

JERSEY / JUDGMENT

CSS Limited and Inns -v- Nautech Services Limited [2015] JCA 021 (30 January 2015)

[2015] JCA 021

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Court of Appeal (Unknown) 30 January 2015 Before : James McNeill, Q. C., President John Martin, Q. C., and David Perry, Q. C. Between CSS Limited Christopher Ernest Inns Appellants And Nautech Services Limited Respondent Advocate O. A. Blakeley for the Appellants. Advocate E. Moran for the Respondent.

judgment

the president:

Introduction

1. The appellants appeal from a judgment given on 26 August, 2014, by the Samedi Division of the Royal Court (Clyde-Smith, Commissioner, with Jurats Kerley and Blampied). In the proceedings which gave rise to that judgment the appellants were, respectively, the first and fourth respondents to a representation made by the present respondent ("Nautech"). By the judgment the second appellant was held to be in contempt of an order for interim relief restraining infringement of copyright in confidential information pending trial and the first appellant was held vicariously liable for that contempt.

Background

2. Nautech, a company incorporated in Jersey in 1992, provides services by way of placing specialist personnel in the maritime and seismic field. Over the years it has built up an extensive database of personnel in respect of whom it has independently verified their internationally recognised qualifications and safety certification. The second appellant was for a number of years employed as the operations manager of Nautech, being responsible for the Jersey office, the provision of personnel to clients, the IT systems and staff. 3. The first appellant was incorporated in February 2013 and in the next month two key personnel resigned from Nautech to join the first appellant. Following that event, Nautech issued various proceedings in April 2013. Shortly before those proceedings were raised, the employment of the second appellant by Nautech was suspended and on 28 May, 2013, he was

dismissed as an employee. He subsequently worked for the first appellant, but as an agent rather than as an employee. The Interim Injunction 4. An interim injunction was obtained at an early stage and subsequently varied. In its original terms it sought to prevent infringement of Nautech's copyright in a specified database or the making of further use of Nautech's confidential information and/or trade secrets. After amendment by the court on 7 May, 2013, the order prohibited the respondents "from infringing [Nautech's] copyright in any of [Nautech's] confidential information and/or trade secrets or any part thereof for any purpose ..." 5. A question of construction of the order arose in the proceedings below us before the Royal Court which determined, at paragraphs 24 to 26, that in the contempt proceedings before it, Nautech had to show firstly that its confidential information contained within specified databases had been used and secondly that such information was subject to Nautech's copyright. That construction is not in issue in the appeal before this court. As is shown in those paragraphs, the specified databases were restricted to the works identified in Schedule F of the amended Order of Justice. The Alleged Breach 6. As matters eventually stood before the Royal Court, the instances of alleged breach comprised five emails sent by the second appellant to individuals on separate dates between June 2013 and January 2014; the second appellant using email addresses sourced from his own Gmail account. The Findings Below 7. Insofar as relevant to this appeal, the Royal Court found as follows. 8. The Royal Court found that it was not in dispute that in or around June 2012 contacts held in a BlackBerry device used by the second appellant were exported to a Jersey Telecoms laptop and from there exported to the personal Gmail account of the second appellant. From that Gmail account the contacts were exported to a new iPhone and, quite separately, to a CSV file (an electronic file storing, among other matters, email contact details and often used transfer data from one software utility to another) and placed in a folder in his Outlook mail box. A few minutes later a second export of default contacts was made to a personal storage electronic file used by the second appellant's Microsoft Outlook e-mail system Mailbox which was maintained as part of his work with Nautech and could be accessed from his Workstation at Nautech (paragraph 46). 9. The Royal Court found that the second appellant had no memory of why the separate export of contacts to the two files had taken place and considered it unlikely that those transactions would have taken place without his involvement (paragraph 47). 10. The Royal Court found it clear that the contacts held on the second appellant's Workstation at Nautech were amongst those exported to his Gmail account and had come from his Workstation via his BlackBerry. The Royal Court, whilst considering that the BlackBerry contacts could, in theory, have been sourced from somewhere outside Nautech, was satisfied beyond all reasonable doubt that the contacts contained on the CSV file were work contacts originating ultimately from his Workstation (paragraph 49). 11. The Royal Court noted that in evidence the second appellant was unable to give any other explanation as to how the contact details had got onto his Gmail account (paragraph 59). 12. The Royal Court accordingly was satisfied to the criminal standard that in relation to the specified emails the second appellant had used information that had derived from his Workstation at Nautech. 13. In determining whether or not Nautech had copyright in confidential information the Royal Court determined that, in the light of the business

