Neutral Citation Number: [2020] EWHC 3201 (Comm)

Case No: CL-2011-001058

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 9 November 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between:

(1) LAKATAMIA SHIPPING COMPANY LIMITED

First Claimant/Applicant

(2) SLAGEN SHIPPING CO. LTD
(3) KITION SHIPPING CO. LTD
(4) POLYS HAJI-IOANNOU

Second to Fourth Claimants

– and –

(1) NOBU SU (aka SU HSIN CHI; aka NOBU MORIMOTO)

First Defendant/Respondent

(2) TMT CO., LIMITED
(3) TMT ASIA LIMITED
(4) TAIWAN MARITIME TRANSPORTATION CO., LIMITED
(5) TMT COMPANY LTD, PANAMA S.A.
(6) TMT CO., LTD, LIBERIA
(7) IRON MONGER I CO., LTD

Second to Seventh Defendants

TOSHIKO MORIMOTO

Additional Party

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Mr N Casey and Mr J Goudkamp (instructed by **Hill Dickinson LLP**) for the **Claimant**
The First Defendant appeared in person
Mr D Head Q.C. and Mr G Chalfoun (instructed by **Baker & McKenzie LLP**) for the **Additional Party**
The Second to Seventh Defendants were **unrepresented**

Hearing date: Friday 30 October 2020 and Monday 9 November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mrs Justice Cockerill :

Introduction

1. This is an application by the First Claimant ("Lakatamia") pursuant to CPR Part 31.22 to use documents obtained from the Respondent, Mr Su, in these proceedings ("the Su Enforcement Proceedings") pursuant to a search order made by Mr Justice Andrew Baker ("the Search Order") in related proceedings bearing the claim number CL-2019-000141 ("the Morimoto Proceedings") ("the Collateral Use Application").

2. The Additional Party ("Mrs Morimoto"), is the Second Defendant in the Morimoto Proceedings, in which Lakatamia alleges (in short) that Mrs Morimoto assisted Mr Su in evading enforcement of certain orders of this court, as explained below. Mrs Morimoto made a separate application within the Morimoto Proceedings addressing the case management consequences in those proceedings of the present application, if granted.

3. Normally such an application would not give rise to a full judgment of this sort. However at the hearing of the application my attention was drawn by Mr Head QC for Mrs Morimoto to what appeared to me to be breaches of the restriction on collateral use of documents. I required a witness statement to be sworn by Mr Russell Gardner of Hill Dickinson, the partner with responsibility for both matters, and convened this further hearing for submissions to be made in the light of this further evidence. That response and the position adopted on behalf of Lakatamia have only reinforced the need for this matter to be dealt with in a considered judgment.

Factual Background

4. Mr Su's name will be familiar to any student of modern commercial litigation. He is a gentleman who has gone by various names over the years, including Nobu Su, Su Hsin Chi and Nobu Morimoto. Over the past 10 years Mr Su has been embroiled in a substantial number of civil court proceedings in England and Wales and elsewhere. These included proceedings brought by Lakatamia against him in the Commercial Court under claim 2011 Folio No. 357.

5. Mrs Morimoto is an 86-year old resident of Taiwan and his mother.

6. On 6th July 2008, Lakatamia, a shipping company, entered into a series of freight forwarding agreements ("FFA's") with Mr Su and various companies that were owned by him. Subsequently, Mr Su breached the agreement, causing Lakatamia substantial losses. Lakatamia subsequently brought a claim for damages against Mr Su.

7. In mid-2011, Lakatamia applied for, and was granted, a WFO against Mr Su by Mr Justice Blair. That prohibited Mr Su from dealing with, or dissipating, his assets anywhere in the world, up to the value of US$48,842,440.24 ("the Su WFO").

8. In November 2014, following a trial, Mr Justice Cooke granted judgment in favour of Lakatamia against Mr Su in the sum of US$37,854,310.24 (*Lakatamia Shipping Co Ltd v. Su* [2014] EWHC 3611 (Comm); [2015] 1 Lloyd's Rep 216). On 16th January 2015, Mr Justice Cooke granted judgment in the further sum of US$9,852,200.50.

9. Mr Su has not discharged these judgment debts voluntarily. Lakatamia has spent the last five years attempting to enforce the judgment - with very limited success. Mr Su's liability to Lakatamia to date currently stands at around US$60m ("the Judgment Debt"). Interest and costs were awarded and continue to accrue/be incurred.

10. In 2015, in the course of seeking to enforce the Judgment Debt Lakatamia identified that Mr Su was the owner of two valuable Monegasque properties known as Villa Rignon and Villa Royan ("the Monegasque Villas") through a corporate structure comprised of two corporate entities, Portview Holdings Limited("Portview") and Cresta Overseas Limited ("Cresta"). These were sold in October 2015 at the suit of the mortgagee, Barclays Bank, for some €65 million. In February 2017, following the redemption of the mortgages, a sum of €27 million was released to a lawyer acting for Cresta, Maître Arnaud Zabaldano.

11. In January 2018, Mr Justice Popplewell granted an order requiring Mr Su to surrender his passports and remain in the jurisdiction pending a hearing at which he was to be cross-examined as to his assets.

12. A year later, Mr Su entered the United Kingdom and was met by the police at Heathrow and served with the order of Popplewell J. Shortly thereafter, Mr Su was arrested in Liverpool in the course of attempting to flee the jurisdiction by ferry. He was brought before the Commercial Court in London, whereupon Lakatamia served him with a committal application notice ("the Committal Proceedings").

13. Lakatamia contended that the sale and dealing with the proceeds of the Monegasque Villas was a breach of the Su WFO.

14. In February 2019, at a hearing before Sir Michael Burton, in the course of being cross-examined by Mr Stephen Phillips QC on behalf of Lakatamia as to his assets, Mr Su gave evidence to the effect that (i) his mother, Mrs Morimoto, had received the proceeds from the sale of the Monegasque Villas ("Net Sale Proceeds") via her lawyers, (ii) she knew about the Su WFO and (iii) she performed a "treasury" function for the Su family.

15. Lakatamia at once applied *ex parte* on an urgent basis for a WFO against Mrs Morimoto, Portview and Cresta; which injunction was granted by Sir Michael Burton ("the Morimoto WFO").

16. In early March 2019, Lakatamia issued the Morimoto Proceedings. Those proceedings essentially concern the dissipation arising from the sale of the Monegasque Villas. Lakatamia advances claims in: i) unlawful means conspiracy; and ii) the tort of inducing and/or facilitating a failure to pay a judgment debt, both relating to Mr Su's alleged breach of the Su WFO and his failure to discharge the judgment Debt. of the Commercial Court.

