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Managing risk and implied undertakings

BY LUCY WILLIAMS AND MILICA VUKANCIC - NOV 11, 2022 8:30 AM AEDT

SNAPSHOT

- A recent Victorian decision has clarified that actual knowledge is required to engage the implied undertaking.
- When receiving information, solicitors should be satisfied they are not being wilfully blind or reckless as to their knowledge of that information's provenance.
- When providing documents to clients, solicitors should ensure clients understand that wider disclosure is not permitted, as this may amount to contempt of court.

The recent decision of *Re Ramsay Health Care Australia Pty Ltd* [2022] VSC 226 (‘***Ramsay***’) highlights the need for parties to be vigilant in managing the risks arising from the implied undertaking, both when receiving information that was produced pursuant to compulsory court processes, and when providing such material to clients.

What is an implied undertaking?

The implied undertaking, often referred to as the ‘Harman undertaking’, was enunciated by the High Court of Australia in *Hearne v Street* (2008) 235 CLR 125 (‘***Hearne v Street***’):

‘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 ’ (at [96]).

The implied undertaking is further reinforced by *Uniform Civil Procedure Rule* 21.7 and *Federal Court Rule* 20.03.

The undertaking is to the court, not to the producing party – a person can only be released from the obligation by the court (*Hamersley Iron Pty Ltd v Lovell* (1988) 19 WAR 316, 321). Otherwise, a breach is treated as contempt (*Ainsworth v Hanrahan* (1991) 25 NSWLR 115, 168-169).

What documents does implied undertaking apply to?

The implied undertaking applies to ‘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’ (*Hearne v Street* at [96]).

The obligation extends to ‘copies of those documents and information derived from these documents’ (*Fotopolous v Commonwealth Bank of Australia* [2017] VSC 461 at [33]), even when information is stored in the mind (*Jones v Treasury Wine Estates Limited (No 4)* [2020] FCA 1131 at [67]).

What conduct constitutes a breach of the implied undertaking?

The obligation captures any use that would ‘promote some private interest… not within the parameters of the action which brought about their disclosure’ (*Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476). This includes using the information in subsequent proceedings and giving the documents to an external third party.

The decision in *Ramsay*

Dr Khoury had commenced defamation proceedings against Dr Kirwan, pursuant to which Dr Kolt, another doctor at the same hospital, produced a series of emails under subpoena containing comments on Dr Khoury’s

clinical practice (at [1]).

Those emails disclosed that Dr Kolt had breached confidentiality. Dr Khoury arranged for his partner, Ms Khoury, to forward the emails to the hospital's CEO, Ms Keir. Ms Keir then used the emails to issue a show cause notice to Dr Kolt (at [3]-[6]).

In separate proceedings, Kolt and Kirwan alleged contempt by the Khourys (see *Khoury v Kirwan* (*No 4*) [2021] VSC 333) (‘***Khoury v Kirwan***’). The Khourys admitted they had breached the implied undertaking and brought an application to purge their contempt. The application was rejected, notwithstanding that the Court did not accept Ms Khoury was not aware of the implied undertaking and found her contempt as ‘wilful’ (*Khoury v Kirwan* at [126]).

Dr Kolt's solicitors informed the hospital that the emails referred to in the notice had been produced under subpoena and alleged the hospital was in breach of the implied undertaking (at [7]).

The Court confirmed that while obligations under a Harman undertaking extend to third parties (*Hearne v Street* at [109]), in order to be bound, the third party must have actual knowledge that the document had been produced under a compulsory court process (at [25]).

The Court found that Ms Keir, and by extension the hospital, had no actual knowledge of the emails' origin at the time it prepared the show cause notice (at [80]). Notwithstanding that one of the emails unambiguously identified the documents as being obtained under subpoena, due to the combination of Ms Keir's heavy workload, the volume of emails she dealt with daily, and the repetitive emails received from the Khourys, her oversight as to the emails' provenance was ‘not deliberate but rather unintended’ (at [78]). Accordingly, there was no contempt.

Risk management implications

- When disclosing documents to clients, solicitors should ensure clients understand the implied undertaking and that the documents should not be distributed further.
- Parties who are wilfully blind or reckless to the fact that a document may have been produced under a compulsory court process may be inferred to have the degree of knowledge required to be bound by the implied undertaking (at [26]).
- Any person who receives information which could be subject to the obligation should implement procedures to ensure that provenance is clearly understood.
- If documents did originate in prior proceedings, there must be clear evidence that a release was obtained or that the documents were otherwise tendered or read into evidence in open court before the documents can be used for any other purpose.

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