NCN: [2019] EWCA Civ 2256

Case No: A2/2019/1878

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT
QUEEN'S BENCH DIVISION
The Hon Mr Justice Murray
[2019] EWHC 2082 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19.12. 2019

Before:

LORD JUSTICE DAVIS

and

LORD JUSTICE SIMON

- -

Between:

(1) DSM SFG Group Holdings Limited **(2) St Francis Group 1 Limited** **(3) St Francis Group 2 Limited**	**Appellants**
and	
John Thomas Kelly	**Respondent**

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Adam Speker (instructed by **Pinsent Masons LLP**) for the Appellants

David Sherborne and **Greg Callus** (instructed by **Tenet Compliance & Litigation**) for the Respondent

Hearing date: 11 December 2019

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Approved Judgment

Lord Justice Simon:

Introduction

1. The main issue that arises on this appeal is the extent to which it is permissible for a litigant to rely on confidential information, obtained by covert recording of another's premises, to support a legal claim before that litigant has established the right to use that information.

2. It arises on an appeal from a decision of Murray J made on 16 July 2019.

Background

3. The respondent (the defendant in the action) is one of four family members who sold their interest in various businesses to the appellants (the claimants in the action). The transaction took place in 2017 and the respondent received approximately £23 million from the sale. Subsequently, he became concerned that there was something wrong with what had occurred. In late 2018, he entered the claimants' premises and placed recording devices in the office of Adrian Kennedy, the first appellant's in-house solicitor.

4. From late October 2018 to 22 December 2018 the respondent recorded approximately 40 hours of conversations, all of which were confidential and many of which were privileged and confidential, involving conversations with the appellants' solicitor, Stuart McNeill of Pinsent Masons who was, and remains, instructed to advise the appellants in relation to the respondent's complaints.

5. The appellants discovered the recording device, and issued an application for injunctive relief against the respondent: first, under section 3A of the Protection from Harassment Act 1997 in respect of both the recordings and other alleged acts of harassment carried out by the respondent against their employees; and second, in respect of breaches of confidence. The application was supported by Mr McNeill's 1st witness statement (dated 29 January 2019) in which he set out the matters of complaint and the grounds for an injunction. A Claim Form was also issued on 29 January.

6. The appellants' evidence was answered by a witness statement on behalf of the respondent. In his 1st witness statement (dated 4 February 2019), Arun Chauhan, a partner of Tenet Compliance and Litigation Ltd, among other matters, expressly denied that his client was responsible for putting the bugging device in the appellants' offices. Nevertheless, at §66, he set out the respondent's contention that:

> … there should be directions for an expedited trial to decide the central question whether the material which [the appellants] assert is confidential/privileged has that character; and he is prepared to offer sensible undertakings to 'hold the ring' pending that trial. But that process must enable [the respondent] properly to defend these proceedings by contending that the materials are not privileged/confidential.

This was consistent with the skeleton argument settled by the respondent's then counsel.

7. On 5 February 2019, the appellants' application came before May J, who approved a consent order between the parties to which a penal notice was attached ('the February order'). This included directions for a speedy trial: Particulars of Claim to be served by 8 March and a Defence by 22 March, a hearing for directions in the week commencing 13 May and a trial in July. The respondent was required to provide a copy of the recordings to Pinsent Masons by 6.00 pm on 11 February 2019. The respondent also gave various undertakings in respect of both the harassment claim and the breach of confidence claim. Schedule A to the February order contained the respondent's undertakings in relation to the PHA 1997 claim and schedule B contained his undertakings in respect of the appellants' breach of confidence claim.

8. Schedule B included the respondent's undertaking that:

> 2(1) until trial [or] further Order, he will not make any use of the Recordings except for the purpose of defending the Claim;

and,

> 2(4) he will retain solicitors and counsel to defend the Claim who are not instructed by him, or by any company he owns or controls, on any other matter concerning or related to or arising from the affairs of Corbally and/or any one or more of the Claimants, save that solicitors and counsel will not listen to the contents of the Recordings until Pinsent Masons have indicated whether or not they will apply for a variation of the directions as identified in the second sentence of paragraph 16 above.

