Neutral Citation Number: [2023] EWCA Civ 874

Case No: CA-2022-002421

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Nicklin
[2022] EWHC 3011 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE WARBY

- -

Between :

DR ERICA SMITH	**Claimant/ Appellant**
- and –	
DR CHRISTOPHER BACKHOUSE	**Defendant/ Respondent**

- -
- -

Hugh Tomlinson KC and Ben Hamer (instructed by **Brett Wilson LLP**) for the **Appellant**
The Respondent did not appear and was not represented
Naina Patel, Advocate to the Court (Instructed by **The Treasury Solicitor**)

Hearing date: 11 July 2023

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Approved Judgment

This judgment was handed down remotely at 3.30 p.m. on 21 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the circumstances in which the court can refuse to accept undertakings which a defendant has agreed to provide to the court as part of accepting a Part 36 offer made by the claimant. The issues arise in the context of a claim for relief pursuant to sections 1 and 3, Protection from Harassment Act 1997, and in relation to misuse of private information and unlawful, unfair and inaccurate processing and processing without appropriate security of personal data pursuant to the General Data Protection Regulation (EU) 2016/679, the UK GDPR and the Data Protection Act 2018.

2. The Appellant, Dr Erica Smith ("Dr Smith") appeals paragraph 1 of the order of Nicklin J dated 8 November 2022 ("the Order") by which the judge refused to accept paragraphs (1), (2) and (3) of the undertaking sought by Dr Smith in her Part 36 offer (and referred to as a, b and c in the offer itself) which the Defendant, Dr Christopher Backhouse ("Dr Backhouse"), accepted and agreed to give to the court. The judge accepted paragraphs (4) – (8) of the undertaking (referred to as d, e, f, g, and h in the offer), however.

3. Dr Smith appeals on the following bases, namely, that the judge: (i) was wrong in law not to accept proper and enforceable undertakings which had been agreed between legally represented parties on the acceptance of a Part 36 offer where they were not illegal, immoral or equivocal and there were no "other exceptional circumstances"; (ii) in any event, the judge was wrong in law to find that the undertakings were too broad; (iii) further and in any event, he was wrong to find that they were too vague; and (iv) he was wrong to reject the undertakings entirely rather than accepting them subject to provisos narrowing their terms to meet his concerns.

4. Dr Smith was represented before us by Mr Tomlinson KC and Mr Hamer. Dr Backhouse, however, was not represented and did not appear before us. Instead, the judge, who gave permission to appeal, suggested that the Court consider asking the Attorney General to appoint an advocate to the Court to ensure that the point was properly argued. Warby LJ subsequently invited the Attorney General to consider appointing an advocate to the court. Ms Patel fulfilled that role, for which we are grateful.

Background

5. Dr Smith is a physicist and post-doctoral fellow at Indiana University. Dr Backhouse was formerly a Royal Society University Research Fellow in the Department of Physics and Astronomy at University College London. They both conducted research at Fermilab, a collaborative research facility.

6. Dr Smith's claim as pleaded was concerned with a campaign which was conducted between 9 November 2020 and 25 May 2021 which included: the creation of social media accounts impersonating her; the misuse of her private information and personal data, including the dissemination of manipulated pornographic images that falsely purported to be her; anonymous texts and online messages including threats of violence, a threat to "swat" her (which was a reference to an intention to deceive the police into sending an armed response team to her home address) and threats of arson; misusing her details such as her email address, phone number and postal address by

signing her up to receive unwanted services and messages and providing these details to third parties, including subscriptions to far right hate groups and fetish websites; and attempts to monitor, access and/or shut down her personal social media account, including by submitting a report to Twitter stating that she had died.

7. Dr Smith's claim was issued on 23 December 2021. She made a Part 36 offer on 29 December 2021 ("Dr Smith's Part 36 Offer"). The material terms of Dr Smith's Part 36 Offer were: i) the payment of £49,975 in damages by Dr Backhouse; and ii) within 14 days provision of a signed undertaking to the court by Dr Backhouse that he would not:

(1) Publish by any means, including but not limited to on the worldwide web, social media, telephone or any form of text, email, instant electronic messaging service, any express or implied reference to or any pictorial depiction of the Claimant, save

(a) for the purposes of seeking legal advice or in the context of legal proceedings, and

(b) for complying with any legitimate obligations under his contract of employment.

(2) Attempt to impersonate the Claimant.

(3) Seek to monitor the Claimant's activities, including but not limited to her activities on the worldwide web, social media or the activities of her friends or family.

(4) Attempt to contact the Claimant by any medium or any platform, including but not limited to telephone or any form of text, email, instant electronic messaging service, in person or otherwise either directly or indirectly save through lawyers or where he is required to do so under a contract of employment for legitimate purposes.

(5) Attempt to contact by any medium or any platform individuals who he knows or suspects are friends, family, acquaintances and/or colleagues of the Claimant save where he is legitimately required to do so under a contract of employment.

(6) Knowingly approach within 50 metres of the Claimant save where he is legitimately required to do so under a contract of employment.

(7) Otherwise engage in any activity that amounts to harassment of the Claimant or any other activity that is likely to cause her distress.

(8) Will not (sic) encourage or permit any third parties to engage in any of the above acts on his behalf.

