French frankness

Edward Coulson and Rachel Ziegler consider the recent Court of Appeal judgment preventing French parties in English litigation relying on the French blocking statute to avoid disclosure

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'Despite the fact that the orders made might expose parties to a risk of prosecution in France, the English court was still entitled to make them, although it had a discretion as to whether to do so in the particular circumstances.'

On 22 October 2013, the Court of Appeal handed down a judgment that prevents French parties to English litigation from relying on the so-called 'French blocking statute' to avoid their obligations to provide information and disclosure in English legal proceedings.

The Court of Appeal judgment was given in two appeals together: *National Grid Electricity Transmission plc v Alstom & Areva; Secretary of State for Health v Servier Laboratories Ltd & ors* [2013].

The Court of Appeal held that the English courts have full jurisdiction to apply their procedural rules to parties in proceedings before them. Therefore, the English courts have a discretion to make directions in respect of foreign parties even where that might cause the parties to breach a foreign criminal law.

In the specific appeals before it, the Court of Appeal confirmed that the High Court had jurisdiction to order French defendants to provide responses to Part 18 requests (as in the *Servier* case) and to provide disclosure (as in the *National Grid* case), in circumstances where complying with such orders would breach the French blocking statute.

The French blocking statute

The French blocking statute is the *'surnom'* given to French statute No 68-678 of 26 July 1968 (as modified by French Statute No 80-538 of 16 July 1980), Article 1 bis of which provides:

> Subject to international treaties or agreements and applicable laws and regulations, any individual is prohibited from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, with a view to establishing evidence in foreign judicial or administrative proceedings or in relation thereto.

In summary, the statute purports to prohibit any French natural or legal person from disclosing commercial information in foreign litigation. This appears to be an extremely broad prohibition, breach of which carries criminal sanctions of up to six months imprisonment or a fine under Article 3.

The statute was originally introduced in France to protect French citizens and corporations from the perceived excesses of the discovery processes in US claims.

Over the 45 years since the French blocking statute came into French law, there have clearly been a large number of French parties coming to the English courts to litigate, both as claimants and defendants. That the issues under appeal had never been conclusively addressed by a higher court in England before strongly suggests that French parties have generally chosen not to invoke the French blocking statute when litigating before the English court. One wonders if this itself is evidence of how unlikely the French authorities are to bring a prosecution under the French blocking statute.

The two appeals: *National Grid* and *Servier*

By coincidence, both the orders on appeal were made by the High Court in competition damages actions. These are claims that rely on breaches of EU competition law (Articles 101 and 102 of TFEU). There have been a rapid rise in the number of these types of cases in recent years, encouraged by the European Commission and the

UK government, who are seeking, as an objective of EU and UK policy, to generate a growth in private competition law enforcement to complement the public enforcement of competition law by the Commission and national competition authorities such as the OFT.

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Indeed, competition litigation is particularly topical at the moment as radical legislative reform in this area is currently being considered by the European and English parliaments. In June 2013, the Commission published a draft Directive on private competition damages actions, and the UK government published the draft Consumer Rights Bill, which includes competition litigation reform among wider consumer rights legislative proposals.

National Grid

National Grid's action (which is set down for trial in June 2014) is a claim for damages brought against Alstom, Areva and other suppliers of Gas Insulated Switchgear (GIS) who were found by the European Commission to have been part of a cartel between 1988 and 2004. As a result of the cartel, National Grid claims it paid higher prices for GIS, which it uses in its electricity transmission network.

While orders for specific disclosure have been made against the other defendants in the action (and against National Grid as claimant), the French defendants, Alstom and Areva, have avoided giving any disclosure as they have relied on the French blocking statute.

National Grid was successful in its High Court application asking that the same disclosure that has been provided by the other defendants should now be provided by Alstom and Areva. Mr Justice Roth, in his judgment of 11 April 2013, considered, among other things, the risk of prosecution and held that it was 'virtually inconceivable' (para 47) that the French defendants would face prosecution for co-operating with the English court and providing disclosure. He therefore exercised his discretion and ordered Alstom and Areva to provide disclosure despite the fact that compliance with such an order might breach the French blocking statute. This order was stayed whilst the defendants appealed to the Court of Appeal.

Servier

The underlying action is a claim by the Secretary of State for Health and other bodies within the NHS responsible for the provision of drugs, against Servier, suppliers of Perindopril, a drug used in the treatment of hypertension and heart failure. The Secretary of State for Health claims damages caused by Servier's alleged abuse of dominance in the supply of Perindopril and/or caused by Servier's alleged anti-competitive agreement with competitors not to challenge a Perindopril patent held by Servier, which was ultimately found to be invalid.

In his order of 12 October 2012, Mr Justice Henderson ordered the French Servier defendants to respond to the claimants' request for further information, despite Servier's objections that compliance with such an order would expose them to the risk of prosecution in France under the French blocking statute.

The issues before the Court of Appeal

There were two main issues before the Court of Appeal:

- Was there in fact a real risk of prosecution in France under the French blocking statute such that the High Court had exercised its discretion wrongly in ordering the French defendants to provide information and disclosure?

- In any case, was the English court prevented from making a direct order against the French defendants because it was in fact mandatory to follow the procedure set out in the European taking of evidence regulation (Council Regulation (EC) No 1206/2001 of 28 May 2001)? Even if not mandatory, the appellants argued that this route should be used as it would not cause them to breach the French blocking statute.