9. Paragraph 16 of the February order provided:

> There will be liberty to apply. In particular, the [appellants] have liberty to apply without any need to show a change of position to seek to vary the directions to allow them to assert a claim for legal professional privilege once they are in receipt of, and have listened to, the Recordings, notice of any such application to be given by the defendant by 4.00 pm on Friday 8 March 2019.

10. On 11 February, the respondent made a witness statement in which he answered specific questions posed by Pinsent Masons according to an undertaking in paragraph 2(5) of Schedule B. These included:

> (iv) the identification, so far as he is able, of the precise location(s) of all and any voice recording devices placed at the Premises or which were otherwise intended to capture voice recordings of the Associated Parties.

11. The respondent's answer, endorsed with a statement of truth, was both emphatic and untruthful:

> 8. I confirm that I have no knowledge whatsoever as to where any voice recording device(s) were placed in the Premises.

12. The appellants served their Particulars of Claim on 8 March, as required by the February order. In summary, the claim alleged harassment and breach of confidence on the basis of the covert recordings made by the respondent at the appellants' premises which he then sought to use so as to put illegitimate pressure on the appellants and their employees.

13. On the same day they issued an application seeking orders: (1) to prevent the respondent's legal team from reviewing the recordings (as defined in the February order) until any privileged material had been redacted; (2) for a confidentiality ring to be established, confining disclosure of and access to the remaining recordings to the respondent's legal team only; and (3) a *Norwich Pharmacal* order, see *Norwich Pharmacal Co v. Customs & Excise Commissioners* [1974] AC 133, requiring the respondent to provide the identity of a whistle-blower whom, he contended, had provided him with details of a particular piece of confidential information.

14. That application was due to be heard on Wednesday 8 May. However, two events occurred prior to the hearing.

15. First, on 27 March, the respondent made a new witness statement in which he admitted lying in his first witness statement:

> 7. The correct position is that I instructed and was assisted (by allowing the individual access to the Premises) a retired police officer … to place a recording device in the [appellants'] offices, in particular the office of Mr Kennedy. Therefor there was no whistle-blower and I was fully aware of the location of the recording device …

16. The second event was the respondent's application (issued on Friday 3 May) seeking to be relieved of some of the undertakings that he had given in the February order in return for new undertakings. The basis of this application was that he wished to use material in the recordings to support broader claims relating to the sale of the business.

17. It is to be noted that the respondent did not serve a Defence as required by the February order. Perhaps more striking, in view of the basis on which Mr Sherborne advanced arguments before the Judge, they have still not done so.

18. The applications came before Mr Anthony Metzer QC (acting as a deputy High Court Judge). By an order dated 8 May, the ('the 8 May order'), the parties agreed some parts of the appellants' application; and further directions were given for the disposal of other parts, including part of the *Norwich Pharmacal* application.

19. Among the orders agreed were:

> 3.c. By 4.00 pm on 21 May, the parties agree to appoint Independent Counsel who shall review the Recordings and/or

> portions of the Recordings in which the [appellants] assert privilege …

20. By the terms of paragraph 4, recordings and portions of recordings in respect of which the appellants did not assert privilege were to be disclosed into a confidentiality ring, established so as to restrict disclosure and access of the recordings to the parties' legal teams.

21. Shortly after the 8 May hearing, the trial window was vacated for the first time by agreement.

22. On 5 July, independent counsel appointed under the terms of paragraph 3(c) of the 8 May order identified material which was privileged, and which should be excluded from the material made available to the respondent.

The Judge's order and reasons

23. It was the matters that had been left outstanding from the 8 May order that the Judge dealt with at the hearing on 16 July. Among the orders he made was a *Norwich Pharmacal* order, in terms which do not require further consideration.

24. So far as the respondent's application was concerned, he made an order allowing him to give revised undertakings, in terms which give rise to this appeal.

25. In place of paragraph 2(1) of schedule B of the February order, see [8] above, the Judge allowed additional words to be added to the exception:

> [u]ntil trial or further Order, he will not make any use of the Recordings except for the purpose of defending the Claim, <u>bringing any counterclaim and/or any related action in his own name and/or the name of any company he owns or controls</u> (emphasis added).

