

Collateral use of documents in related proceedings (Lakatamia v Su)

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Dispute Resolution analysis: The use of disclosed documents by a receiving party outside of the proceedings in which they are disclosed can often be fraught with danger for practitioners and their clients. Here, Lakatamia applied under CPR 31.22 for permission to use disclosed documents in related proceedings (the Collateral Use Application), but was faced with an argument that it had already been using the documents without the court's permission in breach of its undertaking prohibiting collateral use. Notwithstanding that Lakatamia was held to be in breach, retrospective permission for collateral use was granted. The case provides some useful guidance as to what is and what is not permitted, and the circumstances in which retrospective permission may be ordered. Written by Jon Felce, partner at PCB Litigation LLP.

Lakatamia Shipping Co Ltd and others v Su and others [\[2020\] EWHC 3201 \(Comm\)](#)

What are the practical implications of this case?

The practical implications are as follows:

- review [CPR 31.22](#) and any undertaking carefully and adopt a cautious and conservative approach as to the need for the court's permission for collateral use—retrospective permission is rare
- if it becomes apparent that disclosed documents may be relevant to other actual or contemplated proceedings (or some other collateral use), first seek the court's permission to review the documents to consider whether they are relevant, before then seeking permission to use the documents in those proceedings
- apply for permission for collateral use promptly before any adverse inferences can be drawn or criticism made for using documents
- consider whether a Collateral Use Application should be made in the proceedings where the documents are disclosed or where they are sought to be deployed. Sometimes the former might be appropriate—such as where the disclosing party is not a party to the separate proceedings, or the separate proceedings are overseas. On other occasions, the latter may be appropriate so that case management decisions can be taken concerning use of the documents after they are reviewed and disclosed
- be just as careful in relation to the collateral use of information within documents as to the documents themselves
- although the use in this case was by the applicant's lawyers, the client should also be warned at an early stage about the limits of use of documents and information
- bear in mind that these considerations do not just extend to disclosed documents, but witness statements as well (see [CPR 32.12](#))

What was the background?

Lakatamia held a judgment against Su worth around \$US 60m and had been seeking to enforce the judgment (the Su Enforcement Proceedings). This included separate proceedings against Su's mother (Morimoto) in relation to the dissipation of assets (the Morimoto Proceedings).

Lakatamia obtained a search order in the Su Enforcement Proceedings. The search order was continued at a return date hearing at which the court ordered that the hard copy documents obtained should be reviewed by an independent reviewing lawyer (the IRL) before being released to Lakatamia. The search order contained the standard undertaking against collateral use without the court's permission.

Following the return date hearing and the rolling production of documents to Lakatamia from the IRLs (a second IRL having been appointed): (i) searches were undertaken of materials by reference to names, time periods and key words which overlapped with the Morimoto Proceedings, (ii) Lakatamia's lawyers undertook focused searches by reference to search terms relevant to the Morimoto

Proceedings and instructed the IRLs to apply such terms, and (iii) Lakatamia's lawyers corresponded with Morimoto's lawyers about a particular issue arising out of a set of documents received from the IRLs (the Sherry documents).

In the meantime, almost three months after documents first started to be produced by the IRLs, Lakatamia issued the Collateral Use Application.

The issues before the Court were whether Lakatamia had had implied permission for collateral use, and if not, whether retrospective permission should be granted under [CPR 31.22](#). That included consideration of whether Lakatamia had breached the undertaking against collateral use and the consequences of any such breach.

What did the court decide?

The salient principles were summarised with particular reference to *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 as including:

- competing public interests need to be weighed up between prohibiting collateral use and facilitating the just resolution of civil litigation
- the prohibition against collateral use applies to both documents and the information therein (*Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch))
- an applicant must demonstrate special circumstances which constitute a cogent reason for permission for collateral use
- 'use' is a very broad concept. Doing anything other than realising that documents would be relevant to other actual or contemplated proceedings may constitute collateral use (*Tchenguiz v Grant Thornton* [2017] EWHC 310 (Comm))
- retrospective permission is rare (*Shlaimoun v Mining Technologies International LLC* [2012] 1 WLR 1276)

The judge held that:

- there was no implied permission. That was inconsistent with the search order, and accepting implied permission too readily could erode or undercut the discipline of observing the undertaking against collateral use
- there were serious and concerning breaches of the undertaking by the focused searches and use of the Sherry documents
- however, retrospective permission for collateral use would be granted given:
 - the particular facts of the case including Su's conduct, the strong public interest in promoting judgment enforcement, and allegations of fraud
 - the relevance of the documents to the Morimoto Proceedings
 - the lack of prejudice
 - [CPR 31.22](#) was not a 'masterpiece of the art of drafting'
- sanction for the breaches could be imposed in other ways including indemnity costs and the making of a formal judgment expressing the serious concern about what had happened

Case details:

- Court: High Court, Business and Property Courts, Commercial Court
- Judge: Mrs Justice Cockerill (DBE)
- Date of judgment: 9 November 2020

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