17. On 6th March 2019, Lakatamia also issued an application notice seeking *inter alia* orders that (i) the Morimoto WFO be continued against Mrs Morimoto; (ii) Lakatamia be permitted to serve Mrs Morimoto with the claim form out of the jurisdiction on the basis that: (a) she was a necessary or proper party to the unlawful means conspiracy claim against Mr Su, who had been served within the jurisdiction; (b) because damage had been suffered in the jurisdiction; and (iii) Mrs Morimoto disclose her worldwide

assets with a value exceeding US$100,000 and swear and serve an Affidavit confirming that disclosure.

18. The Committal hearing took place in March 2019. In a written judgment handed down on 29th March 2019, Sir Michael Burton held that he was satisfied Lakatamia had proven to the criminal law standard that Mr Su had dissipated the Net Sale Proceeds in breach of the Su WFO and ordered him to be committed to prison for 21 months for contempt (*Lakatamia Shipping Co Ltd v Su* [2019] EWHC 898 (Comm)). Mr Su's subsequent appeal was dismissed and his attempt to secure early release was likewise dismissed ([2019] EWHC 3180 (Comm)).

19. In April 2019 Sir Michael Burton discharged the Morimoto WFO on the basis of lack of risk of dissipation. (*Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145 (CH)) That judgment was overturned on appeal ([2019] EWCA Civ 2203) albeit that the Court expressed some doubt about the case referring to the "tenuous" nature of the evidence and the Morimoto WFO therefore remains in place.

20. In November 2019, His Honour Judge Pelling QC ordered Mr Su to sign various bank mandates and to provide them to Lakatamia, to allow Lakatamia to approach Mr Su's banks directly for documents which Mr Su had been ordered to provide. A further Order to cross-examine Mr Su was made by Waksman J in early 2020.

21. In February 2020, Sir Michael Burton GBE heard a fresh committal application. He found that Mr Su had committed a contempt of court in failing to disclose the existence of three New York apartments which had been revealed to exist in some of the documents and in failing to sign the bank mandates. He committed Mr Su to a period of a further 4 months' imprisonment to be served consecutively to the previous sentence.

22. In March 2020, Lakatamia discovered what they contend to be an interest Mr Su held in a residential property in Tokyo. The failure to disclose that asset, and the alleged failure of Mr Su to produce documents, are the subject of Lakatamia's third committal application.

The Search Order

23. The background to the present application is that shortly thereafter Lakatamia sought an electronic search order. It did so initially to obtain material from Mr Su's social media accounts. The application was made without notice before Foxton J in April 2020. At that hearing Foxton J made an order but also made clear to Lakatamia that any use of the documents before the Return Date would be unacceptable. This was explained at [38] of *Lakatamia Shipping Company Ltd & Ors v Su & Ors* [2020] EWHC 865 (Comm),:

> "The order which Lakatamia sought at the without notice hearing was one by which the Independent Lawyer would be in a position to hand over documents to Lakatamia prior to the return date. I was not willing to make such an order on a "without notice" basis, and concluded that I should adopt the same approach as Mr Justice Marcus Smith in TBD Owen, and that the Independent Lawyer should not hand over any material to the Claimants until after the return date. I reached this conclusion because if material was

> handed over, and then the order discharged on the return date, it might well have been too late to get the documentary genie back in the bottle."

24. On 17 June 2020, Lakatamia secured the Search Order in the Su Enforcement Proceedings ("the Search Order"). That Order was granted by Andrew Baker J in broadly usual terms. Pursuant to the Search Order Lakatamia obtained some 800,000 documents from Mr Su. The Search Order made clear, at paragraph 35, that Lakatamia had to apply for permission at the Return Date for production on a rolling basis of the electronic documents.

25. The Search Order was served on Mr Su on 18 June 2020. On 2 July 2020, it was continued. At the Return Date on 2 July 2020, the Court ordered that the hard copy documents obtained under the Search Order be reviewed by an Independent Reviewing Lawyer *before* being released to Lakatamia.

26. It remains the case that before being released to Lakatamia, the documents are being reviewed by Independent Reviewing Lawyers appointed by the Court. Initially there was one Independent Reviewing Lawyer. On 22 July 2020 Lakatamia applied for permission to appoint a second Independent Reviewing Lawyer, which application was granted in early August. They are currently two London barristers.

27. The trial of the Morimoto proceedings (against both Mr Su and Mrs Morimoto, among others) is listed to commence on 8 March 2021.

Events following the Search Order

28. Initially the Independent Reviewing Lawyer was instructed to review the documents in reverse chronological order.

29. It appears (from indications given by Lakatamia in correspondence) that Lakatamia began receiving these documents on 7 July 2020, at a rate of approximately 100 documents a day. This increased to 200 documents per day on 7 August 2020, following the appointment of the second Independent Reviewing Lawyer.

30. It appears likely (given what Mr Gardner says that certain documents referred to before me as "the Sherry documents" – that is documents which pertain to what Lakatamia alleges is the role of Sherry as an assistant to Mrs Morimoto) were received with or soon after the first tranche of documents.

31. On 8 July 2020 an order was made declaring Mr Su bankrupt. Lakatamia began work on an application to annul the bankruptcy order.

32. On 13 July 2020, Hill Dickinson wrote to Mrs Morimoto's lawyers, Baker McKenzie asking Mrs Morimoto to comment on evidence given by Mr Su in February 2019 as regards the role of Sherry. This was the first reference to "Sherry" in correspondence between Hill Dickinson and this firm. Lakatamia raised very specific questions, including whether Sherry monitored Mrs Morimoto's bank accounts, and what legal entity Sherry worked for. On 20 July 2020 Mrs Morimoto denied that Sherry performed any role for her.

33. On 24 July 2020 disclosure was exchanged in the Morimoto Proceedings.

34. On 18 September 2020, the Independent Reviewing Lawyers were requested to apply various search terms that Lakatamia considered may lead to the discovery of Mr Su's assets.

35. On 22 September 2020, Lakatamia made the present Collateral Use Application.

36. On 23 September 2020 Hill Dickinson sent a letter which responded to Mrs Morimoto's "Sherry" letter. That letter stated:

> "We should say at this stage that a number of documents in that disclosure suggest that 'Sherry' of Platform Shipping LLC acts on behalf of your client in communicating and processing requests for funds from the Morimoto family. We note that in your letter of 20 July 2020 you stated that '*Sherry never performed any function on our client's behalf*''. That does not appear to be correct and our client reserves the right to apply for disclosure of documents held by Sherry on behalf of your client"

37. In October 2020 Hill Dickinson made a series of requests to the Independent Reviewing Lawyers to focus the searches they were performing:

    i) On 2 October 2020, the Independent Reviewing Lawyers were requested to focus on documents falling within two temporal periods, namely the period in which the two Monegasque Villas owned by Mr Su were sold for €65.1m and, the period in which Mr Su dissipated the proceeds.

    ii) On 5 October 2020, the Independent Reviewing Lawyers were requested to review documents that were responsive to the names of companies which Lakatamia suspected may be being used to conceal Mr Su's assets.

    iii) On 20 October 2020, the Independent Reviewing Lawyers were requested to review documents responsive to the term "Madame", a variant of "Madam Su" by which name Mrs Morimoto is also known.