which Nautech and its competitors operated, all such businesses would regard their database of contractors as being central to their business, of real value, and confidential (paragraph 66). 14. Turning to the copyright issue, the Royal Court noted the evidence of the second appellant as to the judgment required on his part in arranging the database from the incoming emails and their content (paragraph 79). It reached the view that the exercise of skill and experience brought to bear by the second appellant in the process was substantial (paragraph 80). It concluded that the work of selection and arrangement was an intellectual creation and that the database qualified as original literary work in which copyright subsisted (paragraph 81). Grounds of Appeal 15. The grounds of appeal, as finally presented in oral argument are, in the main, challenges to the findings in fact by the Royal Court. Put succinctly they were as follows:- (i) The Royal Court erred in its understanding of the evidence and the case for the Representor. (ii) The evidence did not support a finding that the second appellant's Gmail contact list was sourced from his Nautech Workstation. (iii) The court erred in considering whether use of the email addresses constituted a misuse of confidential information as it did not consider whether the names and email addresses themselves were confidential. (iv) The Royal Court had not found that the second appellant had used a confidential directory. (v) To the extent that the court did implicitly find that there had been misuse of a confidential directory, the Royal Court had failed to take into account (a) uncontested social media evidence, (b) existing connections which the second appellant had with certain of the contractors and (c) whether the June 2012 transfer was authorised by Nautech. (vi) The Royal Court erred in law in failing to ask whether the relevant information was in fact already in the public domain or within the second appellant's own knowledge and experience. 16. Turning to copyright issues the appellant's grounds were:- (i) That the Royal Court had erred in failing to make factual findings as to which of the databases listed in Schedule F it was considering. (ii) The Royal Court had been in error in proceeding on the basis that the database in question was the second appellant's own Outlook in box. (iii) The Royal Court was wrong in determining that the content of the Outlook in box constituted individual intellectual creation. The evidence did not justify a finding that the finding of emails went beyond the use of significant labour and skill. (iv) The court erred in finding that copyright in the database had been breached as it had not found that the email addresses themselves were protected by copyright and that the email addresses comprised the whole or a substantial part of the database. (v) The Royal Court had failed to consider whether at the time that the names and addresses were initially copied to the second appellant's Gmail account, such copying was done with the consent of Nautech such that subsequent use of the names and addresses by the second appellant would not be a breach of copyright. Appellate Interference with Findings in Fact 17. This court, on numerous occasions, has indicated the limitations which face an appellate court which is asked to interfere with findings in fact reached by the court of first instance; particularly when that court has had the opportunity to consider oral testimony, the terms in which that testimony is couched and the demeanour of witnesses. In *Pell Frischmann v Bow Valley Iran Limited*

[2008] JCA 146 ,

[2008] JLR 311 the judgment of the court, given by Beloff JA, states:- " 107. It is well established that in a case where findings are made dependant on the view that the Royal Court has formed of the various witnesses, the circumstances in which the Court of Appeal can interfere with a judgment of the Royal Court are circumscribed. There is indeed a consistent line of authority in this Court to that effect: Hyams v. English

[1981] at page 89, Taylor v. Fitzpatrick

[1979] 1 CA at page 9, Shalia v. Granite [1971] 1 CA at pages 758-760, Davis v. Stirling

[1983] 1 CA at pages 79-80. This line of authority adopts the approach of the English Courts under the pre-CPR regime. The position may also be compared with the present position in England, epitomized in Assicurazioni Generali SpA. v. Arab Insurance Group

[2003] 1 WLR 577 per Clarke LJ at paragraphs 14-17. 108. In the House of Lords, Lord Sumner put the matter in the following way in The Hontestroom