Regulation 1206/2001 – the 'Evidence Regulation'

The Evidence Regulation provides a procedure to facilitate the taking of evidence in another Member State in civil and commercial matters. The Regulation does not define the concept of 'evidence' but the accompanying guide says that it 'includes for instance hearings of witnesses of fact, of the parties, of experts, the production of documents…'

One of the procedures in the Regulation is the 'court-to-court route' whereby requests for evidence from a party domiciled in another member state (eg France) are to be transmitted by the English court to the court of that member state (in this case the French court), which in turn shall administer the request by collecting the evidence from the party concerned and returning it to the English court.

Roth J refused to make use of this procedure due to concerns that it would lead to further delay and uncertainty in the procedural timetable of the English litigation (the French defendants had also previously tried to use another route available under the Regulation and this had failed).

The appellants argued in the Court of Appeal that use of this procedure was mandatory because the order of the English court was one that would impinge on the sovereignty of France by causing the defendants who complied with it to breach a prohibition in France. The enactment of the French blocking statute was, they asserted, an exercise of sovereignty by the French state and therefore an order that required a party to defy it should be viewed as an intrusion into France's sovereignty. In such circumstances, they said the court had to use the Regulation to order the provision of disclosure and information.

The respondents, National Grid and the Secretary of State for Health,

argued the contrary: that all matters of procedure in their claims were governed by the law of England and Wales (the *lex fori*) and such law does not give primacy to foreign laws when considering what orders to make, although it will have regard to them when exercising its discretion and deciding whether to make such orders. The French defendants had submitted to the English court's jurisdiction and impliedly accepted the laws of such jurisdiction.

The respondents also refuted the proposition that the Evidence Regulation now required the application of the *lex fori* to be subordinated to a compulsory adoption of the procedure in the Evidence Regulation. They argued that use of the Evidence Regulation was optional and that it ought not to be used if there was a more convenient or expeditious procedure.

Court of Appeal conclusions

Mandatory to use the evidence regulation?

Lord Justices Rimer, Beatson and Laws were unanimous in their conclusions. In the leading judgment, Lord Justice Rimer 'unhesitatingly' rejected the appellants' submissions that use of the Evidence Regulation was mandatory and agreed that the orders that had been made by Roth J and Henderson J were of a procedural nature and therefore governed by the *lex fori*. Despite the fact that the orders made might expose parties to a risk of prosecution in France, the English court was still entitled to make them, although it had a discretion as to whether to do so in the particular circumstances.

Lord Justice Beatson added that he had also taken into account that the purpose of the Evidence Regulation procedures is to improve and accelerate the procedures for taking evidence in another member state and was therefore aimed at 'increasing and not reducing options' (para 112) open to the courts of member states, and 'does not, on its face, remove or restrict existing forms of proceeding' in those member state courts.

Discretion correctly exercised by the High Court?

The Court of Appeal then considered whether Roth J and Henderson J correctly exercised their discretion in making their orders despite the theoretical risk of prosecution in France. Lord Justice Rimer found emphatically that the exercise of discretion by the High Court judges was 'unimpeachable' (para 102). The Court of Appeal noted that there was no evidence of any prosecutions in France under the French blocking statute apart from one case (Christopher X) in which the facts were exceptional, involving the use of deception by a French lawyer without the protection of a court order.

Lord Justice Rimer also agreed with Roth J's conclusion that use of the Regulation would be likely to be 'slow, cumbersome and inadequate', and that a direct order for disclosure was 'plainly the more appropriate course' (para 104), despite the theoretical risk of prosecution to which it exposed the French defendants.

The European context

The Court of Appeal judgment must also be seen in the wider European law context. Both the *National Grid* and *Servier* cases rely on alleged or established breaches of European competition law, specifically Articles 101 and 102 of the Treaty (TFEU). Lord Justice Beatson emphasised this in his judgment explaining that it was a fundamental point that as France is a signatory to the European Treaties, French law must give way to the supremacy of EU law. He therefore found the prospect of prosecutions by the French authorities under the blocking statute against the defendants in these cases to be highly unlikely as they would amount to an attempt to use national law (the French blocking statute) to trump the requirements of EU law.

In his *National Grid* High Court judgment, Roth J (para 47) strongly advanced the same view:

> I find it virtually inconceivable that where jurisdiction over a company is exercised pursuant to an EU regulation to make it a defendant to proceedings in another EU Member State, for damages alleged to result from an established and serious violation of a fundamental provision of EU law, which proceedings serve an objective of EU policy, the public authorities of one EU Member State would... institute criminal proceedings against that company for complying with the procedural rules of the courts of the [other] Member State.

Despite the fact that the orders made might expose parties to a risk of prosecution in France, the English court was still entitled to make them, although it had a discretion as to whether to do so in the particular circumstances.

French blocking statute not a barrier

As a result of the Court of Appeal judgment, French parties to English civil litigation cannot successfully invoke the French blocking statute as a basis to avoid the provision of disclosure and information in that litigation. If you submit to the jurisdiction of the English court, you must play by the rules.

The Court of Appeal refused permission to appeal to the Supreme Court. The appellants have subsequently applied directly to the Supreme Court for permission to appeal. The legal communities on both sides of la Manche watch this space with interest. ■

National Grid Electricity Transmission plc v ABB Ltd & ors; Secretary of State for Health v Servier Laboratories Ltd & ors
[2013] EWCA Civ 1234
National Grid Electricity Transmission plc v ABB Ltd & ors
[2013] EWHC 822 (Ch)
Secretary of State for Health & ors v Servier Laboratories Ltd & ors
[2012] EWHC 2761 (Ch)