38. On 23 and 24 October 2020 Hill Dickinson endeavoured to apply search terms relevant to the Morimoto Proceedings ("the Morimoto Search Terms") to the documents which they had received from the Independent Reviewing Lawyers as part of the product of the Search Order in the Su Enforcement Proceedings.

39. From 25 October 2020, Hill Dickinson began to draw up a further list of documents that the Independent Reviewing Lawyers had released to Lakatamia, which were not responsive to the Morimoto Search Terms, but were in any event disclosable in the Morimoto Proceedings. 147 documents were identified as disclosable as a result. No such disclosure list had been drawn up before 25 October 2020.

40. On 26 October 2020, Hill Dickinson asked the Independent Reviewing Lawyers to apply the Morimoto Search Terms. That instruction was given on the basis that Lakatamia had applied for permission to use the Search Order documents in the

Morimoto Proceedings and that Mrs Morimoto had applied for case management directions in those proceedings.

41. On 27 October 2020, Hill Dickinson contacted an external e-disclosure provider, Epiq and, on 28 October 2020, transferred the documents received from the Independent Reviewing Lawyers to date for electronic searching.

The Collateral Use Application

42. The Collateral Use Application was listed together with a case management application in the Morimoto Proceedings. As part of their skeleton for that application counsel for Mrs Morimoto drew my attention to certain matters relevant to the grant of permission for collateral use.

43. In addition, Mrs Morimoto raised concerns that:

i) Lakatamia's decision to issue the Collateral Use Application in case CL-2011-001058 meant that: (i) none of the defendants in the Morimoto Proceedings (other than Mr Su, who is currently unrepresented) would have obvious standing to appear or obtain copies of the evidence in support of the application. Indeed Lakatamia initially vociferously objected to the joint listing and sought to insist that the case management implications of its proposed collateral use be heard at a separate date; (ii) the case management implications for the Morimoto Proceedings would not (absent their separate application to list a case management hearing) be before the Court in deciding this application; and (iii) the impact of any permission granted to Lakatamia to make collateral use of the documents on the other parties to the Morimoto Proceedings would not be before the Court.

ii) It appeared from the hearing bundle that Lakatamia was deploying in the present proceedings copies of correspondence between Baker & McKenzie LLP and Hill Dickinson LLP in the Morimoto Proceedings, including direct quotes from Mrs Morimoto's disclosure, which itself is a collateral use of documents.

iii) The approach to collateral use appeared to her to be the latest in a series of breaches. Mrs Morimoto relied on the fact that in her skeleton argument dated 8 April 2019 for the return date of the Morimoto, she had complained of Lakatamia's use of her first witness statement in the Morimoto Proceedings being used in cross-examining Mr Su as to his assets in separate Committal Proceedings in March 2019, in breach of the restrictions on collateral use and without the Court's permission.

The Law

44. CPR r 31.22 provides in material part as follows:

> "Subsequent use of disclosed documents….
>
> 31.22

> (1) 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 –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been".

45. That provision, as I shall mention below, is thought by many not to be a masterpiece of the art of drafting. However on its face it provides a clear indication that the default position is that collateral use is not permitted.

46. The authorities on CPR 31.22 establish a number of propositions, which were not seriously in issue before me.

47. There is a public interest behind the prohibition on collateral use. The terms of CPR 31.22 (1) reflect the terms of the implied undertaking as to the use of documents that arose at common law. One of the reasons for the rule is that compulsory disclosure is an invasion of a person's private right to keep one's documents to oneself and should be matched by a corresponding limitation on the use of the document disclosed. Another is in order to encourage those with documentation to make full and frank disclosure of it, whether helpful or not – on the footing that, subject to exceptions, it will not be used save for the proceedings in which it is disclosed: *Riddick v Thames Board Mills* [1977] 1 QB 881, 896; *IG Index v Cloete* [2014] EWCA Civ 1128[42-3].

48. The public interest behind the prohibition on collateral use is an order of magnitude greater where the documents have been obtained in criminal proceedings. In *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409Jackson LJ at [58] adopted the *dicta* of Lord Hope in *Taylor v Serious Fraud Office* [1999] 2 AC 177,: "*I do not think that it is possible to overstate the importance, in the public interest, of ensuring that material which is disclosed in criminal proceedings is not used for collateral purposes*".

49. In *Smithkline Beecham v Generics* [2004] 1 WLR 1479 the Court of Appeal held that the CPR provision is now to be taken as the complete code on this subject and also that the prohibition applied not just to documents themselves but also to the information derived from those documents.

50. The fact that documents have been produced in one set of proceedings does not mean that they are not disclosable in another set of proceedings. Rather, this creates a tension between two legal obligations, which can only be resolved by the Court (see Knowles J at [22-24] of *Tchenguiz v Grant Thornton* [2017] EWHC 310 (Comm) | [2017] 1 W.L.R. 2809).

51. The leading summary of the principles is to be found in *Tchenguiz v Serious Fraud Office* at [66]:

> "The general principles which emerge are clear:
>
> i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.
>
> ii) The collateral purpose rule contained in section 9 (2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension.
>
> iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above.
>
> iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution.
>
> v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law (as in *Gohil*) or failed to take proper account of the conflicting interests in play (as in *IG Index*)."

52. There are a few further principles which were not in issue in that case, but which are material for the purposes of the case before me.

53. The first is that the burden is on the party making the application to demonstrate cogent and persuasive reasons for allowing the collateral use sought. In *Crest Homes Plc v Marks & Others* [1987] 1 AC 829 Lord Oliver stated that the court would not permit the use of disclosed documents for a collateral purpose "*save in special circumstances and where the release or modification would not occasion injustice to the person giving discovery.*"

54. Secondly, what constitutes "use" of a document for the purpose of CPR 31.22 is very broad – perhaps more so than most litigators might think. On one view the Court's permission is required even to review the documents. In truth this is an aspect of the drafting which is difficult. However the courts have not reacted to that difficulty by adopting a laissez faire attitude. In *IG Index v Cloete* [2014] EWCA Civ 1128, Christopher Clarke LJ emphasised that the restriction extended not only to the

documents but to the information contained therein, and (at paragraph 40), that the restriction extended to: "*(a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the characteristics of the document, which include its provenance*."

