"Implied undertakings" – use of documents obtained by discovery or court process.

Access to material that is confidential to another is a privileged position.

Where the access has been forced upon the third party by court process, it is accompanied by a strictly enforced obligation to use that material only for the purpose intended.

There is an "implied undertaking" not to use documents or information disclosed by a party under compulsion for a purpose that is collateral the proceedings[1] without the leave of the Court.[2] Breach of this "use and disclosure" restriction does not require bad faith or deliberate impropriety,[3] simply use for any purpose other than prosecution of the proceeding in which the document was given.[4]

Strictly speaking, the formulation of the obligation as an "implied undertaking" is an anachronism arising from its historical roots[5]. It is better characterized as a substantive obligation which binds a party without recourse to the law of undertakings [6]. One of the more significant aspects of this distinction is that the obligation binds persons who are not legal practitioners.

Other than in the Family Court the obligation ends once material is received into evidence.[7]

In *Hearne v Street*[8] the majority (Hayne, Heydon and Crennan JJ at [96]) cast the obligation widely:

> *"[96] Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits."*

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[1] *Harman v Secretary of State for the Home Dept* [1983] 1 AC 280

[2] *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509.

[3] *Jones v Purnell Motors Pty Ltd* [2012] NSW DC 235 per Gibson DCJ at para 6

[4] Cg; *Bell Group Ltd (in liq) v Westpac Banking Corp* (1998) 86 FCR 215 at 220 – use of discovered materials by liquidator seeking to conduct examinations. See also Order 15 Rule 18 of the Federal Court Rules.

[5] *notably Harman [1983] 1 AC 280, see n. 1*

[6] See *Hearne v Street* [2008] HCA 36 per Gleeson CJ at para 3 and Hayne, Heydon and Crennan JJ at para 102

[7] See *Family Law Rules* (pre action procedures – Parenting cases Pt 2, R. 4, also corresponding rule in Part 1, financial cases).

[8] *Hearne v Street* [2008] HCA 36 *see also Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509; Ainsworth v Hanrahan (1991) 25 NSWLR 155; *Spillane v Curr* [2011] NSWDC 150; *Oswal v Burrup Holdings Ltd (no 2)* [2012] FCA 1187 per Barker J at para 92

The obligation may also apply at common law to material obtained in proceedings conducted outside traditional courts or tribunals,[9] or may be express in the Court or Tribunal rules.[10]

What constitutes "collateral or ulterior[11]" use, or use "for purposes other than the conduct of the legal proceedings' is not settled[12]. In *Hearne*, the Court noted that the obligation is binding upon third parties such as counsel, expert witnesses and the officers of a litigant. By implication, disclosure to these classes of persons does not offend the rule. The majority also noted that litigation funders who come into possession of the documents are bound by the restraint – again without adding the caveat that disclosure to such funder would be a violation to begin with.[13]

The party in possession of documents need not be aware that collateral use is a violation of their obligation to the Court, provided they know the source of the documents.[14]

Clients and consultants should be given specific advice concerning the obligation prior to furnishing them with affected material. In *Legal Services Commission v Cochrane, Robert* [15]a solicitor who acted without understanding his obligations with respect to the material was found to have engaged in unsatisfactory professional conduct.

It is possible that failure to warn a client that the material they are being provided is subject to usage restrictions may potentially lead to civil or disciplinary consequences.

We suggest that copies and scans be clearly watermarked with an appropriate endorsement to minimize the chances of mistakes.

Circumscribed documents may not be used in subsequent proceedings without leave. Arguably, however, they must be discovered in such subsequent proceedings if relevant and irrespective of whether leave has first been

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[9] For example, documents produced under a disclosure order from an arbitrator; *Esso Australia Resources Ltd & Ors v Hon Sidney James Plowman* (Minister for Energy & Minerals)[1995] HCA 19 citing Dolling-Baker v Merrett [1990] 1 WLR 1205 with approval.

[10] It is also worth noting Rule 28 of the ASCR which prohibits publication of material concerning current proceedings which may prejudice the trial or administration of justice.

[11] *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571 @ [20]

[12] Cases cited by Mr Howe, Australian Government Solicitor on that point (http://www.ags.gov.au/publications/legal-briefing/br75.htm) at footnote 9 "*Idoport Pty Limited v National Australia Bank Limited and Ors* [2001] NSWSC 648 per Einstein J at [27]. Much will depend on the closeness of the connection between the subject proceedings and the use or disclosure in question. A 'rule of thumb' is to ask whether the use or disclosure is calculated to vindicate an asserted right in the subject proceedings or some other alleged right. A collateral purpose encompasses 'purposes different from the conduct of the proceedings in or in relation to which the inspection was had' *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 18 ACSR 218 at 221 per Giles J in CommD. Difficult questions arise in relation to amendment of pleadings and counterclaims by reference to documents attracting the undertaking: see *Arnold Mann v Medical Defence Union* [1997] FCA 45; *Spalla v St George Motor Finance Ltd* [2004] FCA 1014; *Allstate Life Insurance Co v ANZ Banking Group* (1995) 57 FCR 360; *Eckert v National Australia Bank* (1997) 191 LSJS 221; *Morgan v Mallard* [2000] SASC 445."

[13] *Hearne v Street* [2008] HCA 36 per Hayne, Heydon and Crennan JJ at [109].

[14] *Hearne v Street* [2008] HCA 36, at [57], [111], [112]; *Hamersley Iron Pty Ltd v Lovell* [1998] WASCA 133 per Anderson J at [109] (Pidgeon & IPP JJ concurring); *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31 per Blackburne J at [107]

[15] *LSC v Cochrane, Robert* LPT 2008, in aggregation with other charges the overall finding was one of professional misconduct.

obtained[16]. By application of the above principles, the receiving party in those circumstances would be subject to the obligation to make the appropriate application prior to using them.

The obligation is to the Court and can not necessarily be waived by the original owner of the document or information.[17] Naturally, the attitude of the party entitled to the confidence is highly relevant to the Court's exercise of discretion[18] and the obligation of confidence can be enforced by the owner of the confidential information directly, not just by complaint to the Court or regulator[19].

An application for leave to use the confidential material should generally be made to the Court in which the original proceeding was conducted.[20]

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[16] *Griffiths & Beerens Pty Ltd v Duggan* [2008] VSC 230 citing Mason CJ in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33; *Cadbury Schweppes v Amcor* [2008] FCA 398 at paras [11] – [13], however see *Alessi v Moses* [2006] VCAT 149
[17] *Spillane v Curr* [2011] NSWDC 150 (30 September 2011) (Gibson DCJ) at para 33.
[18] Hobhouse J in *Prudential Assurance Co v Fountain Page Ltd* [1991] 1 WLR 756 at 775
[19] *Worth Recycling Pty Limited v Waste Recycling and Processing Pty Limited* [2009] NSWSC 356
[20] But see *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 103 ALR 684 and M*cCabe v British American Tobacco Australia Services Ltd (No. 3)* [2002] VSC 150