A CRIMINAL LAWYER'S BRIEF GUIDE TO THE *HARMAN* OBLIGATION

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Introduction

1. In criminal proceedings it is not uncommon for documents to be produced in related (or even sometimes unrelated) civil proceedings, relevant to issues arising in the criminal case. It often arises in criminal cases where allegations of offending behaviour are also disclosed in concurrent family law proceedings, ordinarily in an affidavit sworn or affirmed by a complainant. An accused person will usually have access to that material if he/she is a party to those family law proceedings. However, it is important to bear in mind the criminal lawyer does not have *carte blanche* to use such documents as he/she sees fit. This paper deals with the nature and extent of the obligation a lawyer has to documents brought into existence as a result of the compulsory processes of other Courts.

I. Nature of the obligation

2. In short, where documents are obtained as a result of the compulsory processes of a Court, there exists an implied undertaking or obligation to the Court that the documents will only be used for the purposes for which they were disclosed, and not be used for any collateral purpose, unless the Court gives leave. The undertaking is often referred to as a *Harman* undertaking and this reference is derived from *Harman v Secretary of State for Home Dept* [1983] 1 AC 280. Although historically referred to as an implied undertaking, it is not really an undertaking at all, but rather a substantive obligation.

II. Extent of the obligation

3. The extent of the obligation was stated by Hayne, Heydon and Crennan JJ in *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [96][1]:

> 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 leave of the court, use it for any purpose other than that for which it was given unless it is

[1] See also *HT v The Queen* (2019) 374 ALR 216; [2019] HCA 40 at [77] per Gordon J.

> 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 (footnotes omitted).

4. The extent of the obligation is very wide and, in addition to applying to the documents referred to above, applies to copies of those documents and information derived from them. Use of a document "for any purpose other than that for which it was given" (*Hearne* at [96]) would include *any* use beyond that necessary for determining whether the obligation applies to the document. This would include using information contained in the document to, for example, formulate a line of questioning in cross-examination, or to seek the client's instructions as to a particular matter concerned with the criminal case. Using any material in the document as background information would also arguably constitute a breach of the obligation.

5. In my view, when in doubt, one should assume that the obligation exists.

III. Rationale for the obligation

6. This was fully explained by the plurality in *Hearne* at [107]:

> The expression "implied undertaking" is thus merely a formula through which the law ensures that there is not placed upon litigants, who in giving discovery are suffering "a very serious invasion of the privacy and confidentiality of [their] affairs", any burden which is "harsher or more oppressive … than is strictly required for the purpose of securing that justice is done". To that statement by Lord Keith of Kinkel of the purpose of the "implied undertaking" may be added others. In *Riddick v Thames Board Mills Ltd* Lord Denning MR said:
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> > "Compulsion [to disclose on discovery] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party – or anyone else – to

> use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."

In *Harman v Secretary of State for the Home Department* Lord Diplock said:

> "The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these the English legal system provides … through its rules about abuse of process and contempt of court."

In *Watkins v A J Wright (Electrical) Ltd* Blackburne J said:

> "In my judgment, a serious inroad into [the safeguards referred to by Lord Diplock] and, therefore, into the utility of the discovery process in the just disposal of civil litigation would occur if it were open to a litigant (or his solicitor) to enjoy the fruits of discovery provided by the other side, but avoid the risk of committal for contempt for acting in breach of the countervailing implied obligation on the ground that he was unaware of the existence of the undertaking. I take the view that it does not lie in the mouth of a person to plead ignorance of the legal consequences of the discovery process."

To speak in terms of "undertaking" serves:

> "a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court."

Staughton LJ said: "[A]lthough described as an implied undertaking it is a rule which neither party can unilaterally disclaim." The importance with which the courts have viewed the obligation under discussion is indicated by the fact that although it can be released or modified by the court, that dispensing power is not freely exercised, and will only be exercised where special circumstances appear.

> "Circumstances under which that relaxation 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." (footnotes omitted)

IV. Relief from the obligation

7. The starting point is that, as the obligation is owed to the Court to which the documents were compulsorily produced, only that Court may release a party from its obligation pursuant to that obligation: *Crest Homes plc v Marks* [1987] AC 829 at 854; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576.