55. This topic was considered by Knowles J in *Tchenguiz v Grant Thornton*, where he explained at [29-31] that although there is an implicit right to read documents to ascertain whether to make an application for permission to make collateral use, that implicit permission is extremely narrow:

> "In a complex case where a party did not already know (from its involvement in the litigation in which the documents had been disclosed) what document or documents it wished to use for a collateral purpose, the implied permission would not extend to allowing a review of the documents with a view to deciding (for example) whether the party wished actually to rely on or otherwise actively make use of any of those documents in advancing its case or meeting the case against it in other proceedings. For that, permission or agreement would be required…..
>
> In my judgment if the purpose of a review of documents that were disclosed in litigation is in order to advise on whether other proceedings would be possible or would be further informed, then the review would be a use for a collateral purpose".

56. It is worthy of note that in *Tchenguiz v Grant Thornton* what was sought was permission to review the documents, not to make use of them.

57. That reflects the fact that it is not only use, but even review which can be a collateral use. In *Libyan Investment Authority v Société Générale SA* [2017] EWHC 2631 (Comm), at [35], Teare J recorded what seemed to be common ground between the parties that permission of the Court would be needed before any of the parties could internally review documents to see whether they could be used for collateral purposes.

58. This restrictive approach is also apparent from *Gee on Commercial Injunctions* paragraph 25-012:

> "(7) The word "use" in CPR r.31.22 extends to use by that party or allowing the document or a copy to be used for any collateral or ulterior purpose, or allowing any third party to have access to the document for such a purpose. The "use" of documents encompasses for example reading it, copying it and showing it to somebody else. It may also extend to referring to the documents and any of the characteristics of the documents, which includes referring to their provenance.
>
> (8) The scope of permitted use turns on the meaning of the opening words of CPR r.31.22(1): '*only for the purpose of the*

> *proceedings in which it is disclosed…*' Any use within the purpose of the proceedings is a permitted use, whilst use for a purpose outside of the purpose of the proceedings requires satisfaction of one of the subparagraphs of r.31.22(1).61 The question is whether what is being done is for the purposes of the proceedings, or some other purpose. The permitted "use" of documents disclosed may extend to a party's existing legal team giving advice on potential further proceedings which might arise from those documents but not to the provision of the documents to external counsel for such advice which would not be '*for the purpose of the proceedings in which [the documents are] disclosed…*' In *Tchenguiz v SFO* the judge acknowledged that this position was difficult to justify as a matter of logic. There is no reason to distinguish between the party's existing lawyers and the instruction of further specialist advice from external lawyers if a party wishes to or needs to instruct them. A party should not be hindered from instructing the lawyer of its choice. Where documents have been disclosed to solicitors acting for a party in one set of proceedings, the rule would not normally prevent those lawyers from acting in another set of proceedings. The use of documents for the purposes of enforcement may be a use for the purpose of the proceedings in which documents are disclosed."

59. On the basis of these authorities it seems that:

i) Absent some provision in the relevant order, doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to other proceedings actual or contemplated, may constitute a collateral use.

ii) The best course is therefore to seek permission for collateral use to review as soon as the issue is identified.

iii) It would then be necessary to apply for permission for collateral use to deploy the documents if a (permitted) review concluded that it was desirable to use them.

60. Moving on from the more difficult aspects of this area, it seems to be quite clear (were it not self-evident) that using information and/or documents from one set of proceedings to threaten a third party falls squarely within the scope of the restriction on collateral use (see, for example, Birss J at [162] of *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch)).

61. What happens if this proper course is not taken? The answer is that the court has a jurisdiction to grant retrospective permission, but will exercise it only in limited circumstances.

62. One example is *Miller v Scorey* [1996] 1 WLR 112. In that case documents disclosed in one action had been used for the purposes of a separate action (referred to in the judgment as the 1995 action) in breach of the implied undertaking (as it then was).

Rimer J observed that, if the court had jurisdiction to grant retrospective leave, it seemed to him that the circumstances in which it would be proper to do so would be rare. However, he said:

> "If, in principle, I considered it just to allow the plaintiffs to use the discovered documents for the purposes of a separate action raising the same claims as the 1995 action, then, absent any special considerations pointing in a different direction, there would in my view be much to be said for declining to strike out that action and for giving leave to the plaintiffs to make use of the documents for its further prosecution. Such an order would, no doubt, amount to a de facto validation of what had happened to date, although the court could perhaps reflect its disapproval of that by the making of appropriate costs orders".

63. The question was more recently considered by Coulson J in *Shlaimoun v Mining Technologies International LLC* [2012] 1 W.L.R. 1276 [43-46]. As emerges from that discussion, the grant of retrospective permission will be "rare"; but it may be appropriate to grant it if no prejudice has been caused to any other litigant by the unauthorised use. It will also be relevant to consider whether the breach was inadvertent, whether if a proper application had been made timeously it would have been granted and the proportionality of debarring the applicant from use of the documents.

64. As to procedure, there is no clear answer as to the proceedings in which the application falls to be made. It appears that the applicant may in some circumstances have a choice whether to make the application for permission to make collateral use in the proceedings where the documents are disclosed, or in the proceedings where the documents are sought to be deployed.

65. There may well be circumstances where it will be necessary to apply in the proceedings where documents have been produced. For example, the party who produced the documents may not be a party to the separate proceedings and may well insist on being allowed to make submissions as to the use of its own documents.

66. However, there are some indications from the authorities to the effect that in some circumstances – for example where there may be case management implications - it will be preferable to approach the Court where the documents are sought to be deployed. In *Tchenguiz v SFO*, at [96], the Court of Appeal made clear that a relevant consideration (albeit not the most important consideration) is the effect that a permission to make collateral use will have on other parties in the proceedings where the documents will be deployed. On the facts of *Tchenguiz v SFO*, the application was made before the Court where the documents were produced, for the reason that the permission was sought to deploy the documents in Guernsey. The Guernsey courts could not have given such a permission. In *Tchenguiz v Grant Thornton*, the application was made before the court where the documents were to be used. The parties and the court specifically discussed the case management arrangements for the use of the documents after they are reviewed and disclosed, and it was "*in light of the forward case management arrangements*" that Knowles J permitted the collateral use (at [33]).

Lakatamia's Original Arguments

67. At the first hearing Lakatamia submitted that permission should be granted for the following principal reasons:

    i) Certain of the documents unearthed by the Search Order are relevant to the Morimoto Proceedings and would be disclosable by Lakatamia if the permission sought is granted.

    ii) It is a matter of fortuity that the Morimoto Proceedings are separate from the enforcement efforts in the instant proceedings. Had the Monegasque Villas been sold and the Net Sale proceeds dissipated before the substantive trial in these proceedings, then Mr Su's alleged co-conspirators would have been joined as defendants to these proceedings. That militates in favour of granting the permission sought.

    iii) Mr Su is a party to the Morimoto Proceedings. But for his bankruptcy, he would be obliged to provide disclosure in those proceedings.

    iv) The application is not resisted by Mr Su; and Mrs Morimoto (who is the only defendant to have engaged meaningfully with the Morimoto Proceedings) has herself demanded disclosure by Lakatamia of the documents obtained pursuant to the Search Order.

    v) The Morimoto Proceedings are, in effect, an extension of Lakatamia's efforts to enforce the Judgment Debt, and there is a strong policy in favour of promoting the enforcement of judgments: *Emmott v Michael Wilson & Partners Limited* [2019] EWCA Civ 219 at [44].

    vi) Lakatamia's allegations in the Morimoto Proceedings raise an important public issue concerning the administration of justice, namely, whether there has been a conspiracy to prevent the enforcement of a debt in the order of US$60 million owing under judgments of this Court. Granting the permission sought will assist the Court in determining whether that alleged serious assault on the administration of justice in fact occurred.

