

Article Information

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The impact of the Harman undertaking on the use of documents by an “eligible applicant” in respect of a right to sue assigned by a liquidator.

The Federal Court has clarified the ability of an assignee of a claim by a liquidator pursuant to s 100-5 of the Insolvency Practice Schedule to rely upon information and documents obtained from a public examination in private proceedings relating to the assigned claim: *LCM Operations Pty Ltd, in the matter of 316 Group Pty Ltd (In Liquidation)* [2021] FCA 324.

Takeaways:

- Liquidators are not in breach of the *Harman* undertaking if documents obtained in an examination are used in subsequent proceedings to get in assets in the liquidation;
- An eligible applicant does not require leave of the Court to use documents obtained in an examination, in subsequent proceedings, if the purpose for which the documents are sought to be used is for the same purpose for which they were obtained under the compulsory process of the Court; and
- An assignee of a claim, who uses documents obtained in an examination in subsequent proceedings, does not pursue a private purpose if the assignment means that the liquidator seeks to pursue the interests of creditors through the assignment.

Background:

316 Group Pty Ltd (In Liquidation) (**Company**) was a special purpose vehicle incorporated to manage a construction contract on behalf of a related party property developer.

The liquidator of the Company identified potential claims available to him and the Company in its winding up, including a claim against Rabah Enterprises Pty Ltd (**Rabah**) for debts owing to the Company, but was unable to acquire funding for proposed public examinations and claims.

The liquidator assigned some of those claims, including the claim against Rabah, to a funder, LCM Operations Pty Ltd (**LCM**) pursuant to s 100-5 of the Insolvency Practice Schedule, which was ultimately approved by creditors of the Company pursuant to s 477(2B) of the *Corporations Act 2001* (Cth) (**Act**).

As part of the assignment, the liquidator and the Company were paid an initial sum plus an entitlement to a share of any proceeds of recovery of those claims (being 15% of the gross proceeds of the claims less recovery costs).

Prior to commencing proceedings against Rabah in regard to its assigned claims, LCM had applied for, and obtained, authority from ASIC to apply to Court as an “eligible applicant” under s 596A and 596B of the Act to issue certain summons for examination and related orders for production.

LCM subsequently commenced examination proceedings to investigate the quantum and prospects of a proposed claim against Rabah in which LCM obtained copies of documents relevant to the claim against Rabah in response to orders for production in those proceedings.

LCM subsequently issued proceedings in the Supreme Court of New South Wales against Rabah in respect of the claim for a debt owed to the Company in the sum of \$14.8 million (as assigned to LCM).

In support of this claim, LCM relied on the documents produced in the examination proceedings.

Rabah asserted that:

- LCM, as an “eligible applicant”, needed leave of the court to rely on the documents produced in the examination proceedings due to the operation of the *Harman* undertaking (discussed further below);
- The predominant purpose of the examinations and summonses was to pursue the private interest of LCM and was an abuse of process.

Decision:

Stewart J ultimately held that LCM was entitled to use the documents produced in the examination proceedings in the private proceedings it had instituted in the Supreme Court of New South Wales against Rabah.

Further, Stewart J held that LCM did not require leave of the Court to use those documents to avoid breaching the “implied undertaking” found in *Harman v Secretary of State for Home Department* [1983] 1 AC 208.

Harman undertaking

Stewart J referred to an extract of *Hearne v Street* [2008] HCA 36 at [96], in which the High Court (Hayne, Heydon and Crennan JJ) described the “implied undertaking” in the following terms:

“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 received into evidence.”

Leave required?

The Court noted that LCM expressly disclosed the purpose of its examination proceeding as being to investigate the Company’s potential claims (assigned to LCM), including an investigation into the debt owed by Rabah to the Company.

The Court held that the purpose for which the documents were sought to be used was the very purpose for which they were obtained under compulsory processes of the Court and consequently that no leave was required.

Private purpose and abuse of process?

The Court noted that, in circumstances where the liquidator was not in a position to fund the examinations, the assignment of the claim to LCM was a means of the liquidator seeking to pursue the interests of creditors.

The payment of an initial sum, and the liquidator and the creditors’ interest to an entitlement to a share of any proceeds of recovery of the claims, indicated that the documents were obtained for a mixed purpose, being part satisfaction of LCM’s own interests and in the interests of the Company and its creditors.