Using documents for a collateral purpose and in separate proceedings – how likely are the courts to approve your application?

There will certainly be occasions where the use of documents disclosed in separate proceedings are useful to your case and it is desirable either to disclose these in the present case or to obtain advice on collateral claims, but which applications are practically viable?

CPR

The Civil Procedure Rules stipulate that, except where a court otherwise gives permission, disclosed documents may be used "only for the purpose of the proceedings in which [they were] disclosed" (CPR 31.22(1)).

(Note: CPR 31.22 is one of the few provisions to be retained by the Disclosure Pilot Scheme in the Business and Property Courts which commenced on 1 January 2019).

But when broken down, how does the court interpret this provision and what happens when you inadvertently disclose collateral documentation?

The following are some of the most recent cases in which the High Court discussed the issue of collateral documents and the interpretation of CPR 31.22.

"Use" of documents

The ECU group v HSBC Bank PLC and Ors [2018] EWHC 3045 (Comm)

In December 2017, ECU had made a successful application for pre-action disclosure of documents relating to the activity of HSBC's traders.
However, having received the documents, ECU used them:

1. in certain communications with UK and US authorities;
2. in certain communications with lawyers in the United States; and
3. to provide a copy of a witness statement to a journalist.

ECU maintained that the documents had been used unintentionally but nevertheless a retrospective application was then necessary.

(Where pre-action disclosure is concerned, “the proceedings” in relation to which disclosed documents may be used will be those contemplated to be commenced in the relevant court).

ECU therefore applied under Civil Procedure Rule (CPR) 31.22(1) for retrospective permission to use the documents for the purposes for which they had actually already been used.

CPR 31.22(1) formalises the implied undertaking to the court contained in common law not to use a disclosed document for a purpose other than for the purpose of the proceedings in which the document was disclosed:

A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where:

- *the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
- *the court gives permission; or*
- *the party who disclosed the document and the person to whom the document belongs agree.*

The High Court considered the applications for retrospective permission to make collateral use of documents disclosed under the pre-action disclosure order where there had been a breach of the implied undertaking as to the use of disclosed documents. It should be noted that there is authority for the proposition that retrospective permission will only rarely be granted (*Miller v Scorey [1996] 1 WLR 1122*).

Permission was denied in relation to the provision of the witness statement to the journalist, however the US attorney communication was permitted subject to certain restrictions.
The Judgment raised the following points:

- While it was "very important" that permission for collateral use would have been granted if it had been sought prospectively, this was not the only factor to be taken into account when considering the application;
- the matter of granting permission is between the court and the party in breach of CPR 31.22(1), not the party that had provided the documents; and
- using knowledge of the content of the disclosed documents, or analysis or conclusions arising out of those documents, does amount to 'use' for the purposes of CPR 31.22(1)

Robert Tchenguiz and Another v Grant Thornton UK LLP and Others [2017] EWHC 310 (Comm).

In this case, the defendants submitted that a collateral document is only "used" in separate proceedings when a party actually seeks to rely on it – perhaps by referring to the document in a statement of case and/or seeking to add the document to the trial bundle.

The High Court disagreed, instead favouring a broad interpretation of "use", which would encompass anything from the review of previously disclosed documents for relevance to other proceedings to the actual deployment of those documents in the subsequent proceedings.

The decision suggests that parties and their legal advisers may not even review disclosed documents for the purpose of considering or advising on collateral proceedings without first obtaining the court's permission. This is a very restrictive approach and contrasts with the previous ECU case.

Glaxo Wellcome UK Ltd and Anor v Sandoz Ltd and ors [2019] EWHC 2545 (Ch)

In this case, the key question was whether documents, obtained in English proceedings, could be made available to the claimants' foreign legal advisors for advice (in Belgium) regarding on-going related IP litigation. Unlike the ECU case, this was an application for prospective (not retrospective) permission.

The court will look to balance the parties' competing interests of justice and will likely only grant permission if the applicant demonstrates "special circumstances" which constitute a compelling reason for permitting collateral use. The following were listed as persuasive reasons to permit the application:

- the parties were equally resourced; therefore the application was not oppressive;
- given that the majority of the documents were of likely relevance to the Belgian proceedings, it was in the interests of justice that the claimants should be allowed to obtain legal advice; and
- the number of the documents was relatively small

These are both cases in which a litigant is trying to use (or has already used) documents, disclosed in on-going English proceedings, in order to obtain foreign legal advice concerning contemplated or on-going related foreign proceedings. However, I would urge practitioners to argue that the same principles apply equally to documents disclosed in separate proceedings in England.