68. Lakatamia submitted that there could be no principled objection to the use sought.

69. Faced with the issues raised by Mrs Morimoto, and in the light of my apparent concern, the argument deployed shifted somewhat. While those arguments were still relied on, Lakatamia put much emphasis on a new "implied permission" argument.

The Implied Permission Argument

70. Mr Gardner, in response to the concerns which I raised responded with the argument that there was no breach because there had always been implied permission for this use in the Search Order, which contains the following standard undertaking:

> "The Applicant will not, without the permission of the Court, use any information or document obtained as a result of carrying out of this Order nor inform anyone else of these proceedings except for the purposes of these proceedings

> (including adding further Respondents) or commencing civil proceedings in relation to the same or related subject matter to these proceedings until after the Return Date"

71. He said:

> "Lakatamia considers that (as a consequence of this undertaking) it had an implied permission to use the documents not only to start new proceedings dealing with 'related subject matter'; but also to pursue proceedings on 'related subject matter' that were already in train, such as the Morimoto Proceedings. To the extent that it had the former permission, it must have had the latter: the greater includes the lesser."

72. This was then expanded upon in the skeleton lodged for the hearing today. This implied permission is said to be "*plain from Undertaking B in the schedule of undertakings given by Lakatamia when the Search Order was made*". It was submitted that I should note the following points about the scheme of the Search Order and the circumstances in which it was made.

    i) The Search Order was made post-judgment. It was not directed at the preservation of documents for use at trial. Rather, its purpose was to enable Lakatamia to identify the whereabouts and value of Mr Su's assets (in circumstances where Mr Su had refused over many years to comply with obligations to disclose this information); and thus to enforce against him the two judgments of this Court in its favour.

    ii) It was not, therefore, in the standard form appended to the Practice Direction to CPR Part 25 (which is directed at the preservation of documents). It contained a bespoke (and carefully calibrated) scheme to ensure that Mr Su's legitimate interests were protected. This scheme involved the appointment by the Court of an Independent Computer Expert and an Independent Reviewing Lawyer.

    iii) The relevant disclosure obligations on the part of Mr Su did not arise in connection with the substantive dispute: that dispute was resolved in 2014 when Mr Su was found to be personally liable for breach of contract. They arose in the context of subsequent enforcement efforts.

    iv) The Morimoto Proceedings originated in evidence given by Mr Su in the Su Enforcement Proceedings (at a hearing under CPR Part 71) about his assets. As such Lakatamia submits these proceedings are "*a subset of the enforcement proceedings*".

73. When the Search Order was made, Andrew Baker J was made aware of the Morimoto Proceedings; and was told in terms that the Defendants to the Morimoto Proceedings might provide information that was relevant to the enforcement efforts against Mr Su. Lakatamia stated (at paragraph 38 of its skeleton argument for the ex parte hearing) that:

> "… Cresta, Portview, UP Shipping and Blue Diamond [i.e. the corporate defendants in the Morimoto Proceedings] are all obliged in the ongoing litigation against Mr Su and his mother to disclose their worldwide assets in excess of US$10,000 and, if those companies were to comply with that obligation, Lakatamia may be able to obtain information enabling it to enforce the judgment debts (although Lakatamia could not rely on any affidavits served, or use information obtained as a result of the orders in question, in the current proceedings without the Court's permission). However, to date, none of these companies has provided any disclosure (although Mr Su has periodically purported to give disclosure on behalf of Cresta and Portview)…"

74. Against that backdrop, Lakatamia submitted that this Court has impliedly permitted Lakatamia to use the documents derived under the Search Order in the Morimoto Proceedings.

75. Lakatamia says that this means that the undertaking not to use any documents obtained pursuant to the Search Order pending the return date was subject to two exceptions. Lakatamia was entitled to deploy them immediately (i.e. before the return date) for the purposes of the Su Enforcement Proceedings; and in order to "*commenc[e] civil proceedings in relation to the same or related subject matter*".

76. Moreover, the undertaking was given in an order made in support of enforcement proceedings against Mr Su, in circumstances where:

    i) This Court has found that assets of Mr Su were passed to Mrs Morimoto;

    ii) The ancillary claim against Mrs Morimoto was already in train; and

    iii) The Judge who made the Search Order was aware of those proceedings.

77. It is said to follow from the above that:

    i) Even before the return date, Lakatamia had an implied permission (founded upon the express terms of the undertaking) to use the documents to start proceedings on "related subject matter".

    ii) That would have included starting the Morimoto Proceedings, which on any view are "related" to the subject matter of the instant proceedings against Mr Su. Since 2015, the sole issue in these proceedings has been enforcement; and the central allegation in the Morimoto Proceedings is that Mrs Morimoto (and the other Defendants) conspired to frustrate Lakatamia's enforcement efforts.

    iii) In the event, it was not necessary to start the Morimoto Proceedings, but that was only because such proceedings were already in train.

iv) Because Lakatamia would have been entitled to start proceedings against Mrs Morimoto it had, a *fortiori*, an entitlement to use the documents to pursue the claim against her.

78. On this basis, Lakatamia has always had an implied permission to use the Search Order documents in the Morimoto Proceedings. It submitted that there are a number of texts and authorities which support this proposition.

79. It follows from that that Lakatamia says that this application was unnecessary. Its position on this is a little obscure. At one point it suggested that it had always thought so but that "*Lakatamia nevertheless made the instant application because it appreciated the sensitivity of using documents obtained in one set of proceedings for the purposes of pursuing another, regardless of the degree of interrelation between them … It wished to have the Court's sanction before disclosing the documents in the Morimoto Proceedings.*"

80. Elsewhere however it says that the use of the Sherry documents was apologised for at the previous hearing "*before the argument on implied permission was articulated*", which suggests that Lakatamia's legal team in fact did not think that they had the implied permission contended for. This latter approach is far more consistent with (i) the fact that the application was made, and the basis on which it was made and (ii) the fact that Lakatamia did not provide disclosure of any of these documents in the Morimoto Proceedings.