8. A defence was filed on 10 February 2022 and Dr Backhouse made a Part 36 offer on 15 July 2022 in which he offered to make a payment of £35,100 to Dr Smith and to provide a signed undertaking (not expressed to be to the court) in similar terms to paragraphs (1) – (5) and (7) of the undertaking set out in Dr Smith's Part 36 Offer. Dr Backhouse's offer was not accepted. On 24 August 2022, however, Dr Backhouse accepted Dr Smith's Part 36 Offer in full and final settlement of her claim. That acceptance rendered Dr Backhouse liable to pay £74,000 odd in costs.

9. A draft Consent Order was signed by Dr Backhouse on 5 September 2022, and the undertaking containing paragraphs (1) – (8) was signed personally by Dr Backhouse

on 7 September 2022. Both Drs Smith and Backhouse were legally represented at that stage. The draft Consent Order provided as follows:

> "UPON the Defendant accepting the Claimant's part 36 offer dated 29 December 2021
>
> AND UPON the Defendant undertaking to the court not to carry out the acts set out in the schedule of this consent order, and upon the Defendant acknowledging that he understands the terms of his undertaking to the court and the consequence of not complying with it
>
> BY CONSENT IT IS ORDERED AND DIRECTED that
>
> (1) The Defendant pay the Claimant the sum of £49,975 in damages by 4 p.m. on 7 September 2022.
>
> (2) The claim is to be stayed save for the purposes of enforcement of the interim costs orders and any application by the Claimant for permission to read a statement in open court pursuant to paragraph 3.2 of Practice Direction 53B.
>
> (3) The Defendant is to pay the Claimant's costs of the claim in a sum to be assessed if not agreed".

10. The draft Consent Order had a penal notice, in conventional terms, endorsed on the front page, warning Dr Backhouse that, were he to breach the undertaking he had given to the court, he might be found in contempt and face penalties ranging from a fine to imprisonment. The undertaking in the schedule to the draft Consent Order was in the same terms as had been set out in Dr Smith's Part 36 Offer. At the foot of the undertaking was the following signed by Dr Backhouse personally:

> "(A) I acknowledge that I understand the terms of this undertaking to the court and the potential consequences of failing to comply with it.
>
> (B) Specifically I acknowledge that I understand that if I breach this undertaking to the court then I may be (a) found to be in contempt of court and may be imprisoned, fined or have my assets seized; (b) liable to pay the Claimant damages and/or legal costs and (c), the subject of criminal complaint and prosecution.
>
> (C) I acknowledge that I have received independent legal advice on (i) the terms of the undertaking and wider consent order; (ii) the consequence of breaching the undertaking and (iii) the claim generally".

11. The draft Consent Order was filed at Court on 8 September 2022 with an application notice seeking an order in those terms "reflecting that the claim has been compromised by way of acceptance of CPR Part 36 offer and should be stayed on the

terms set out therein" and that "the claim has been settled on the terms agreed between the parties reflected in the signed consent order filed herewith".

12. Further, on 22 September 2022, an application notice to read a Statement in Open Court was issued on Dr Smith's behalf and was granted by Choudhury J on 23 September 2022. The statement was read on 11 October 2022. On 10 October 2022, however, an email was sent to the parties on behalf of the judge, stating that he was concerned with the "breadth of the undertaking and whether it is one that is appropriately given to the Court". The matter was considered at a hearing on 8 November 2022. Dr Backhouse's position remained that he was prepared to give paragraphs (1) – (8) of the undertaking contained in Dr Smith's Part 36 Offer, or as many as the Court was willing to accept.

The Judgment in outline

13. The judge gave an ex tempore judgment the citation for which is [2022] EWHC 3011 (KB). In summary, he concluded that:

    i) The relevant legal principles were those which he set out at [14] to which I refer below;

    ii) The parties had reached a contractual agreement with which the court was not being asked to interfere, nor would it do so; and that the terms of the contractual settlement could not be clearer [16] and [17];

    iii) The court should give appropriate weight to the fact that the terms had been contractually agreed in circumstances in which both sides were legally represented but "balanced against that, the Court should not uncritically accept undertakings given to the Court, in whatever terms the parties have agreed." [19];

    iv) the problem arose because undertakings given to the Court have the potential to be enforced by the Court and, in general, the Court would only impose an injunction, or accept undertakings in lieu, in terms the breach of which it would be willing to enforce, if necessary, by a committal order: *South Buckinghamshire District Council -v- Porter* [2003] 2 AC 558, at [32] per Lord Bingham [20];

    v) the more imprecise the terms of an undertaking the less likely it is to be effective because if the Court, on a contempt application, considers the undertaking to be ambiguous or unclear, the benefit of the doubt will be given to the defendant [21];

    vi) it was appropriate to accept an undertaking in the terms of paragraph (7) because it had been agreed between the parties and the law generally prohibits harassment: section 1 of the Harassment Act 1997. Although harassment is not defined, beyond the terms of section 7 of that Act, each citizen is expected to ensure that their conduct does not transgress the law [24];

    vii) the position was different in relation to paragraphs (1), (2) and (3), however. They were too broad. The judge went on:

> "26. . . . These restrictions were no doubt intended to deal with what the Claimant and her advisers believed was the menace that they alleged was at the heart of what the Defendant was alleged to have done . . . However, these restrictions are too broad. Paragraph (1) arguably prevents the Defendant from ever mentioning the Claimant again in any context. It would even appear to prevent the Defendant apologising to the Claimant, were he minded to do so. Paragraph (2) was clearly intended to prevent a repetition of the Defendant's alleged online impersonation of the Claimant by establishing fake social medial accounts, but the terms would also catch any other form of impersonation, even arguably to mimicry. Paragraph (3) would arguably prevent the Defendant from carrying out an internet search of the Claimant."