26. He also permitted the respondent to be released from his undertaking in paragraph 2(4) and to undertake in its place:

> [t]he [respondent] (be that personally and/or through any company he owns or controls) when instructing any firm of solicitors and Counsel, of his choosing, to investigate and/or bring any claim to deal with any matter concerning or related to or arising from the affairs of Corbally against any party to include, but not limited to, one or more of the Claimants and/or its officers/shareholders, shall undertake that a condition of any instruction to the firm of solicitors or Counsel will be that the firm or Counsel shall be the subject of the conditions of the prevailing Confidentiality Club.

27. In the course of reaching this conclusion, the Judge referred to the arguments and the cases to which he was referred, and concluded:

> 48. In my view, Mr Speker's argument that the whole purpose of the claim is to restrain the defendant from using illicitly

> obtained confidential information, and that he should not be allowed to do so until the court decides whether he has a right to do so, is a very powerful one. However, I am ultimately persuaded that the defendant would be unjustly hampered in properly mounting his defence and considering it in its full factual matrix, including the extent to which it gives rise to a counterclaim or cross-claims or related third party claims, by the current undertakings. The review by independent counsel resulting in identification of the privileged material in the Recordings is a material change of circumstances and a factor that supports allowing the Defendant's Application.
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> 49. As I have indicated, I am attracted by the argument that the court should decide on the principal claim and then, as Mr Speker says, at that point, if the judgment is in favour of [the defendant], he can bring whatever actions he wishes to bring. But I am persuaded that the judge who manages the trial can effectively case manage this, including providing appropriate relief to the claimants should it find in the claimants' favour on the principal claim.
>
> 50. I have noted and considered the *British American Tobacco case*, but the factual matrix is quite different, and, in any event, the decision is not binding on me. On the facts of this case, I am confident that the court can effectively case manage this to provide balanced protection to the rights of both parties and to ensure that Mr Kelly does not take 'unfair advantage', in the words of Lord Denning in *Seager v Copydex*. I consider that the potential prejudice to Mr Kelly of not ordering the release of the original undertakings and the substitution of the new undertakings is potentially much greater than the likely prejudice to the claimants, which, as I have said, in my view can be effectively managed by the trial judge.
>
> 51. In short, I conclude that it is in the interests of justice to allow the Defendant's Application and to trust to the case management powers of the trial judge to deal justly as between the parties on this issue.

28. Following this order, a second trial window was vacated.

The grounds of appeal

29. Mr Speker submitted that the Judge had erred in three material respects.

30. First, he had erred in principle in permitting the respondent to be released from the original undertakings in exchange for the revised undertakings. The original undertakings protected the appellant's confidential information until the issues in relation to the claim for breach of confidence were resolved; whereas the revised undertakings allowed the respondent to use and disclose the appellants' confidential information, so as to make claims including claims against third parties, before he had

established any right to do so. The Judge's order had the effect of allowing the use of confidential material before the right to do so had been established, see *Imerman v. Tchenguiz and ors* [2010] EWCA Civ 908, [2011] Fam 116 at [142]. In effect, the order granted the respondent summary judgement on the issue of confidentiality, subject to reservations whose effect was necessarily uncertain.

31. Second, the Judge had been wrong to find that the appointment of independent counsel which had resulted in the identification of privileged matters constituted a change of circumstances that justified releasing the respondent from his original undertakings. The appointment of independent counsel was foreseeable from the outset and, in any event, did not constitute a material change of circumstances.

32. Third, the Judge was wrong to release the respondent from his original undertakings on the basis that overall fairness could be secured by appropriate case management directions.

33. In answer, Mr Sherborne submitted that the Judge had made a decision to accept the revised undertakings in what was essentially an exercise of his discretion in the course of case management. As to the first ground, he argued that the respondent has always had the right to use the recordings to defend the claim for harassment and breach of confidence; and that what had occurred as a result of the Judge's order had been what he described as 'a subtle change in the purpose for which the recordings can be used'. The February order held the position on a basis that was just and convenient at the time, but with the delays to the trial date and developments in the case, the balance struck had become 'inequitable'. He accepted that confidential information should not be used as a 'springboard' for any purpose that a defendant wished; but argued that the 'respondent simply wishes to rely on the recordings for related commercial claims to be tried concurrently with the harassment and breach of confidence trial itself.'