[1927] A. C. 37, at pages 47-48 (approved in Whitehouse v. Jordan

[1981] 1 WLR 246 by Lord Wilberforce at page 249, and by Lord Fraser at page 263):- not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the Judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the Judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his Judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone. In The Julia (1860) 144 Moo. P. C. 210, 235, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' Wood L. J., in The Alice (1868) L. R. 2 P. C. 245, 248, says: 'The principle established by the decision in The Julia is most singularly applicable We should require evidence that would be overpowering in its effect on our Judgment with reference to the incredibility of the statements made.' James L. J. thus laid down the practice in The Sir Robert Peel (1880) 4 Asp. M. LC. 321, 322: 'The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the Judge has had "the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression".' 109. In the case of Jones, Jones and Bedell Cristin Trustees Limited v. Plane

- [2006] JLR 438 , the Court of Appeal at paragraph 29 approved another classic passage from the speech of Lord Wright in *Powell v. Streatham Manor Nursing Home*
- [1953] A. C. 243 at pages 265-266 couched in the following terms:- "Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal, 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong' ... And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing". The Court of Appeal in *Jones* at paragraph 30 of its own Judgment went on to say as follows:- "The application of these principles is ... particularly important in this jurisdiction where, as in this case, the facts are found by the Jurats rather than a judge". 110. This latter dictum is, in our judgment, a recognition of the jurats' distinctive (and historic) role as fact finders; in contrast with that of the Judge who has a dual role in deciding both law and fact." 18. It follows that in an appeal on matters of fact in this jurisdiction the Appellate Court must not only be convinced that the decision of the court below is wrong but also clear that there was no evidence which could have supported the relevant findings of the Royal Court. In carrying out this task, it may be that occasions arise where it appears that there was simply no primary evidence to support a particular finding in fact. But, where the finding is one based on inference from ascertained primary facts, this court must accord a very high degree of respect to the findings of the Jurats. 19. As regards the first contention, Advocate Blakely, in oral argument, highlighted that the interim injunction specified the Nautech email public folder; not, for example, the quite separate Outlook contacts folder maintained in the second appellant's work email system. As had been clear from the evidence of Nautech's expert witness, Mr Merhet, the operations which he described the second appellant and fellow work colleagues undertaking was restricted to that of in some way organising email contacts details within his own email system, not the Nautech email public folder. There could therefore have been no question of evidence suggesting that the email contact details on the second appellant's Gmail had come from an infringing source. For Nautech, Advocate Moran drew our attention to the Affidavits of Mr Merhet and various passages in the transcript which, she submitted, showed that the infringing source had been identified. 20. The second contention for the appellants was that the Royal Court had no evidence on which to make the finding that the email addresses contained in the Second Appellant's Gmail had derived from the Workstation. 21. That finding was made at paragraph 49 of the judgment, where the Royal Court had indicated that it was clear that the contacts held within the Workstation CSV file were amongst those exported to the Gmail account. They had come from the second appellant's BlackBerry and had reached the BlackBerry from the second appellant's Workstation. As I have indicated, the Royal Court stated that whilst it accepted in theory that the BlackBerry contacts could have been sourced from somewhere outside Nautech, it was satisfied beyond all reasonable doubt

that contacts had originated from the second appellant's Workstation. 22. For the second appellant Advocate Blakeley accepted that the second appellant had email addresses in Gmail which addresses were also contained in data stored on the Workstation. It was also accepted that the CSV file contained the email addresses which also existed in Gmail and accepted that contacts from the BlackBerry had been transferred to Gmail. 23. It was not accepted that the BlackBerry had been populated with the email addresses as a result of them having been transferred to the BlackBerry from the Workstation. In order for contacts contained on the Workstation to be transferred to the BlackBerry there would have had to have been a synchronisation between the two pieces of hardware. Although synchronisation could have been achieved between the two, there was no evidence that any such synchronisation had occurred. Further, even if there had been synchronisation, there was no evidence of when such synchronisation had occurred nor what data was transferred from the Workstation to the BlackBerry. 24. Advocate Blakeley laid particular stress on cross examination of Mr Merhet, an expert called to give evidence for Nautech in respect of the possibility of a transfer of contact details from the Workstation to the BlackBerry. 25. In evidence given in response to questioning from the learned Commissioner, Mr Merhet had indicated that synchronisation between the BlackBerry and Workstation would take place on a semi-automated basis, typically if the second appellant plugged in his BlackBerry to his Workstation. If there was a new contact that had been created on the BlackBerry it would be transferred back to the Nautech contacts and vice versa (transcript 25 June 2014 page 3). In cross examination from Advocate Blakeley Mr Merhet had confirmed that, taking a freeze-frame of time in which there were ten contacts on the BlackBerry and ten contacts in Outlook, you could not tell whether any of the Outlook contacts had come from the BlackBerry or whether the contacts on the BlackBerry had come from Outlook (transcript 25 June, 2014, pages 18-19). Further, in principal cross examination Mr Merhet had accepted that he could not say definitively how the contacts on the BlackBerry had got onto the BlackBerry or where the data had come from (transcript 24 June, 2014, page 142). 26. In response Advocate Moran submitted that neither of the appellants gave any evidence as to any alternative origin of the information on the BlackBerry and that, at most, the second appellant sought to deny or to deny recalling any synchronisation (transcript 25 June, 2014, page 78). As the court had accepted that the information did come from the Workstation to the BlackBerry, it must follow that the court did not accept the second appellant's evidence on that point. Even when working to the criminal standard of proof, there may be a sufficiency of evidence to convict where an inference can be drawn in the event of the defendant not explaining the existence of an alternative source: AG v Evans