viii) The judge concluded that the problem with accepting "such wide undertakings" was that it increased the risk of the parties being back in court on a contempt application. He went on:

> "27. . . .The court has limited resources. Experience shows that contempt applications can become hard-fought litigation often involving substantial disputes of fact over what is alleged to have taken place. Undertakings given to the Court that are vague or too wide make it more likely that there will be future disputes. In terms of undertakings, in my judgment the Court can properly want to regulate the instances where it is prepared to enforce future compliance with undertakings to those cases where the parties have made proper efforts to provide undertakings that comply with the requirements of clarity and certainty. The wider the terms of an undertaking, and the more likely that they are to catch behaviour that cannot arguably be of any form of wrongdoing, the more vigilant the Court will be as to whether it is appropriate to accept those undertakings as ones properly given to the Court. The Court will not uncritically sign up to policing an agreement the terms of which are vague and unjustifiably wide. Equally, the Court is not going to agree to its powers of compulsion in respect of injunctions or undertakings to the Court being used to enforce agreements that embrace trivial or insubstantial matters . . . ";

ix) The court had jurisdiction to accept only some of the agreed undertakings; he could not re-write the undertakings because they had been agreed; and that what the court was doing by accepting the undertakings was to increase the powers of enforcement available to a claimant [28];

x) He would reject paragraphs (1), (2) and (3) which were "too vague/wide" but accept paragraph (7) and it was likely that what would fall within (1), (2) and (3) would fall within (7) in any event [29];

xi) Accordingly, the court would accept paragraphs (4) – (8) and in relation to any breach of paragraphs (1) – (3), Dr Smith would be left solely to her contractual remedies [31].

Submissions in outline

14. In his written submissions, Mr Tomlinson KC, on behalf of Dr Smith, pointed out the anomaly which he says that the judge's approach has produced. The judge refused to accept undertakings leaving Dr Smith to her contractual remedies which would include enforcement by means of an injunction. He did so, however, on the basis that it was questionable whether the court would enforce the very same undertakings. The effect, it is said, is to deprive Dr Smith of the protection of clear and unequivocal undertakings to the Court which Dr Backhouse, with the benefit of legal advice, had freely agree to.

15. Mr Tomlinson does not quarrel with the legal principles which the judge set out at [14] of his judgment. In summary, they were that:

i) parties are free to settle litigation on terms which go beyond what a court would order by way of relief: *Mionis v Democratic Press SA* [2014] EWHC 4104 at [7] and [2017] EWCA Civ 1194, [2018] QB 662. Having done so, the defendant's contractual agreement curtailing his rights was one which could legitimately be enforced by the claimant;

ii) in terms of punishment for subsequent breach, an undertaking to the Court has the same effect as an injunction;

iii) generally, the court cannot re-write the contractual terms of a settlement agreed by the parties: *Watson v Sadiq* [2013] EWCA Civ 822 and *Zenith Logistics Services (UK) Ltd v Keates* [2020] EWHC 774 (QB), [2020] 1 WLR 2982. In general, where the parties are represented, the court should not enquire as to the terms of the settlement which they have reached and in making a Tomlin Order to give effect to a settlement was not giving the Court's approval to the settlement terms. The practice was different in the Commercial Court, however, where schedules to Tomlin Orders should be reviewed, the justification being that: "The court will not make an order providing that the parties can reinforce its terms on application without checking whether all the terms make that appropriate." (Paragraph D18.5 Admiralty and Commercial Court Guide);

iv) the circumstances in which the court can decline to enter a consent order are limited: *Bruce v Worthing Borough Council* [1994] 26 HLR 223, 228 and *Arthur JS Hall & Co. v Simons* [1999] PMLR 374;

v) the terms of an injunction or an undertaking must be precise and clearly inform the defendant what conduct is prohibited: *Boyd -v- Ineos Upstream Limited* [2019] 3 WLR 100 [34(4)]; *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 [50]; and, in the particular context of harassment, *Hayden -v- Dickenson* [2020] EWHC 3291 (QB) [53] and *MBR Acres Ltd -v- Free The MBR Beagles* [2021] EWHC 2996 (QB) [76], [91]-[94];

and

vi) the Part 36 regime permits a degree of flexibility as to certainty of terms which are more generous than would be the case if normal contractual principles were applied: *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188.

16. Mr Tomlinson emphasises two further points, however. First, he says, that where parties have agreed a consent order to settle an action, the Court should only interfere in exceptional circumstances. In this regard, he relies upon passages in *Bruce v Worthing Borough Council* and in the *Mionis* case on appeal. In *Bruce*, Staughton LJ made the following remark which was obiter, at 228:

> "In our adversarial system a judge who is asked to make a consent order should do so, provided that the parties are of full age and understanding and that the order is not illegal, immoral or so equivocal as likely to give rise to further dispute."

In the *Mionis* case, Sharp LJ stated that:

> " 87… the court in *Warren's* case plainly thought that however a settlement was reached, whether through statutory mechanisms, the rules of court or through the private agreement of the parties, there were powerful and common underlying reasons which made it right to uphold such a bargain, save in exceptional circumstances; and its views on the significance to be attached to such contractual settlements are important and highly persuasive."

Sharp LJ was referring to *Warren v The Random House Group Ltd* [2009] QB 600. Mr Tomlinson says that "exceptional circumstances" would include illegality, immorality and equivocal terms and that there were no exceptional circumstances in this case.