34. As to the second ground of appeal, Mr Sherborne argued that the Judge was correct to conclude that there had been a change in circumstances that justified releasing the respondent from the original undertakings. He maintained that a material change of circumstances is not a condition that is required before a court can release a party from its undertaking; and, even if it were, there is no indication that the change of circumstance must be unforeseen. In any event, there had in fact been a change of circumstance since the original undertakings were first given. Originally they had been given in the context of what was understood would be an expedited trial. However, since then: (i) two trial windows had been vacated; (ii) the respondent had learned of a new concern about the valuation of certain assets; (iii) the appellants had confirmed that their premises had been raided by the Competition and Markets Authority; and (iv) the independent counsel had excluded all of the privileged material from the recordings. Such changes in circumstance justified relieving the respondent from the original undertakings.

35. So far as the third ground was concerned, Mr Sherborne submitted that the point was unsustainable on the facts. The parties agreed a consent order, endorsed by the Judge on 5 August 2019, which directed that the respondent could not disclose the contents of the recordings to a third party without the appellants' consent, unless that party were joined to the present claim and had given undertakings that it would join the confidentiality ring (along with its lawyers) on the same basis as the respondent and his lawyers. If a party were to refuse to join the confidentiality ring, the appellants and

respondent would jointly apply for injunctive relief for disclosure of the recordings, if necessary. It followed that the appellants' stated concerns could not arise. The complaint that the trial was not guaranteed to be in private was no different than the position if the release from undertakings had not been granted.

Discussion

The protection of confidential material

36. The principles to be applied when determining this question are well established, and can be summarised by reference to the judgment of Swinfen-Eady LJ in *Lord Ashburton v. Pape* [1913] 2 Ch 469 at 475:

> The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the publication of confidential information but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession the confidential information has come from themselves in turn divulging or propagating it.

He added at p. 477:

> The fact, however, that a document, whether original or copy, is admissible in evidence [in other proceedings] is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it being published or copied.

37. In *D v. L* [2003] EWCA Civ 1169, [2004] EMLR 1, Waller LJ observed, at [26]:

> … It seems to me that the correct starting point was that these tapes were being taken secretly, related to private matters being discussed in a private conversation and were taped without the consent of D. It may be less wrong for this to have been done by L in her own shared space than if she had put a listening device into what was D's space. It may also make it less wrong that her reasons were for the purpose of providing evidence in the event of domestic violence proceedings. [If the tapes provided such evidence and this application were concerned with tapes that provided such evidence the position would be entirely different.] But equity should as it seems to me impose on the conscience of the person who secretly takes tapes of a private conversation relating to private matters for a purpose that may be justified an obligation not to use the same for any other purpose ...

38. *D v. L* concerned two people in private conversation and the taping of a conversation by one person about what at the time were private matters without the consent of the other.

39. In the present case, the respondent had secretly and (at this stage of the analysis must be regarded as) impermissibly recorded conversations to which he was not a party. Once he had procured and listened to the tapes, the starting point should have been that he should not have been allowed to use their contents. The appellants' pleaded case is that he had in fact used them to target individuals and continued to misuse the contents for the purpose of causing damage to the appellants. The respondent had raised in argument possible legitimate uses of the material, but the court had made no decision as to his entitlement to use the material other than by way of defence, which it had been common ground from the start he might do, see [6] above.

40. In *Seager v. Copydex Ltd* [1967] 1 WLR 923, Lord Denning MR, at 931B-E, said this:

> I start with one sentence in the judgment of Lord Greene M.R. in *Saltman Engineering Co. v. Campbell Engineering Co* [1948] 65 RPC 203, 213:
>
> > If a defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.
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> To this I add a sentence from the judgment of Roxburgh J. in *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd* [1960] RPC 128 130, which was quoted and adopted as correct by Roskill J. in *Cranleigh Precision Engineering Ltd. v. Bryant* [1965] 1 WLR 1293, 1317:
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> > As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.
>
> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole of the information is private.

