has published a reported decision that excuses a recipient of a Grand Jury subpoena from complying with that subpoena on the basis that compliance would cause a violation of a foreign confidentiality or collateral use law."

95. However, I feel sure that the relevant US courts will appreciate and take into account that I must apply the law of this jurisdiction 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 this 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.