17. Secondly, he emphasises the public policy reasons behind upholding a bargain to dispose of litigation which has been freely entered into and which, all things being equal, will be enforced by way of an injunction if necessary: *Mionis* at [91] and *ABC (Arcadia) & Ors v Telegraph Media Group Limited* [2018] EWCA Civ 2329, [2019] EMLR 5 [62], in which *Mionis* was cited with approval.

18. In support of this, in his written submissions, he draws the analogy with the treatment of settlement terms contained in a Tomlin Order. In those circumstances, he says that the court will make an order staying proceedings on the terms set out in the schedule to the order without enquiring into those terms (*Zenith Logistics Service(UK) Limited v Coury* [2020] 1 WLR 2982 at [67]). Where the scheduled terms are breached, the other party can apply to the court for an injunction and at that stage, the court will scrutinise the terms to determine whether they are illegal, immoral or equivocal. He says that a similar exercise is conducted when a party seeks an injunction to enforce undertakings in a contract. Mr Tomlinson says, therefore, that there is no conceptual difference between the conversion of contractual undertakings into an injunction and converting undertakings made in a Part 36 offer into undertakings to the Court and

nor is there a difference in terms of enforcement between an injunction and an undertaking to the Court.

19. Mr Tomlinson also accepted that:

    i) even though the form of the undertakings may have been agreed as part of a settlement agreement, the court may decline to accept them if they are insufficiently clear and would cause embarrassment to a court required to decide whether their terms had been infringed: *Wilson & Whitworth Ltd v Express & Independent Newspapers Ltd* [1969] 1 WLR 197 at 201 E – H; and that

    ii) undertakings will not be accepted if they are contrary to public policy and the public interest: the *Mionis* case at [103].

20. He disagrees with Ms Patel, however, in two particular respects. He says: that there is no general principle that the court will refuse to accept undertakings if they do not strike an appropriate and proportionate balance between the need to avoid too wide a restraint and to provide an effective remedy in cases where there is an agreement; and that the court is not restricted to accepting undertakings which it would have power to order were it to grant an injunction. It can go beyond those parameters where there is an agreement and the *Mionis* case is a good example of such a case.

21. In summary, therefore, Mr Tomlinson says that the judge failed to give proper or any weight to the fact that paragraphs (1) – (3) of the undertaking were part of an agreed settlement of litigation and that he should have appreciated that there were no exceptional circumstances which would warrant refusing to accept them or any public policy reasons for doing so.

22. In addition, he submits that the judge was wrong to say that paragraphs (1) – (3) were too broad or too vague. He says that they are in clear terms and were directed at the nature of the harassment which had been suffered. By way of example, he referred us to a number of cases in which he said that similar undertakings had been accepted by the court:

    i) *Dew v Mills-Nanyn* [2022] EWHC 1925 (QB) was a committal for contempt of court. The claim for harassment and misuse of private information had been settled on the basis, amongst other things, of undertakings given to the court that the defendant would refrain from doing the things which had constituted the campaign against the claimant which had been complained of. The judge, Collins-Rice J, described it as "quite a long list of things, because the activities comprising the course of conduct complained of were multiple" [3]. She explained that the defendant "undertook, among other things, not to communicate with Ms Dew, her family, her friends, her university or her employers. He undertook not to monitor them or impersonate them. He undertook not to publish Ms Dew's private and confidential information. He undertook, in other words, to stop harassing." [3];

    ii) *Galloway v Ali-Khan* (unreported 19 April 2018 per Warby J (as he then was)) was a judgment sentencing for contempt in relation to twenty-six admitted breaches of undertakings given to the court. The defendant had given an

undertaking to the court not to make any further public statement about certain litigation or any public statement defaming or disparaging Mr Galloway. The defendant was accused of breaching those undertakings and an order was made recording further undertakings made to the court including: not to publish in any way, including online, any reference, whether express or implied, to Mr Galloway; and not to re-publish, including but not limited to by re-tweeting on Twitter or sharing on Facebook, any statement made by a third party which referred to the defendant;

and

iii) *R v Alex Belfield* – (unreported 16 September 2022 per Saini J) being sentencing remarks and judgment on the Crown's application under section 5A Protection from Harassment Act 1997. In addition to sentencing the defendant for the counts of stalking in relation to which he had been found guilty, Saini J was also concerned with an application for restraining orders to prevent further harassment against the complainants. The defendant had conducted an online campaign against the complainants. Saini J made orders restraining him from contacting, or attempting to contact the complainants by any means, whether direct or indirect; publishing through any form of publication or electronic communication, any statement or other material relating or purporting to relate to them; and monitoring the use by any of them of the internet, email or any other form of electronic communication.

Mr Tomlinson drew attention to the similarity between paragraphs (1) – (3) and the relief in those cases and pointed out that just as the relief in those cases had been necessary to address the risk of harm as a result of the conduct complained of, paragraphs (1) – (3) were necessary in this case to protect Dr Smith.

23. Mr Tomlinson also observed that the judge's examples of possible trivial breaches could occur in any circumstances and were no reason to decline to accept paragraphs (1) – (3). He said that: the judge's objection to paragraph (1), that it might prevent an apology was invalid, no apology having ever been offered and were it to be, it could be proffered through solicitors; there was no substance in the criticism of paragraph (2) as to mimicry, impersonation being an important restriction in the light of Dr Backhouse's conduct; the criticism of paragraph (3) had no substance because the term "monitor" is drawn from section 2A(3)(d) Protection from Harassment Act 1997 which refers to "monitoring the use by a person of the internet, email or any other form of electronic communication"; and furthermore, there was nothing vague about paragraphs (1) – (3).