41. The Judge set out this extract in his judgment, before considering the Australian case which had been cited to him: the decision of Brereton J in the Supreme Court of New

South Wales: *British American Tobacco Australia Ltd v. Peter Gordon and anor* [2007] NSWSC 230. That case arose following a claim brought by the family of a Mrs McCabe against British American Tobacco Australia Services Limited ('BATAS'). After the conclusion of litigation, the law firm Clayton Utz, acting on behalf of BATAS, undertook a confidential internal review of the defence of Mrs McCabe's claim. During the course of that review, confidential documents ('the Relevant Information') were leaked, apparently by the partner who had conducted the confidential review and who, for unrelated reasons, had left Clayton Utz. Among the recipients of the confidential documents was the defendant, the senior partner of the law firm, Slater & Gordon, which had represented Mrs McCabe in her claim against BATAS. Mrs McCabe having in the meantime died, the executor of her estate (Ms Cowell) and Slater & Gordon wished to use the confidential documents to re-open the judgment of the Victoria Court of Appeal that had set aside the original judgment of Eames J in which Mrs McCabe had succeed against BATAS, so as to reinstate the original judgment.

42. Brereton J ruled against Ms Cowell and Slater & Gordon, holding that the defendants could only use the information for that purpose if and when they had successfully defended the breach of confidence claim. He gave his reasons:

> 31. In my view, therefore, if the Plaintiffs ultimately succeed, the relief to which they would be entitled would include an injunction prohibiting the use of the Relevant Information for the purposes of instituting legal proceedings. Unless the balance of convenience otherwise indicates, interim relief should not be less protective of the Plaintiffs.
>
> 32. As to the balance of convenience, the detriment to BATAS from declining relief in the more extensive form which it seeks, is that BATAS may then be exposed to proceedings, the decision to bring which is founded on information which Ms Cowell ought never have had. That is a real detriment, and one that cannot practically be undone after the proceedings are instituted. Thus, if there were use of the information even for the limited purpose which paragraph (3) of the proposed undertaking would permit, it is probable that a proceeding will then be instituted, and as a result processes invoked, which if at final hearing it is established that the information was confidential and ought not to have been used for that purpose, cannot be undone. On the other hand, Ms Cowell will, if ultimately successful in the breach of confidence proceedings, be at liberty to bring the Proposed Reopening Proceeding, using the Relevant Information then, and is in any event at liberty to bring that proceeding in the meantime, if the decision to institute them is not informed by the Relevant Information.

43. In order to ensure that the information was properly protected until ruled upon, the Judge accepted undertakings to ensure that the leaked information was only provided (see [33]):

> … to such of the lawyers she has retained or who she may retain to act for her in these proceedings who have executed an undertaking to keep the information confidential.

This was similar to the position in the present case under the February order.

44. In succeeding paragraphs of the judgment, Brereton J stressed the importance of the necessarily 'separate and anterior' nature of an application for injunctive relief in respect of a breach of confidence when it was proposed to seek to use the relevant information in other proceedings, see [50] and [54]-[55]. In relation to the application to transfer the proceedings from New South Wales to Victoria, he said this at [50]:

> 50. In this context, 'fragmentation' is unavoidable and essential: the breach of confidence proceeding is a separate proceeding, anterior to the proceeding in which it is hoped or apprehended that the confidential information may be used. This is because, unless an injunction is obtained before the information is tendered in evidence in the second proceeding, the fact that it has been obtained in breach of confidence or privilege does not render it inadmissible, and once in evidence its confidence is for all practical purposes destroyed [*Calcraft v Guest* [1898] 1 QB 759]. Thus in *Lord Ashburton v Pape*, the proceeding for an injunction to restrain publication in breach of privilege and confidence was a separate proceeding, which if it were to have utility had to be determined before the proceeding in which it was threatened to use the privileged information ...
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> 54. Other cases that illustrate the necessarily separate and anterior nature of the application for injunctive relief in respect of a breach of confidence when it is proposed to seek to use the relevant information in other proceedings include Sullivan v Sclanders, and AG Australia Holdings Limited v Burton. Accordingly, the two proceedings – the proceeding to restrain the use of information obtained in breach of confidence, and the proceeding in which tender of that information is apprehended – are necessarily separate and to that extent 'fragmented' … Moreover, because the issues in the two proceedings are different, there is no risk of inconsistent findings. Nor is there duplication: if the plaintiff succeeds in the breach of confidence proceeding, the defendant in those proceedings is prohibited from using the information in the other proceedings; whereas if the plaintiff in the breach of confidence proceedings fails, the defendant is at liberty to tender the information, if otherwise admissible, in the other proceedings …

45. Brereton J's conclusion was that, because of the significance of the order in which the issues were determined, the breach of confidence proceedings must be heard and determined separately, and before the proceedings in which it was intended to deploy them, see [55].

