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## Use of liquidator's examination documents in litigation assigned to funders — *Re LCM Operations Pty Ltd; 316 Group Pty Ltd (in liq)*<sup>1</sup>

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This case concerned an important practical point for litigation funders who have purchased claims from liquidators: can they use documents obtained by an examination into a company's affairs in subsequent litigation?

A litigation funder, LCM Operations Pty Ltd (LCM), had obtained documents from a public examination of the affairs of 316 Group Pty Ltd in the Federal Court, under ss 598A and 596B of the Corporations Act. LCM itself had conducted the examination to obtain evidence for its subsequent prosecution of claims it had already purchased from the company's liquidator prior to the examination. The liquidator had assigned to LCM all of the company's claims, with the liquidator to receive 15% of the proceeds of any success in litigating the company's claims.

Australian Securities and Investments Commission (ASIC) had approved the funder as an "eligible applicant", entitling LCM to issue examination summonses under ss 596A and 596B and orders for production. LCM's only purpose in conducting the examination had been to obtain evidence for its litigation of those claims. No challenge had been made to the examination summonses. Having obtained the evidence, LCM sued an examinee, Rabah Enterprises Pty Ltd (Rabah), in the NSW Supreme Court. Rabah complained that any use of the examination documents was a breach of the *Harman* undertaking, which is an implied undertaking to the court that arises automatically in nearly all litigation under which all persons, including parties and their lawyers, must not use any document obtained in court proceedings for a purpose foreign to those proceedings.<sup>2</sup> That usually means that use of a document produced in a proceeding, such as an affidavit or a document produced under subpoena, will not be able to be used in other proceedings. An application can be made to the court for leave to use the document, but the applicant must prove there are special circumstances justifying that leave.

Following Rabah's complaint that LCM was in breach of the *Harman* undertaking, LCM applied to the Federal Court for a declaration that its use of the documents in

the Supreme Court case would not be a breach. In the alternative, LCM sought leave to use the documents. Rabah opposed the application on the basis that leave was required but should not be granted. The court ultimately accepted LCM's primary submission that there was no breach of the undertaking given that the entire purpose of the examination proceedings had been to obtain evidence for potential claims.

Rabah's primary argument was that the liquidator may not need to leave, but LCM as a litigation funder did, despite ASIC having authorised LCM as an eligible applicant and LCM itself having conducted the examination. Rabah relied on the principle that an examination is an abuse of process if its predominant purpose is foreign to any benefit to the company. That test derives from the general law on abuse of process, but applies somewhat awkwardly in circumstances where creditors and third parties are able to be authorised by ASIC to conduct examinations and liquidators are entitled to assign the company's claims to third parties. Plainly, such persons will only conduct such examinations if they perceive there to be some realistic prospect of a benefit to them. The Corporations Act expressly permits liquidators to assign claims to any person. Section 100-5 of the Insolvency Practice Schedule (Corporations), being Sch 2 to the Act, permits a company's external administrator, such as a liquidator, subject to certain conditions, to "assign any right to sue that is conferred on the external administrator by this Act". Upon any such assignment, a reference in the Corporations Act to the liquidator "is taken to be a reference to the person to whom the right is assigned". There is no limitation on the identity of the assignee. There is no need for the court's approval, unless the external administrator had already commenced proceedings.

The claim against Rabah was for more than \$14 million, such that the liquidator stood to make significant gains if LCM succeeded, with the liquidator entitled to 15% of the proceeds of the litigation. Rabah's essential point was that LCM still required leave because the 15% deal meant that LCM's predominant purpose was its prospect of earning 85%.

Justice Stewart held that, despite the phrase “predominant purpose”, for an examination to have a mixed purpose, including a partly private purpose, is not an abuse of process, so long as there is also a purpose to benefit the company with a “demonstrable benefit”, citing *Arrium v Walton*.<sup>3</sup>

Here, LCM was not solely pursuing a private purpose given that there was a real benefit to the liquidator (and ultimately the company’s creditors) in the examination, the use of the documents in the Supreme Court proceedings and by reason of the other obligations LCM owed to the company pursuant to the assignment deed, such as to provide information and periodic reports to creditors. Accordingly, his Honour made the declaration sought.

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## Footnotes

1. *Re LCM Operations Pty Ltd; 316 Group Pty Ltd (in liq)* [2021] FCA 324; BC202102384.
2. See *Harman v Secretary of State for Home Department* [1983] 1 AC 208.
3. *ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq) v Walton* (2020) 383 ALR 298; [2020] NSWCA 157; BC202007056 (*Arrium*) at [140] per Bathurst CJ, Bell P and Leeming JA. It should be noted that special leave to appeal to the High Court of Australia has been granted — [2021] HCATrans 018, S-20/2021.