24. Lastly, and in the alternative, Mr Tomlinson submitted that although the court could not settle the terms of undertakings itself, the judge should have indicated that he would accept paragraphs (1) – (8), subject to provisos which narrowed them to meet his concerns about vagueness and given the parties the opportunity to consider their position. That was what happened in the *Wilson* case when it first came before the court in 1936.

25. Ms Patel agrees that if undertakings are to be accepted by the court there must be certainty of terms, a nexus between the undertakings and the conduct complained of, there must be no illegality and the terms must not be contrary to public policy.

26. In relation to the need for certainty and a nexus between the undertakings and the conduct complained of, she relied both on the *Wilson* case and a decision of the Federal Court of Australia in *Australian Competition and Consumer Commission v Auspine* [2006] FCA 1215. That was a case in which a settlement agreement had been reached which included giving undertakings to the court. In the circumstances, the court's jurisdiction to grant an injunction was statutory and much of the court's reasoning turned upon the breadth of that statutory jurisdiction.

27. Amongst other things, however, Besanko J observed that the power to accept undertakings was subject to the same limitations that applied to its power to grant an injunction [25], that the terms should be clear and unambiguous [29]; and that there should be a relevant nexus between the undertakings and the conduct complained of. In relation to nexus, however, he stated that the court was not limited to restraining a repetition of contravening or alleged contravening conduct but as far as future conduct was concerned, an undertaking might be in wider terms [30]. He quoted extracts from cases which turned, amongst other things, upon whether the injunctive relief or the undertakings proffered were "appropriate" which was stated to be a matter of evaluative judgment.

28. In fact, Besanko J declined to accept the undertakings which had been part of the settlement agreement, for a number of reasons. These included the fact that he considered that he did not have power under the relevant statute to make an order or accept an undertaking requiring an external audit of a compliance programme to be conducted by a third party. He considered it inappropriate to accept an undertaking which left the definition of the major obligations undertaken by a respondent to a third party or which made the question of whether there has been a breach turn on the assessment or opinion of a third party.

29. Ms Patel also drew an analogy with the circumstances in which the court will exercise its discretion to grant an injunction which she submitted was based upon the justice of the particular situation. The court, she said, took a practical approach and determined what degree of protection was appropriate and proportionate in the circumstances. She accepted, however, that such protection might be wider than the claimant's legal rights.

30. With regard to public policy Ms Patel referred us to *Neville v Dominion of Canada News Company Ltd* [1915] KB 556 and to *London Regional Transport & Anr v The Mayor of London & Anr* [2001] EWCA Civ 1491. She also noted that when granting an injunction, the court should ordinarily be willing to enforce it and that the order made is just in all the circumstances: *South Buckinghamshire District Council v Porter* per Lord Bingham at [32].

31. She submits, therefore, that where there is a settlement agreement, when determining whether it should decline to accept agreed undertakings, the court must consider all of the limiting factors to which she referred. She says, therefore, that there was no error of law in the judge's approach.

32. In relation to the breadth of the paragraphs, Ms Patel says that the authorities to which Mr Tomlinson referred us by way of analogy are of little assistance. They turned on their own facts and both in the case of *Dew* and of *Galloway* neither those facts nor the undertakings are set out in full. She says that the judge was entitled to take the

view he did about the breadth of paragraph (1) and the unnecessary breadth of the term "impersonation" in paragraph (2) which would go beyond the conduct complained of which was impersonation online. She says that the same is true about paragraph (3). For the same reasons, she says that the judge was entitled to decide that each of paragraphs (1) – (3) was too vague.

Discussion and Analysis

- *Applicable principles*

33. There is no dispute, therefore, that the court may decline to accept undertakings even if they form part of a settlement agreement but that the circumstances in which it may do so are limited. The real question for us is whether the judge's identification of the limited circumstances was wrong in law.

34. In answering that question, it is convenient first to set out some general principles: (i) there can be no dispute that an injunction is a discretionary remedy which will be granted where it is just to do so and that the court should be slow to make an order which it would not be willing to enforce: the *South Bucks District Council* case per Lord Bingham of Cornhill at [32]; (ii) the circumstances in which an injunction might be refused are not closed and will turn on the particular facts of the case: *D v P* [2016] ICR 688 per Sir Colin Rimer at [21]; (iii) as a matter of general principle, an injunction must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order and so that the injunction will be enforceable, if necessary, by means of contempt proceedings: see Gee on Commercial Injunctions (7th Ed), chapter 4, section 1 citing *Redland Bricks v Morris* [1970] AC 652 (666F-667C) citing *Kennard v Cory Brothers and Co Ltd* [1922] 1 Ch 265 at 274; and (iv) an undertaking is a very serious matter with serious consequences the breach of which can lead to a fine or imprisonment. It should be recorded in writing in full and clear terms and although there may be room for argument as to its interpretation, the circumstances in which such arguments can be raised should be kept to a minimum: *Zipher v Markem Systems Limited* [2009] EWCA Civ 44 at [19].

35. Further, in circumstances in which undertakings are offered in lieu of the injunctive relief which has been sought, the court will be cautious about accepting them in terms that it would not itself have granted by way of injunction to restrain the conduct complained of. However, there is no firm rule about the extent of the undertakings which may be accepted. As Leggatt LJ (as he then was), with whom David Richards LJ (as he then was), and Underhill LJ agreed, stated in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [50], in the context of an injunction:

> " . . . While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decision of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford

> effective protection to the rights of the claimant in the particular case."