46. As noted above, the Judge (at [50] of his judgment) declined to follow the reasoning and conclusion in this case because 'the factual matrix was quite different' and because the decision was not binding on him.

47. The circumstances were different, but, whether or not the decision was binding on him, Brereton J's judgment set out a clear and principled approach to the issue that faced the Judge: that the issue of the confidentiality of documents should be resolved before they were deployed, and not at the same time or afterwards. The effect of the Judge's order was the reverse: the respondent was enabled to deploy the confidential information before he had established the right to do so.

48. The Judge's approach confused two different issues: first, the respondent's right to use the recordings so that he could defend himself in relation to the appellants' claim (a matter that was common ground, as is clear from the undertakings in the February order); and second, allowing the respondent access to those recordings so that he could use them to advance separate claims against the appellants and others associated with them before he had established the right to use them for such purposes. To allow the respondent to do so was not 'a subtle change in the purpose for which the recording could be used'; it was inequitable and had the potential for injustice.

The power to release a party from undertakings

49. In the light of my conclusion on the first ground, I can express my view on the second ground more shortly. The starting point is that the Court has an inherent jurisdiction to release a party from an undertaking that has been given, see *Kensington Housing Trust v. Oliver* (1997) 30 HLR 608. As an alternative, a court may decide to accept an offer of a further undertaking in different terms (as opposed to 'varying' it, which is not possible), and grant an application for release of the existing undertaking: see *Birch v. Birch* [2017] UKSC 53, 1 WLR 2959, Lord Wilson, at [5].

50. In *Di Placito v. Slater* [2003] EWCA Civ 739, [2004] 1 WLR 1605, proceedings were compromised by consent on terms that included a voluntary undertaking by the claimant not to commence proceedings for the revocation of probate after a specified date. The claimant did not comply with the time limit and applied for an extension. The application was refused.

51. The judgment of Potter LJ (with whom Laws and Arden LJJ agreed) set out the circumstances that may justify a release from undertakings in a court order.

> 31. … I prefer the phrase 'special circumstances' because, in my view, it is more apt to emphasise that the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.
>
> 32. In this connection, when deciding whether release from an undertaking is in the public interest and/or just as between the parties, three matters are of particular importance. First, the context, including of course the nature of the proceedings in

> which the undertaking was given. Second, the question whether the undertaking was (a) given to the court as an undertaking required by, or offered to, the court independently of the agreement of the other party (as in the case of undertakings required by, or offered to, the court as the price of obtaining a particular form of relief), or (b) as part of a collateral bargain between the parties (as for example as part of, or pursuant to, the freely agreed compromise of an action). In the former case, the court is concerned primarily with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court sees fit to discharge or release such undertaking. In the course of doing so, the court incidentally takes account of the interests and reasonable expectations of any party for whose benefit or protection the undertaking has been given. In the latter case, the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made.
>
> 33. Third, the court will be concerned with the circumstances in which the application is made. In relation to both categories of undertaking, the question is whether there are 'special circumstances' in the sense of circumstances so different from those which may properly be regarded as contemplated or intended to be governed by the undertaking at the time that it was given, that it is appropriate to release the undertaker from the burden of his undertaking.

52. This indicates that the discretion is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances intended to be covered or which ought to have been foreseen at the time the undertaking was given. See also Sir Terence Etherton C in *Safin (Fursecroft) Ltd v. Estate of Dr Said Badrig* [2015] EWCA Civ 739, [2016] L&TR at [63].

53. In *Birch v. Birch* (above), Lord Wilson indicated at [11] that, although the jurisdiction in respect of undertakings is discretionary and a discretion was always at large:

> … unless there has been a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive.

54. The issue facing the Judge was whether the circumstances that had subsequently arisen involved a significant change of circumstances, such that, by reason of their type or gravity, they could not have been intended to be covered or could not have been foreseen at the time the undertaking was given, and which justified depriving the appellants of the bargain that had been voluntarily been made.