81. It also seems to be consistent with Mr Gardner's evidence that "*It would (of course) be overstating matters to say that Lakatamia expressly considered that it had this implied permission to use the documents in the ways identified by Mrs Morimoto as collateral use.*"

Discussion

Implied Permission

82. As I have made clear in the course of the hearing I was surprised to find this argument being taken, and more so to find it being maintained. I regard it as completely misconceived and, despite Mr Casey's best efforts, incoherent.

83. For example if the implied permission argument had been correct it would have permitted use before the return date, which plainly was not what the Court ordered in this case; or what Lakatamia understood to be the case. To give but one example, Mr Gardner's Sixth Statement at paragraph 28(1) said that Lakatamia *"had no right to receive any of the documents yielded by the Search Order until after the return date, viz 2 July 2020"*. If that was the case before the Return Date it is not terrible clear how matters changed thereafter.

84. Logically the undertaking, which was in standard form, means the same thing in this case as it does in other cases. The fact that this case is post judgment does not mean that it is not directed to preservation, though the preservation is not for trial. Proceeding on this hypothesis, if the case advanced is correct, on a true reading of this standard form undertaking - given in all search orders - the party who obtains a search order has implied permission to deploy the documents and information it obtains in

pre-existing related proceedings. That would seem to drive a coach and horse through the scheme of CPR 31.22.

85. No sensible basis was put forward for this approach. None of the authorities cited by Lakatamia had anything to do with use extending beyond commencing new proceedings. Thus the texts relied on do little other than restate what the undertaking says, without any consideration of related proceedings:

    i) *Gee on Commercial Injunctions* writes at paragraph 25-018: "*The uses permitted by undertaking (4) of the example search order include commencing new civil proceedings 'in relation to the same or related subject-matter to these proceedings'*".

    ii) *Matthew & Malek in Disclosure* write: paragraph 19.18 fn 64: "*The search order in Sch.C, para.(4) contains an undertaking against collateral use of information or documents obtained as a result of the order except for the purpose of the proceedings or commencing civil proceedings in relation to the same or related subject matter until after the return date, without the court's permission*".

86. As for the casescited, in *Tajik Aluminium Plant v Ermatov* [2005] EWHC 2241 (Ch) the dictum of Blackburne J remarked at [189] ("*the purpose of that undertaking was to ensure that the information or documents so obtained would be used only for the purpose of these or related proceedings"*) is plainly obiter and there is no suggestion that extant related proceedings were being considered. It offers no support for an expansive view. Rather the Court was concerned to protect against a "*potentiality of abuse*" (at [6], and [189)]. The judge specifically endorsed the criticism made by the respondent as to the failure by the applicant to explain precisely what was intended to be done with the documents (at [206] and [207]).

87. The other case relied upon was *TBD (Owen Holland) Ltd v Simmons* [2020] EWHC 30, the relevant Search Order was in a different form to the order in the present case, being a pre-judgment order directed squarely at the preservation of documents. It was clearly geared towards the use of the documents (at [21(8)(a)]). Further Marcus Smith J made it clear at [48] that, had the applicant been entitled to disclosure of documents that had been caught by a search order, the undertaking would have entitled the applicant to *"use any information or documents for the purposes of the proceedings"*.

88. But the analysis there, which draws on the judgment of Mann J in *Hewlett-Packard v Manchester Technology Data* [2019] EWHC 2089 (Ch) [2019] 1 WLR 5832, makes an important point – namely at [48(6)] that:

> "Neither the Search Order Precedent nor the Search Order in this case makes any provision for disclosure. In my judgment, the Search Order Precedent and the Search Order simply make provision for preservation of documents. That is consistent with the undertaking given by the applicant's solicitor that all items obtained will be retained in their own safekeeping until the court directs otherwise. There is no permission to use the documents."

89. The judgment notes at [48(7)] that the undertaking which we are considering is an "inconsistency", concluding: *"That implies disclosure is ordered by the court, but it seems to me that (where disclosure is not specifically ordered in the body of the order) such an undertaking is redundant, albeit harmless."*

90. It is also worthy of note that in that case Marcus Smith J concluded (at [69]) that in the event the applicant had made a "significant and unjustifiable" breach of the search order, by searching imaged data which had been subject to no safeguards so far as confidential privileged and incriminating documents were concerned, and using it to commence proceedings against new defendants. So serious was the breach that he made a draconian order including the stay of the proceedings.

91. It follows that there is some doubt whether the undertaking, despite its wording, allows any use of the documents, because of the wording of the remainder of the standard form injunction. If there is a change brought about by the wording of the Return Date order it is hard to see why the undertaking is designed to be in the without notice injunction. It may well be that this is an area which will be clarified by future work on the standard form; certainly this case illustrates that Marcus Smith J's characterisation of it as "harmless" may be overoptimistic.

92. But in any event the fact that the undertaking gives - at best - permission to use only for the purpose of starting new proceedings is clarified by a consideration of the authorities referred to above and their very cautious approach. In particular Robin Knowles J in *Tchenguiz v Grant Thornton* said at [31]:

> "If however the purpose of the review of documents disclosed in litigation was to advise on that litigation, but when undertaken the review showed that other proceedings would be possible or would be further informed, then (i) the review would not have been for a collateral purpose, (ii) a further step would be a use for a collateral purpose, but (iii) the use of the document for the purpose of seeking permission or agreement to take that further step would be impliedly permitted."

93. This statement disagrees with the analysis of Hollander who, in a previous edition of his work quoted in the judgment in *Tchenguiz*, suggested that even seeking permission was logically outside the permission. The basic position is therefore that, while a realisation of relevance within a permitted review is itself permitted, even using that information to ask for permission for further review, or for use is on the edge of what is permissible.

94. The undertaking in the search order may against this background be seen as clarifying the issue as to how one goes about taking the next step where new proceedings are needed (against, it must be recalled, a background where search orders are usually sought under time pressure and with all the issues which justify a without notice application). That makes perfect sense. It enables the without notice nature of the relief to be joined to the necessary proceedings.

95. There is however no need - and no justification in the text - to extend it to related proceedings already on foot, particularly when one bears in mind that (i) those proceedings are *ex hypothesi* proceedings in which a without notice application will

be less likely and (ii) using a document to start proceedings means using the knowledge derived in the most limited sense, rather than actually deploying the document itself. What may be granted by the undertaking is thus the minimal extension potentially required for practicality.

96. It is also perhaps worthy of note that the concept of implied consent has been considered by Hollander in *Documentary Evidence* paragraph 28-15, dealing with the potentially anomalous situation with pre-action disclosure documents and *Norwich Pharmacal* product. Even in that context he notes:

> "…the 'implied consent' never actually obtained from the court nor asked for needs to be restricted to cases where it is a necessary implication as a result of the order made. It is better to put an express proviso in the pre-action disclosure or Norwich Pharmacal order for disclosure of the documents to the effect that the court gives consent. The passage to this effect in the previous edition was approved by Christopher Clarke LJ in *IG Index v Cloete*. Too ready an acceptance that the court had impliedly given permission might well lead to unacceptable laxity in relation to the need to obtain permission before use or, if that has not been done, to seek it retrospectively."