36. So far as I am aware, there is no direct authority to support Ms Patel's submission that when determining whether to accept undertakings, the court must strike an appropriate and proportionate balance between the need to avoid too wide a restraint and to provide an effective remedy. It seems to me that the better formulation of a similar, if not the same principle, is contained in the extract from Leggatt LJ's judgment to which I have referred. It must apply equally to undertakings given in lieu of injunctive relief. It needs no further explanation.

37. Ms Patel's submission in relation to the need for a nexus between the injunctive relief granted or the undertakings in lieu of that relief, based on the Australian authority of *Auspine,* is also answered by the extract from Leggatt LJ's judgment. In any event, it seems to me that the underlying reasoning in *Auspine* was much the same. *Auspine* turned, for the most part, upon the relevant statutory jurisdiction. Besanko J accepted, however, that the terms of the relief granted could be wider than the conduct complained of and quoted with approval passages in which it was stated that the question was whether the relief was "appropriate".

38. Not surprisingly, the authorities also support the view that the court will decline to accept undertakings where the terms are imprecise or uncertain, a proposition which is not in dispute. The need for precision and certainty is obvious. There is no need to provide examples. The party giving the undertaking must be clear about what is required and the terms of the undertaking should be such that the court will be in a position to enforce it. I should also add that it goes without saying that undertakings should not be frivolous or of a nature that the enforcement of them would bring the court into disrepute. That would cover the examples of an undertaking never again to eat bananas or to sing "La Marseillaise" in Trafalgar Square each Wednesday, to which the judge referred at [18] of his judgment.

39. It is also common ground that the court will refuse to grant an injunction and, accordingly, will decline to accept undertakings on the basis of illegality or immorality or if they are contrary to public policy.

40. The *London Regional Transport* case, to which Ms Patel referred us, is an example of both illegality and public policy. The court was concerned with an order discharging an injunction on the defendants' undertaking not to publish a report, except in a redacted version. The claimants had sought to restrain publication of the report even in a redacted form on the basis that because of certain confidentiality agreements, the court had no option but to prevent disclosure. The defendants contended that even if there were a breach of confidentiality (which was not accepted) there was a strong public interest in publication. Both parties were public authorities. The need for proportionality in a restraint on freedom of expression if the restraint was to be justifiable for the purposes of Article 10(2) of the European Convention on Human Rights was accepted. Both Walker LJ (as he then was) with whom Sedley LJ concurred and Aldous LJ agreed, concluded that when granting an injunction the court must respect the relevant Convention rights which the judge had done.

41. Sedley LJ explained at [60] that in the absence of any meaningful threatened breach of confidentiality, by virtue of section 6(1) of the Human Rights Act 1998, it was

unlawful for either claimant to seek, whether by contract or by lawsuit, to interfere with Article 10 rights, whether those of the defendants or those of the public.

42. The case of *Neville* was concerned with public policy. *Neville* was a case in which the court was required to decide whether a contract was enforceable and concluded that it was in restraint of trade. Whilst basing his decision on restraint of trade, Lord Cozens-Hardy MR also observed that what he regarded as a bribe paid to secure an absence of comment upon land at a particular location with which the company was concerned, was an agreement which was contrary to public policy. Pickford LJ agreed with that approach quoting the words used by Atkin J at first instance to the effect that for a newspaper to stipulate for consideration that it would refrain from commenting on fraudulent schemes was quite contrary to public policy.

43. As both Mr Tomlinson and Ms Patel accepted, in a case such as this, the starting point is slightly different, however. The court is not required to address the merits of the underlying claim. Instead, it is concerned with a settlement agreement. Mr Tomlinson accepted that the fact that, in this case, the agreement arose from the acceptance of a Part 36 offer made no difference. In the absence of a good reason to the contrary, the agreement will be enforced in accordance with its terms. As Lord Cairns LC explained in a different context in *Doherty v Allman* (188) 3 App Cas 709 at 720:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. . ."

That was a case which involved a leasehold dispute where the court held that there was, in fact, no relevant negative covenant and where an injunction was ultimately refused. Lord Cairns LC's remarks are, therefore, strictly obiter, but in subsequent cases they have been considered to be authoritative, nonetheless.

44. The principle applies, all the more so, where the agreement is to settle litigation. Sharp LJ (as she then was) with whom Gloster and Lindblom LJJ agreed, emphasised the importance of the settlement of litigation in the *Mionis* case at [88] – [89] as follows:

> "88. There were obvious advantages to both sides to this litigation, in reaching a settlement, as there are for litigants more generally. As Lord Bingham put it:
>
> > "The law loves a compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by court decision. A party who settles foregoes the chance of total victory, but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat.

> The law reflects this philosophy, by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, and by giving special standing to an agreement embodied, by consent, in an order of the court":
>
> see the foreword to *Foskett, The Law and Practice of Compromise*, 4th ed (1996), p xi.
>
> 89. I would add that settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases. The law therefore encourages and facilitates the mutual resolution of disputes by various means, for very sound reasons of public policy; and there is obviously an important public interest in the finality of settlement."