8. However, there *is* authority for the proposition that *another court* has power to make an order which in effect relieves a party from the *Harman* obligation owed to the Court to which the documents were produced. In *Bondelmonte & Ors v Bondelmonte* [2017] FamCA 924 a wife commenced proceedings in the Family Court to set aside a property settlement order upon the basis that the husband failed to disclose relevant information at the time the final property settlement orders were made. In order to do so the wife sought to inspect documents produced to the Federal Court of Australia. The husband objected asserting, inter alia, breach of the *Harman* obligation. Watts J held that the Family Court has an implied power to control its own processes in relation to matters of discovery and inspection and that, in the circumstances of that case, the Court had an implied power to facilitate the expeditious and just conduct of the case by making an order allowing the wife to inspect the documents produced to the Federal Court.

9. In considering the issue, Watts J referred to six cases where one court had ordered discovery of documents even though the *Harman* obligation was owed to another court (at [83]). Those cases included decisions by the Federal Court and Victorian Supreme Court. His Honour also referred to decisions where the power of a court in the second proceedings to release a party from an obligation owed to another court was questioned (at [90]-[93]).

10. I am not aware of any authoritative pronouncement on the topic by an appellate court in New South Wales. Query whether an inferior court of record, like the District Court of New South Wales, would even possess the implied power to relieve a party from the *Harman* obligation owed to another court: see *BUSB v The Queen* (2011) 80 NSWLR 170; [2011] NSWCCA 39 at [24]-[34] per

Spigelman CJ. In any event, where the obligation exists the best bet would be to seek relief from it from the court to which the obligation is owed.

11. In any case where release is sought from the obligations, special circumstances will be required to be demonstrated. In *Springfield Nominees Pty Ltd v Bridge Lands Securities Ltd* (1992) 38 FCR 217, at 225, Wilcox J said:

> For "special circumstances" to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and the prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.

12. Citing that case, in *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283; [2005] FCAFC 3, at [31], the Full Federal Court said:

> In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show "special circumstances": see, for example, *Springfield Nominees Pty Ltd v Bridge Lands Securities Pty Ltd* (1992) 38 FCR 217. It is unnecessary to examine the authorities in this area in any detail. The parties were not in disagreement as to the legal principles. The notion of "special circumstances" does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined.

13. Where an application for release is decided in contested proceedings, it seems that special circumstances will fairly readily be found where it is established that the use of documents discovered in a proceeding is reasonably required for the purpose of doing justice between the parties in the other proceedings: *Australian Trade Commission v McMahon* (1997) 73 FCR 211 at 217 per Lehane J. It seems to me that, when the documents sought to be used are relevant to an accused person's defence, particularly if they are relevant in establishing a positive defence, the special circumstances test will be passed with flying colours, as the public interest in establishing innocence in criminal proceedings is classically recognised as a circumstance requiring the disclosure of documents within an otherwise immune class: *Ex Parte Coventry Newspapers Ltd* [1993] 1 ALL ER 86, at 91J, per Lord Taylor of Gosforth CJ.

V. When the obligation ceases

14. At common law there is some controversy on this topic. In *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; [1995] HCA 19, at CLR 32-33, Mason CJ said the obligation ceases once the material is adduced in evidence in court proceedings and becomes part of the public domain. That is essentially what the plurality said in *Hearne.* However, in *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571; [2003] VSCA 43 at [48] the Victorian Court of Appeal (Phillips, Batt and Buchanan JJA) said, with respect to an interlocutory proceeding:

> Where documents are provided to a party to litigation under some coercive process of the court with the result that an implied undertaking attaches to the effect that, without the leave of the court, they not be used otherwise than for the purposes of the litigation, the party bound by that undertaking is not freed of it simply because the document in question is marked as an exhibit in the proceeding in the course of which it was provided. To the extent that knowledge of the document has become public by dint of its tender in open court, members of the public will be free to make use of that knowledge as they will (subject always of course to any order specially made protecting confidentiality and the like), but the party affected by the undertaking remains bound as to use of the document itself.

15. More recently the New South Wales Supreme Court declined to follow *British American Tobacco* as it was contrary to High Court

authority, irrespective of the fact that *British American Tobacco* dealt with an interlocutory hearing as opposed to a final hearing: *Crawford v Timms* [2020] NSWSC 380 per Beech-Jones J at [50].