[1965] JJ 527 at 530. Discussion 27. It is obvious that these were fundamental elements of the case against the appellants as it had to be shown, to the criminal standard, that what was used by the second appellant was information contained within the Nautech database. There had to be no reasonable doubt that the information could have come from any other source. It is therefore critical to identify, in the first place, what is said in the judgment

below on this matter and, in the second place, whether what is said appears to pose the correct question. Assuming that the correct question appears to have been asked, it may be necessary to consider whether there was evidence to support the finding and, in doing so, to consider whether such primary evidence as had been found was incapable of supporting a finding that the relevant fact had been proved beyond all reasonable doubt.

28. Looking at the judgment, the relevant passage appears to be paragraphs 46 to 49. What is set out in those paragraphs is the following:- (i) The contacts in the BlackBerry used by the second appellant would be synchronised semi-automatically with the default contacts on his Workstation. (ii) A series of actions took place in or around June 2012 as a result of which the contacts in the BlackBerry used by the second appellant were uploaded to the second appellant's personal Gmail account from which he had allegedly sent some of the emails in breach of the interim order. (iii) Whilst in theory the BlackBerry contacts could have been sourced from somewhere outside Nautech, the Royal Court was satisfied beyond all reasonable doubt that the contacts contained on the CSV file were work contacts which originated ultimately from the second appellant's Workstation. 29. It is the third point identified in the preceding paragraph which appears to be most critical. With respect to the Royal Court not only is the process of reasoning by which it reached the finding that the source was the second appellant's Workstation left unexplained, the mere reference to the Workstation, without more, is surprising. 30. As to the reference to the Workstation, it is to be remembered that the Royal Court had spent some time on the proper construction of the injunction, ultimately restricting its ambit to the specified works: see paragraphs 11 to 26. It is reasonable to assume, therefore, that the court had in mind the need for Nautech to show that a specified work had been infringed. A finding, without more, that the contacts in question were work contacts which originated ultimately from the second appellant's Workstation would not be sufficient. On one view, therefore, it may be that this court, in reviewing the finding in paragraph 49, should proceed upon the basis that the Royal Court on the evidence before it, was of the opinion that a finding of the Workstation as source necessarily carried with it the use of a specified work available from the Workstation. 31. It is, as I have indicated, perhaps surprising that the finding in paragraph 49 is that the original source through which infringement arose was the Workstation - the mere computer terminal

- rather than a source specified in the interim injunction. Further, as the evidence had disclosed, an individual accessing emails from the Workstation would be able to see his Outlook Mailbox as well as the public folders referred to in Schedule F: see the evidence of Mr Merhet, Transcript 24 June, at pages 83-84. 32. On the evidence before the Royal Court, two sources were capable of supporting an inferential finding that, having found the originating source to be the Workstation rather than any other electronic or non-electronic source, the source within the Workstation would have been an infringing source. The first is the third Affidavit of Mr Merhet where, in paragraphs 6-9 he expressed the clear opinion that the contacts exported in June 2012 fell within Schedule F. He was not cross-examined on that statement. The second is his evidence in chief where he indicated that, when he was