45. *Mionis* was a case in which media defendants had entered into a confidential settlement agreement with the claimant, a businessman who had brought libel proceedings in respect of a series of articles in a newspaper which concerned his alleged involvement in tax evasion. The agreement prohibited the defendants from making any reference at all to the claimant and his immediate family, in print or online, in any jurisdiction, subject to certain specified exceptions. Following the publication of further articles in alleged breach of the agreement, the claimant applied for an injunction to enforce it and for an inquiry into damages caused by the alleged breach. The judge refused to grant any relief, on the basis that the relevant clause was too vague and uncertain to be enforced by an injunction. On the claimant's appeal to this court, the defendants conceded that the clause was valid and enforceable, and that they were in breach of its terms, but argued that its enforcement would amount to a disproportionate interference with their right to freedom of expression under Article 10, to which s.12(4) of the Human Rights Act 1998 required the court to have particular regard.

46. As explained in a judgment of the court in *ABC v Telegraph Media Group Ltd* [2019] EMLR 5 at [27] – [29], the Court of Appeal held in *Mionis* that the settlement agreement formed an important part of the analysis which section 12(4) of the Human Rights Act 1998 required the court to undertake, and that since the settlement agreement had been made with the benefit of expert legal advice on both sides, it would require a strong case for the court to conclude that the bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles: Sharp LJ at [67].

47. Sharp LJ continued as follows:

> "90. The parties in this case decided, with the benefit of expert legal advice on each side, to enter into a contract that compromised their legal proceedings…
>
> 91. Parties are of course generally free to determine for themselves what primary obligations they accept; and legal certainty requires that they do so in the knowledge that if something happens for which the contract has made express

> provision, then other things being equal, the contract will be enforced (pacta sunt servanda). This is a rule of public policy of considerable importance. Furthermore, the principled reasons for upholding a bargain freely entered into, obviously apply to one that finally disposes of litigation with particular force."

48. Under the heading "Conclusions in this case", Sharp LJ stated that it was "axiomatic" that "the right to freedom of expression is a Convention right of fundamental importance" and that the court must have particular regard to it, by virtue of section12(4) of the Human Rights Act 1998. She continued, at [102]:

> ". . . Accordingly, close attention must be paid to those rights, and in particular to the extent that the defendants' participation in a free press permits and requires them to exercise those rights.
>
> 103. However, article 10.2 permits restrictions on those rights for the protection of the reputation and rights of others, which includes, in this case, the private rights of the parties under an otherwise validly constituted contract of settlement. This is something to which the law attaches considerable importance and save in well-defined circumstances, such contracts would normally be enforced. The issue thus resolves itself into one of proportionality, and in particular, whether the restrictions in clause 3.2 are a disproportionate interference with the defendants' article 10 rights.
>
> 104. The wording of section 12 requires a consideration of article 10, because the court is being asked to grant an injunction that affects freedom of expression. However, in my view, the analysis after a settlement agreement has been freely entered into and the parties have waived their respective rights, is not the same as that which arises at the interim stage say, in a contested privacy or defamation action. That is to ignore the importance in the public interest of parties to litigation, including this kind of litigation, being encouraged to settle their disputes with confidence that, if need be, the court will be likely to enforce the terms of a settlement freely entered into on either side."

49. It seems to me that the passages to which I have referred form the ratio of the decision in *Mionis* which was reaffirmed and adopted in the *ABC* case. In the circumstances, therefore, it is clear that when determining whether undertakings are to be accepted or enforced, it is essential that proper and due weight is given to the settlement agreement itself and the public interest of the parties to litigation being encouraged to settle their disputes in the confidence that the terms of their settlement will be upheld. Furthermore, in cases in which Article 10 is engaged the question is one of proportionality.

50. It follows that although the court will not accept undertakings which are contrary to public policy, illegal or uncertain, proper weight must be given to the terms of a

settlement agreement and, as Sharp LJ put it, it would require a strong case for the court to conclude that such a bargain restricting Article 10 rights was disproportionate and should not be enforced other than on ordinary contractual or equitable principles.

51. It follows that I do not consider that the use of "exceptional circumstances" as a touchstone in determining the circumstances in which the court will decline to accept undertakings where they form part of a settlement agreement is either helpful or accurate, whether or not one is concerned with a settlement agreement which may seek to curtail freedom of expression. Although Mr Tomlinson relied on the passage in the judgment of Staughton LJ in the *Bruce v Worthing Borough Council* case, in fact, Staughton LJ did not use the phrase. Although Sharp LJ did use it at [87] in the *Mionis* case, she did so in the course of explaining the approach adopted in *Warren's* case. It was not part of her central reasoning.

- *Grounds 1, 2 and 3*

52. How does this all apply in this case? In my judgment it is clear that the judge erred in law in his approach to whether paragraphs (1), (2) and (3) of the undertaking should have been accepted. Although he referred to the acceptance of Dr Smith's Part 36 Offer and the settlement agreement and noted the principles in the *Mionis* case at [14i)], having done so, he does not appear to have given it any further or any proper weight. Furthermore, despite the fact that this case is concerned with restriction on freedom of expression, he also failed to apply the test of proportionality, described by Sharp LJ in *Mionis*.

53. Instead, at [27] he appears to have concentrated on whether there would be difficulties in enforcing the terms of an agreement which he describes "vague and unjustifiably wide". He seems to have based his decision to decline to accept paragraphs (1) – (3), therefore, upon their breadth which he considered would make it more likely that there would be future disputes and that they "might catch behaviour that cannot arguably be of any form of wrongdoing".