16. In my view, Beech-Jones J is correct.

17. In any event, in most jurisdictions the debate is somewhat academic, as court rules provide when the obligation ceases. Thus, rule 14.11 of the *Federal Circuit Court Rules* 2001 provides:

> **14.11 Use of documents**
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> (1) An order or undertaking whether express or implied, not to use a document for any purpose other than for the proceeding in which it is disclosed does not apply to the document after it has been read to or by the Court or referred to in open Court in such terms as to disclose its contents.
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> Note: An implied undertaking arises where documents are produced in the process of discovery: *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
>
> (2) Subrule (1) does not apply to a family law or child support proceeding and is subject to any order of the Court on the application of a party or of a person to whom the document belongs.

18. Rule 20.03 of the *Federal Court Rules* 2011 provides:

> **20.03 Undertakings or orders applying to documents**
>
> (1) If a document is read or referred to in open court in a way that discloses its contents, any express order or implied undertaking not to use the document except in relation to a particular proceeding no longer applies.
>
> (2) However, a party, or a person to whom the document belongs, may apply to the Court for an order that the order or undertaking continue to apply to the document.

19. Rule 13.07A of the *Family Law Rules* 2004 provides:

> **13.07A Use of documents**
>
> A person who inspects or copies a document, in relation to a case, under these Rules or an order:
>
> (a) must use the document for the purpose of the case only; and

(b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission.

20. Rule 21.7 of the *Uniform Civil Procedure Rules* 2005 provides:

> **21.7 Discovered documents not to be disclosed** (cf SCR Part 23, rule 3(11) and (12); DCR Part 22, rule 3(11) and (12))
>
> (1) No copy of a document, or information from a document, obtained by party A as a result of discovery by party B is to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into evidence in open court.
>
> (2) Nothing in subrule (1) affects the power of the court to make an order restricting the disclosure or use of any document, whether or not received into evidence, or the operation of any such order.

21. Once again, if in doubt as to the existence of the obligation, it is best to apply to the court to which the obligation is owed for release from its terms, particularly having regard to what follows under the next sub-heading.

VI. Consequences of breach of the obligation

22. Breach of the obligation constitutes a contempt of the court to which the obligation is owed: *Ainsworth v Hanrahan* (1991) 25 NSWLR 155, and is punishable as such. In practice this is highly unlikely to occur, particularly if the breach was due to ignorance or oversight. However, if the breach is detected in advance (either by the court or your opponent) you would be prohibited from relying on the relevant documents in any way in your client's defence. You (and perhaps your client) would also have committed a contempt.

23. In any event, upon discovery of any breach steps should be taken to purge the contempt. The principles relating to the purging of contempt are conveniently set out in the judgment of Samuels AP in *United Telecasters Sydney Limited v Hardy* (1991) 23 NSWLR 323 at 340. In practical terms you should:

- Have the matter listed before the court which the obligation is owed;

- Explain the circumstances of the breach and any use made of the relevant documents ;
- Deliver an unreserved apology;
- Hope the court does not take the matter any further.

VII. Practical aspects of the obligation

24.In any criminal case where:

- The client provides you with documents relevant to his/her defence obtained from other legal proceedings;
- You become aware that documents exist in other legal proceedings relevant to your client's defence;
- The documents have not been admitted into evidence

you should consider making an application to the court where the proceedings were/are being heard, for access to the documents. The application should refer to the specific court rule upon which the application is based. It will need to be accompanied by an affidavit and preferably written submissions in support of the application. It is not sufficient to compel production of the documents from the other court by subpoena – obtaining access and inspecting the documents that way would constitute a breach of the *Harman* obligation. As I say, in my (albeit limited) experience courts are sympathetic to applications to be relieved of the *Harman* obligation where the documents sought to be used are directly relevant to an accused person's defence of a serious criminal charge. One should not however take for granted use of the documents will be permitted, particularly in sensitive family law or child support proceedings and so the basis of the application should be fully and clearly articulated, including by reference to material contained in the prosecution brief of evidence, which can be annexed to a solicitor's affidavit.

25.I wish you all good luck with any applications in the future.

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