97. Here Lakatamia ask me to provide just such ready acceptance. I decline to do so. The purpose behind the rule is an important one, and it is important that the discipline of observing the undertaking (given to the court and expected to be observed by lawyers as officers of the Court) is not eroded or undercut.

98. The second hypothesis would be that the undertaking has the meaning which I have ascribed to it (i.e. that generally it means that there is no implied consent), but that for some reason, in the circumstances of this case it bears a different meaning.

99. I regard that submission as almost equally unattractive. There was no suggestion that counsel had explained to Mr Justice Andrew Baker that this was the position. Indeed it seems clear to me from the evidence served, in particular the passage in Mr Gardner's statement which I have set out above, that at the time those involved did not take the view that this was the position.

100. Had it been considered that the circumstances of this case meant that collateral use was permissible it would, it seems to me, have been incumbent upon those acting for Lakatamia to draw this fact to the judge's attention, as a departure from the normal position in relation to such injunctions.

101. As Gee *on Commercial Injunctions* makes clear at paragraph 17-022 by reference to *Gadget Shop Ltd v Bug.Com Ltd* [2001] F.S.R. 383:

> "The advocate is expected to use the current example order as the starting point for drafting the proposed order, …, to draw the salient features of the draft to the attention of the judge hearing the ex parte application, to draw to the judge's attention any relevant points based on the practice of the court, and to give disclosure of all facts and circumstances relevant to the

> judge's assessment of whether to grant the application and if so what should be the terms of the order. These include those material to … the content of the undertakings."

102. If it were the case that the undertaking was said, in these exceptional circumstances, to bear a different meaning to that which it generally bears, it would plainly have been incumbent on counsel to draw that point to the attention of the judge.

103. I conclude, without hesitation, that the implied consent argument is wrong. It follows that those acting for Lakatamia breached the collateral undertaking.

Breach of the collateral use of undertaking – extent and consequences

104. Mrs Morimoto argued that in its approach to its Collateral Use Application, Lakatamia and its solicitors appear to have paid scant regard to CPR 31.22. While I do not accept quite all of the points made, my own reading of the material forces me to the conclusion that those acting for Lakatamia did breach CPR 31.22 more than once, and that those breaches were of an escalating gravity.

105. The starting point is one of timing. I expressly asked for Mr Gardner to address the timeline of when relevant material was found, as against the date on which the Collateral Use Application was made. He did not do so directly, but the plain inference from his evidence is the relevant material emerged very soon after the Search Order was made. He tells me that the first tranche of documents was sent to his firm on 7 July 2020 and that "*an early batch of documents*" included the "Sherry" email string.

106. Yet Lakatamia waited until 22 September 2020 (that is very nearly three months) to issue its Collateral Use Application. It made no application for permission to review for collateral use (which could have been done on the documents within a very short time of the first relevant documentation being identified). I conclude that Lakatamia did not make the application promptly.

107. That question of timing of course is to some extent a separate question from breach. However, had that application been made it is almost inevitable that it would have been granted. Further, much of what happened afterwards would have been unobjectionable and not open to criticism. That is part of the backdrop to the issue I have to consider.

108. Proceeding in ascending order of gravity from here, the second area is the searches of the materials by reference to names, time periods and key words which have an overlap with the Morimoto Proceedings. This covers much of what was done in early October. Mrs Morimoto complains that there was no right to do searches at all and that "*Lakatamia's legal team has been focusing a significant proportion of its efforts in seeking to extract evidence damaging to Mrs Morimoto from documents obtained in other proceedings, without Mrs Morimoto having access to any of these documents.*" Lakatamia contends that these searches were equally relevant to the Su Enforcement Proceedings.

109. On this point, while I understand Mrs Morimoto's concern, I do not think it can be said that the focussing of the searches was a breach. The searches are relevant for the

purposes of the Su Enforcement Proceedings. Paragraph 33.2 of the Search Order required the Search Order documents to be organised by the Independent Computer Expert so that they could be "efficiently searched". This would have been pointless had the Court not intended for them to be searched. In order to render a review of some 800,000 documents effective, it had to be directed towards known repositories of assets, which necessarily implies a search.

110. Of course it is very possible that absent the Morimoto Proceedings these precise searches would not have been made at this precise point. It is impossible to tell if "but for" the existence of the Morimoto Proceedings (and its timeline) Lakatamia's legal team would have proceeded in the same way. I do not consider that there is sufficient evidence to conclude that there was a breach in this respect. However, by proceeding in this way without making the application, those acting for Lakatamia have certainly exposed themselves to the speculation and criticism which has been directed at them; which would have been avoided had an earlier application been made.

111. Had I come to a different view as regards this area I would have had no hesitation in granting retrospective permission as regards these particular searches. I accept that had such permission been requested at the return date, it would inevitably have been granted by Foxton J, against the background of the wording already alluded to and the fact that the judge gave Lakatamia permission for the documents reviewed by the Independent Reviewing Lawyer to be released to Lakatamia on a rolling basis. That was only consistent with Lakatamia having an immediate right to review the documents.

112. Then we come to the focussed searches by reference to the Morimoto Search Terms. This covers two aspects: (i) searches by Hill Dickinson of the documents released by the Independent Reviewing Lawyers and (ii) the instruction to the Independent Reviewing Lawyers to apply the Morimoto Search Terms from the Morimoto Proceedings.

113. Once the implied permission argument is disposed of, it is very clear that both of these were breaches of the collateral use undertaking. They are also ones which I regard as serious. The second has the added factor that it essentially involved a direction to the Independent Reviewing Lawyers to breach their obligations to the Court, which may put them in a difficult position.

114. The excuse tendered by Lakatamia (and persisted in, despite my obvious distaste for it at the first hearing) was that it was "*prompted by Mrs Morimoto's application for case management directions in the Morimoto Proceedings*". I remain of the view that this was no excuse. A request from an opponent cannot justify a breach of the rules. And as I have noted, the case management aspect could (and should) have been triaged by an earlier application for permission to review.

115. The final area is the "Sherry correspondence". On this it was accepted that, subject to the implied permission argument, this was a breach. An apology was made before me at the first hearing, and has been made (albeit somewhat tersely and conditionally) by Mr Gardner in his statement.

116. I do regard this as not only a clear breach, but a very serious one. What is more there appears to be some force in Mrs Morimoto's submission that the Sherry

correspondence was by way of an ambush. The timing is rather suggestive and I certainly regard the inference as open to be made:

i) The first documents reach Hill Dickinson on 7 July 2020. "An early batch" contains the Sherry emails;

ii) On 13 July 2020, Hill Dickinson write to Baker McKenzie for Mrs Morimoto asking about Sherry;

iii) On 20 July 2020 comes the Baker McKenzie denial;

iv) On 22 September 2020 the Collateral Use Application is made;

v) On 23 September 2020 Hill Dickinson write openly deploying the material obtained from the search.