54. As I have already explained, breadth in itself is no reason to decline to accept an undertaking, when it arises from a settlement agreement. Even in the context of whether an injunction should be granted, the question is whether the restriction is necessary to afford effective protection to the rights of the claimant in the particular case: see Leggatt LJ's explanation in the *Cuadrilla* case at [50].

55. Furthermore, the judge's specific criticisms of paragraph (1), which led him to refuse to accept it, were unfounded. He stated that it arguably prevented Dr Backhouse from ever mentioning Dr Smith again in any context and would appear to prevent him from apologising to her, if he were minded to do so. Save for a matter raised by my lord, Lord Justice Arnold during the hearing, there was nothing to suggest that the terms of paragraph (1) were too broad to meet the nature of the wrong which had been committed and which might be repeated. Furthermore, the undertaking itself contained two specific caveats and given the fact that both parties were represented, it could be assumed that the question of an apology had been considered and rejected.

56. In relation to paragraph (2) (attempt to impersonate Dr Smith), the judge's criticism was that the terms were wide enough to catch any form of impersonation, including mimicry. I agree with Mr Tomlinson that this criticism has no substance. The terms of

the undertaking are not vague and there would be no difficulty in enforcement were it necessary. Furthermore, given the nature of the harm, there was no basis upon which it could be said that the terms were not necessary to afford Dr Smith effective protection. Further, as Mr Tomlinson submitted, if a trivial breach were pursued by means of contempt proceedings, the court would be in a position to respond appropriately.

57. As to paragraph (3), the judge's criticism appears, once again, to come under the heading of breadth. He considered that its terms would arguably prevent Dr Backhouse from carrying out an internet search for Dr Smith. I have already explained that breadth is not the correct criterion. In any event, I agree with Mr Tomlinson that the criticism has no substance. Paragraph (3) uses the term "monitor". That has a specific meaning for the purposes of the Harassment Act 1997. Further, as a matter of ordinary language it refers to conduct which extends beyond a single internet search.

58. In my judgment, therefore, the judge erred in law in relation to the basis on which he approached the question of whether paragraphs (1), (2) and (3) should be accepted and compounded that error by criticising the terms of the paragraphs on insubstantial grounds. The judge himself noted that the court must specify precisely what behaviour is being prohibited [23]. It seems to me that that is what paragraphs (1), (2) and (3) seek to do. It is particularly important to do so in a case of this kind where the conduct has been wide-ranging and damaging and distressing to the claimant. It is of no assistance to say that such conduct might well fall within (7), in any event. That related specifically to harassment and would require Dr Smith to prove more in order to establish a breach.

59. In fact, as Mr Tomlinson pointed out, paragraphs (1), (2) and (3) are not unusual in cases of this kind and are similar to those which have been accepted in other cases, such as *Dew*. Although the cases to which Mr Tomlinson took us in which it was said that similar undertakings had been given and accepted by the court, including *Dew*, turn on their own facts, they are at least some indicator of the kind of restrictions which are the norm in cases of online and personal harassment. It seems to me that the restrictions in paragraphs (1) – (3) are appropriately tailored to the wrongdoing complained of in the *Cuadrilla* sense.

60. I also consider that the judge's conclusion that paragraphs (1) – (3) are too vague is misplaced. He himself commented, albeit in a different context, that the terms of the contractual settlement could not be clearer.

61. It follows, therefore, that I consider that there was an error of law in the judge's approach.

Ground 4

62. Before turning to my own assessment, it is necessary to deal with the last ground of appeal. It is common ground that the judge cannot re-write the undertakings which have been agreed (*Watson v Sadiq* at [49]), nor is it in dispute that the judge might have explained his concerns and given the parties an opportunity to consider the position (the *Wilson* case when it first came before the court in 1936.) It seems to me

that it was open to him to take that course. He was not under any duty to do so, however. Accordingly, it cannot be said that the judge erred in law in this respect.

Conclusions and the caveat

63. In my judgment, if one considers paragraphs (1) – (3) with the settlement agreement in the form of Dr Smith's Part 36 Offer firmly in mind and applies the approach in the *Mionis* case, including the duty to consider the matters arising as a result of sections 6 and 12(4) Human Rights Act 1998 and Article 10 of the Convention, paragraphs (1) – (3) must be accepted, subject to one caveat. But for that one matter, I consider that they were proportionate. The matter arises in relation to paragraph (1). As my Lord, Lord Justice Arnold observed during the hearing, paragraph (1) would prevent Dr Backhouse from citing any scientific paper produced by Dr Smith in any academic and/or scientific publication of his. This would seem to be restrictive, disproportionate and contrary to public policy in the light of the fact that both Dr Smith and Dr Backhouse appear to be research scientists who work in a similar field. In the circumstances, it would seem appropriate and proportionate and in accordance with Dr Backhouse's right to freedom of expression that paragraph (1) should be subject to a suitable proviso.

64. It seems to me that the appropriate mechanism to give effect to a proviso, in these circumstances, is to make a declaration in the following form:

> "IT IS DECLARED THAT it shall not be a breach of paragraph (1) of the Undertaking in the Schedule hereto for the Respondent to cite any scientific article or book authored or co-authored by the Appellant in any scientific article or book authored or co-authored by the Respondent."

It follows that a schedule should be appended to the order setting out the paragraphs of the Undertaking and that the order should include the declaration.

65. Subject to that proviso, I would allow the appeal for all of the reasons set out above.

Lord Justice Arnold:

66. I agree.

Lord Justice Warby:

67. I also agree.