Reasons for use

Again, as in the Glaxo case, the phrase "special circumstances" was mentioned.

In *ACL Netherlands BV and others v Lynch and another [2019] EWHC 249 (Ch)* ("**ACL**"), the High Court said that an applicant is unlikely to be granted permission for collateral use of evidence disclosed in English civil proceedings, unless there are special circumstances amounting to 'cogent and persuasive reasons'.

In this case, the Claimants brought an application pursuant to CPR 31.22 (1) (b) and 32.12 (2) (b) that documents may not be used unless:

"*the court gives permission*"

The Claimants applied to obtain the Court's permission to use the disclosed documents and witness statements and provide them to the FBI.

The Court re-iterated that the leading guidance in this area remains the case of *Crest Homes Plc v Marks [1987] AC 829;* the Court has discretion to release or modify the restrictions on the collateral use of disclosed documents only when:

1. the applicant can demonstrate cogent and persuasive reasons why the restrictions should be released or modified; and
2. the release or modification will not occasion injustice to the disclosing party.

The Court in ACL followed the approach in Crest and found that it was not persuaded there were sufficient "cogent and persuasive" reasons in favour of the use of collateral documentation had been established to outweigh the public interests protected by CPR 31.22 and 32.12". and declined the Claimant's request to 'release or modify the restrictions'.

The Court reasoned that, following *Crest Homes,* it is paramount to protect a litigant's right to privacy and confidentiality. In essence, public policy reasons in favour of the collateral use of the documents need to outweigh the factors in favour of preserving confidentiality.

If this cannot be proven, the Judge commented that 'the burden is such that, in reality, it will usually be difficult, if not impossible, to obtain permission for collateral use'.

To compound matters in *ACL*, there was also a lack of sufficient evidence as to the importance or 'necessity' of the particular disclosure sought by the Claimant despite the fact that the disclosure was to be to the FBI.

Notting Hill Genesis v Ali [2020] EWHC 1194 (QB)

In this most recent case, the High Court granted the claimant retrospective permission to use documents that the defendant had disclosed in previous, separate proceedings.

C had issued an application for an interim injunction to restrain D from further disclosure of C's confidential documents.

In this case, D was C's former employee and C sought permission to use documents that D had disclosed in his Employment Tribunal (ET) action against C. C said these documents were necessary to support of C's present application for an interim injunction to prevent D from misusing C's confidential information and that of its tenants. (C was a housing association).

Nicol J stressed that, although permission for collateral use is usually sought in advance, the outcome will depend on the circumstances of the particular case.

(Note: C's application was retrospective only because the relevant documents had already been referred to at a prior High Court hearing in relation to the interim injunction).

Nicol J noted that:

- The High Court has power to grant permission for the use of documents disclosed in ET proceedings, in subsequent High Court proceedings (*IG Index Ltd v Cloete [2014} EWCA Civ 1128*).
- The restrictions on the collateral use of disclosed documents are part of the careful balance of competing rights which has to be struck between an individual's right of privacy and the wider public good.

- When retrospective permission was sought, an important consideration was whether the court would have granted permission for the collateral use of the documents had it been sought prospectively. In the present case, it would have done.

Permission was granted. It was made clear that this was to protect C's confidentiality, to prevent D from using C's documents further and to protect C's tenants' confidential and sensitive data (clear public policy considerations).

Comment

Parties should be warned that any applications for retrospective consent should not be used to circumvent the usual procedure for obtaining consent to collateral use of documents. It is by no means guaranteed.

Parties making an application (whether retrospective or prospective) should have regard to the following:

- The court will look at the parties' competing interests of justice, including whether the parties are on an equal footing;
- Are there special circumstances involved? Is there a public policy consideration?
- If retrospective, would a prospective application have been successful?
- Is the use of the collateral documents a necessity?
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- Is there an issue in protecting the litigant's privacy and confidentiality?
- Are there cogent and persuasive reasons to depart from the restrictions?
- Were the documents used in ET proceedings? (see authority above)
- Be specific in the type and amount of documentation; a wider scope has a very low chance of being successful.

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