117. If Lakatamia do not like that inference being said to be open, it can only be reiterated that a more cautious approach as regards making a prompt application would (i) have concentrated its lawyers' minds on whether such correspondence was open to them or advisable to use and (ii) have made it possible to make such points openly and without criticism.

118. I therefore do consider that there were breaches by Lakatamia's legal team of CPR 31.22, and I do regard them as being serious and concerning. The question thus becomes whether I should nonetheless give retrospective permission. Mr Head QC for Mrs Morimoto reminds me that that discretion is one which I should exercise very cautiously.

119. Having said that I am not persuaded that the authorities preclude me from exercising a discretion here. *Shlaimoun* may have been in the context of *Norwich Pharmacal* and so a special case (a desire for use for other proceedings is almost inherent in the relief), but I take the view that there must be some form of sliding scale, and that the factors which Coulson J considered are appropriate also here. I must simply take account of the fact that Lakatamia do not have the same favourable starting point as the applicant in *Shlaimoun*.

120. So far as this is concerned I am not particularly attracted by either of Lakatamia's "headline" points, namely that the breach was not deliberate and that it represented a *bona fide* attempt to assist the Court in the unusual circumstances of this case.

121. I accept that the breach was not deliberate; it was nonetheless serious and it was a breach which should not have happened. It seems to me that in the doubtless trying circumstances of attempting to enforce the Judgment Debt, Lakatamia's legal team were too focussed on the result, and simply neglected to think about the rules which underpin the exercise that they were performing.

122. As for attempting to help the Court; this is simply an excuse for having failed to make the appropriate application promptly. Had that been done, the Court could have had this assistance perfectly legitimately.

123. Nor am I attracted by the argument by reference to *TBD (Owen Holland)*, namely that this was not egregious because it was not as bad as the breach in that case. The fact

that worse cases of collateral use can be found, does not detract from the fact that more than one not insignificant breach occurred here.

124. I should add that neither am I particularly attracted by Mr Head's argument that a higher hurdle should be applied because this was material gained in the context of criminal proceedings, by reference to the authorities which I have cited earlier. It is true that technically the search order was made in the context of the Committal Proceedings. However those are *quasi*-criminal rather than criminal, it was a civil search order not an exercise of the powers of the criminal courts and the committal itself is inextricably linked with attempts to enforce a civil judgment of this court (an enforcement resisted tooth and nail by Mr Su).

125. In the end Lakatamia has four things weighing in their favour.

126. The first and by far the most powerful is the position as regards Mr Su. This can be regarded as a single factor, or a constellation of factors. But whichever way one arranges it, there is very much to be said about the unattractiveness of depriving Lakatamia of the ability to deploy these documents. Lakatamia points out that one of the acts that constituted the unauthorised collateral use (ie. running the Morimoto Search Terms on the Search Order documents) was an act that Mr Su should himself have performed in accordance with his obligations in the Morimoto Proceedings.

127. That links to the points that:

    i) The Morimoto Proceedings arise out of and are closely related to Lakatamia's efforts to enforce the Judgment Debt. Lakatamia are therefore entitled to pray in aid in this context the strong public policy in favour of promoting the enforcement of judgments;

    ii) The existence of separate proceedings is to some extent a fortuity in that had the Monegasque Villas been sold earlier these allegations would have come into the main trial, under a slightly different guise (here a citation of Lord Oliver in *Crest Home Plc v Marks* at 860C-D is apposite);

    iii) If Lakatamia is right in its allegations in the Morimoto Proceedings there has been a conspiracy to prevent the enforcement of a debt in the order of US$60 million owing under judgments of this Court and that it is in the public interest to determine on proper evidence whether such a serious attempt to undermine the administration of justice in fact occurred.

128. This factor, or constellation of factors, is powerful.

129. The second point is the relevance of the documents. I do not deal with this in any detail because permission has not yet been given, but I am satisfied from what I have seen that (perhaps unsurprisingly given the cross-over between the proceedings) the documents identified are ones which are plainly relevant and likely to be of assistance to the Court determining this matter at trial.

130. The third is the lack of prejudice. The application was not initially resisted by Mr Su, though sensing an opportunity, he has since changed his position. Mrs Morimoto initially positively demanded access to the documents. No prejudice has been asserted

by either of them, or Cresta or Portview; save as to the Sherry documents to which I shall come shortly.

131. There is no case management prejudice. In case management terms permission will not derail the Morimoto Proceedings – the parties have agreed a timeline to accommodate the production of this material.

132. There has been no harm caused by the breach. No step has been taken in reliance on the information obtained as a consequence of the application of the Agreed Search Terms beyond the communication of that information to Baker McKenzie in an attempt to agree case management directions in the Morimoto Proceedings.

133. There is the Sherry correspondence on which Mr Head relied, but while that use is entirely to be deprecated, that correspondence has not actually caused prejudice. I am not persuaded that the correspondence in question amounts to prejudice – or if it does to any extent, in the context it is not significant.

134. The fourth factor to which I do give some weight is that this is an unfortunately drafted part of the CPR, which when worked through has a tendency to require a degree of doublethink and which can certainly give rise to confusion. Indeed Hollander says: "*The lamentable drafting of CPR r.31.22 has led to unexpected consequences in every direction and it plainly wins the prize for the worst drafted section of the CPR*.". Had this been a better drafted provision the breaches would have been less susceptible to any form of excuse.

135. There is also to the limited extent that I acknowledge it, the lack of advertence in the breach.

136. Even taking all these points on board I have been troubled by whether the grant of permission would mean that there was insufficient sanction for breaches which I do regard as serious - and for which there plainly must be some sanction. Here the passage from *IG Index* to which Mrs Morimoto drew my attention is apposite:

> "Further, too ready an acceptance that the Court had impliedly given permission might well lead to unacceptable laxity in relation to the need to obtain permission before use or, if that has not been done, to seek it retrospectively."

137. However ultimately I conclude that to refuse permission would impose on Lakatamia a disproportionate penalty for breaches which were non-deliberate breaches by Lakatamia's legal team and not Lakatamia itself, against the very particular background which I have examined above and the lack of clarity in this area to which I have alluded.

138. I conclude that some significant degree of sanction can be imposed in other ways. I will therefore grant permission retrospectively, but I do so via this formal judgment detailing my conclusions and making very clear the serious view which the Court takes of such breaches, and the very real dangers run by those who commit them.

139. There will also be costs consequences. It seems to me that all the costs of this exercise should be paid by Lakatamia on the indemnity basis.