considering where the data might have been copied from, 'the most likely place was the Nautech email public folder.' : transcript, 24 June 2014, page 80. 33. In addition it is important, in this context, to recollect the evidence in relation to synchronisation. The thrust of the evidence of Mr Merhet was that there could have been synchronisation, but depending upon an action by the second appellant. This was the point specifically put to the second appellant in examination in chief (transcript, 25 June, 2014, at page 78) where he indicated that he had not, to his knowledge, either wirelessly or by plugging in a cable, synchronised his BlackBerry with his Workstation. He indicated that he had on occasion backed up his BlackBerry but had no necessity to synchronise it with the Nautech system because emails would appear on his BlackBerry automatically. He specifically denied at any time plugging in his BlackBerry to the Nautech system in order to extract email addresses or contacts onto his BlackBerry. It will also be recollected that Mr Merhet could not say definitively that the contacts on the BlackBerry had come from the Workstation. 34. Having regard to the evidence on synchronisation, for the Royal Court to have reached the view expressed in paragraph 49 of the judgment - that the contacts originated from the Workstation, notwithstanding the theoretical possibility of sourcing from somewhere else - required the court not only to accept that semi-automatic synchronisation could take place between the BlackBerry and the Workstation but that, beyond reasonable doubt, it had taken place. That finding required a prior finding that the second appellant had indeed taken some action to synchronise the two pieces of hardware. To reach that finding the Royal Court would have had to have reached the view that the evidence of the second appellant was either unreliable or not entitled to be treated as credible. 35. In certain jurisdictions it is incumbent upon fact-finding tribunals to give express reasons for a finding of lack of credibility or lack of reliability. In this jurisdiction, however, it is to be remembered that very significant weight is allowed to the findings made by the Jurats. It is also to be borne in mind that in *AG v Edmond-O'Brien*

[2006] JLR 133 , the Judicial Committee of the Privy Council, whose opinion was delivered by Lord Hoffmann, specifically stated that, at least in criminal matters, questions of credibility were a matter for the Jurats and it was not the function of the Court of Appeal to say, for example, that the evidence of the accused should have been accepted. 36. In concluding on this first point of appeal, it seems to me important to indicate that when, in this jurisdiction, a finding depends upon a determination as to credibility or reliability the court of first instance ought, however succinctly, to indicate the basis upon which it finds the evidence of a particular witness either to be unreliable or not entitled to be found credible. Without such assistance in this case, and given the necessary inference as to the view below on reliability or credibility, there is no basis upon which this court could express a view as to the credibility or reliability of the second appellant. As indicated above, even when working to the criminal standard of proof, there may be a sufficiency of evidence to convict where an inference can be drawn in the event of the defendant not explaining the existence of an alternative source: *AG v Evans*

[1965] JJ 527 at 530. Here the second appellant did not offer an alternative source, and synchronisation by him was a possibility. There was no challenge to the evidence of Mr Merhet that, in considering where the data might have been copied from, 'the most likely place was the Nautech email public folder' . But I find it difficult to overlook the potential importance to this case that the Royal Court made no specific finding that the contacts used in the five emails were taken from any of the works specified in Schedule F; albeit I am mindful that this particular issue was not raised in this form either in the grounds of appeal or in the written contentions. I therefore propose that it should be remitted to the Royal Court. If that proposal is adopted, what I have to say regarding the remainder of the appeal may be of secondary importance. 37. Within the appellants' first ground of appeal there then followed a number of ancillary contentions in paragraphs numbered

(2) to (7). 38. As regards (2) it was suggested that the Representation brought by Nautech did not allege the second appellant's Gmail contact list to be confidential to Nautech . In my view this contention has no bearing upon the issues between the parties. The principal issue was whether the second appellant was using information confidential to Nautech when he used his Gmail account to contact contractors. 39. In sub paragraph (3) the appellants contended that the Royal Court fell into error in considering whether a database containing contact details would be confidential rather than considering whether the names and email addresses themselves were confidential. At paragraph 66 of the decision below the Royal Court noted this submission but accepted evidence for the Representor that databases containing contact details of contractors were at the heart of businesses such as that of Nautech , whose ability to place specialists on vessels was dependent upon having a readily contactable pool of suitably qualified contractors. To this end Nautech and its competitors compiled their own "directories". 40. In addressing this issue the Royal Court directed themselves to the views of Sir Robert Megarry V.-C. in *Thomas Marshall Limited v Guinie* [1979] 1 Ch 227, especially at page 247. The appellants do not contend that the Royal Court was in error in adopting this approach. Upon that approach the Royal Court judged, as a matter of fact, that such a database would be regarded by all such specialists as Nautech as confidential information central to their business of being able to supply specialist crew. I do not discern a basis upon which this court could say that the Royal Court were necessarily wrong in that

conclusion.