55. Prior to the February order, Mr Chauhan's 1st witness statement, had set out his client's position in relation to the order sought by the appellants:

> [64] The Defendant is not prepared to agree to all the requested undertakings relating to the recordings. He is prepared to send all recordings and transcripts to my firm, to delete those recordings from all the devices in his possession and not to use them for any purposes but for these proceedings, namely to defend the Claim and the Application. The short point is that the Defendant must be entitled to defend these proceedings, which necessarily requires access to the recordings in question and cannot be expected to take on trust what the Claimants say about them.
>
> [65] My client obviously accepts that it is for the Court to adjudicate on whether this material is confidential/privileged. He also accepts that until the Court decides that question, he should not make use of the material and that steps should be taken to ensure that if it is confidential, whatever happens until trial does not prejudice that confidence. Likewise, he is prepared to instruct a legal team separate from that instructed on the present claim deal with the ongoing dispute with Corbally and his siblings in order that there can be no suggestion that material which the Claimants say is confidential is being misused (obviously if the Court concludes at trial that the material is not confidential, the position will be different.)

56. This was a clear acknowledgment that the issue of whether the respondent was entitled to rely on documents which were said to be either privileged or confidential must be decided before he could use them to make claims against third parties. The initial undertakings were provided so as to secure the position. What then changed?

57. Apart from the delay to the trial date and possible further claims that the respondent might wish to bring, Mr Sherborne was not able to identify very much. The review of the material by independent counsel either was, or should have been, foreseen in the light of the fact that the recordings included communications between lawyers. It was not, as the Judge found it to be a 'material change of circumstances,' It was not unforeseeable; and nor was the delay to the trial date the fault of the appellants in circumstances where the respondent had made an application in May which should have been refused in July. The respondent has had the recordings, less the privileged materials, since 19 July; yet there is still no Defence nor any formal indication of what it consists of.

Case management

58. The Judge was persuaded that the appellants' position could be preserved by proper case management, with the trial judge providing 'appropriate relief' should the Court find in the appellants' favour. There are familiar expressions to describe this approach, which involve unbottled genies, stable doors and bolting horses. Mr Sherborne relied on the facts of *D v. L* (above) at [7] as an example of how this might be done. However, that was a case in which confidential material was disclosed for

the first time during the trial. It provides no useful guidance on how such cases should be managed. For that, the principles set out in the Australian case provided a very much surer guide. This was not a case where the Judge was concerned with balancing prejudice, as he found at [50] of the judgment. It was a case in which the undertakings had properly been offered and where there had been no sufficient change in circumstances such as to come close to justifying allowing the respondent to resile from them.

Conclusion

59. In my view the respondent's application, which has itself contributed to the delay in the trial, should have been dismissed. The undertakings had been properly offered and accepted so as to preserve the appellants' position pending an anterior decision on the breach of confidence claim; there had been no significant change of circumstances which justified altering the position adversely to the appellants; and no identifiable case management decisions would have been an appropriate substitute to the proper management of the issues envisaged in the February order.

60. At the conclusion of the oral argument, we announced that the appeal would be allowed, and ordered that the initial undertakings should be restored. These are my reasons for that decision.

Lord Justice Davis:

61. I agree with the judgment of Simon LJ.

62. The initial undertakings contained in the February order were, in my opinion, a thoroughly sensible and practical way of holding the ring pending the anticipated expedited trial. It was, to my mind, very unfortunate that the respondent thereafter applied to be released from important parts of those undertakings; and even more unfortunate that the Judge was persuaded to accede to such application.

63. In my view, with all respect to the Judge, his conclusion was plainly wrong. Release from the undertakings was neither convenient nor just. It was not convenient because case-management at trial (on a hypothetical basis that the confidential information might be properly and publicly deployed for cross-claims even though the right to do so remained to be established) would potentially have been a nightmare and would potentially have greatly added to the complexity of the trial. More fundamentally, it was not just: precisely because it would have permitted the respondent to make use of covertly obtained confidential information to his own perceived advantage without his right to do so first having been established. That would, in the circumstances of this case, have been a demonstrable unfairness at that stage to the appellants. Moreover, holding the respondent to the original undertakings would occasion no prejudice to the actual defence of the claim, as the Judge seems to have thought: because the February order in terms already permitted use of such confidential information to defend the claim.

64. I also agree that no cause sufficient to justify release from the undertakings, in the form of a material change of circumstances or otherwise, in any event begins to be shown.

65. The parties are to agree a Minute of Order. The claim itself should now come on for trial at the earliest practicable date and without further delay.