41. Turning to sub paragraph (4) the appellants submit that, notwithstanding the finding that there was no publicly available "directory", the court had not found that the second appellant had used a "directory". In my view this contention is unwarranted. The simple conclusion expressed at paragraph 67 by the Royal Court was that the "information used by Mr. Inns was confidential information." 42. As regards sub paragraph (5) it was submitted that the court fell into error in failing to take into account (a) uncontested evidence that the second appellant used social media contacts, (b) undisputed evidence that the second appellant already knew two of the five contractors before starting to work for Nautech and was

connected to two of the five by social media and (c) whether the transfer of contacts to the second appellants' phone in June 2012 was authorised by Nautech . Sub paragraphs (a) and (b) can be taken together. It was of no moment for the second appellant to show that he knew any of the five contractors or was connected to them when his actual means of contact at the relevant time was by use of the allegedly confidential information. 43. In sub paragraph (6) the appellants contended that the Royal Court should have asked itself whether the relevant information was in fact already in the public domain instead of asking whether Nautech believed the information to be in the public domain and whether that belief was reasonable. In my view there is no foundation in the submission as the Royal Court's approach was in line with that taken by Sir Robert Megarry in *Thomas Marshall v Guinie* . 44. The further contention in sub paragraph (7) added nothing to the contentions in sub paragraph (5). 45. Ground of Appeal 2 merely set out a conclusion based upon submissions in Ground of Appeal 1. 46. Grounds of Appeal 3 to 6 dealt with the conclusions of the Royal Court in respect of infringement of copyright. 47. The appellants submitted that in the whole circumstances the Royal Court was not entitled to conclude that any copying of the individual email addresses constituted a breach of copyright. 48. The appellants commenced by asserting that the Royal Court had been in error in considering the issue as to whether "the database" was a work in which copyright subsisted without first making any factual findings as to which of the databases listed in Schedule F it was considering. In my opinion that contention misapprehends the ambit of the order. As noted by the Royal Court in paragraph 13 of the judgment below, paragraph 2 of the amended Order of Justice had defined what was meant by "the database", namely all the suite of programmes listed in Schedule F including databases containing relevant employment details. It was the confidential information contained within those elements which was protected: see paragraph 26 of the judgment below. 49. The appellants next contended that the Royal Court was in error in appearing to proceed on the basis that "the database" in question was the second appellant's Outlook inbox, under reference to paragraph 79 of the judgment below. That is not what the Royal Court said at paragraph 79. In that paragraph the Royal Court found that once an email had come in from a contractor, the second appellant would assess whether it should be filed and if so where. Alternatively, emails might be left in his inbox or deleted. CVs might be left attached to the email or put into a separate CV folder. I have already dealt with the proper interpretation of the Royal Court's finding at paragraph 49 in paragraphs 29 - 32 above. Further reference could be made to the evidence of the second appellant at page 124 of the Transcript of 25 June where, in cross-examination, he specifically referred to his putting contact details into the Nautech email public folders. 50. The appellants then contended that the Royal Court was wrong to conclude that the second appellant's email inbox was protected by copyright as the evidence did not justify a finding that the filing of emails went beyond the use of significant labour and skill. 51. This is a finding in fact based upon a legal analysis which is not the subject of challenge by the appellants. This court could only support the appellants' challenge if it were manifest that the determination by the Royal Court was unsupportable. The appellants' submissions could not identify that to be the case. 52. The appellants then contended that the Royal Court had

further erred in finding that copyright had been breached. Whilst the Royal Court had found that the names and addresses of the recipients had been copied by the second appellant, it had not found that the email addresses themselves were protected by copyright and that, whether taken individually or together, the five addresses comprised the whole or a substantial part of the database. 53. In my view this contention misunderstands the width of the order. The addresses were part of the database and, as the Royal Court had found at paragraph 59 the second appellant was unable to give to the Royal Court any explanation as to how the contact details got into his Gmail account. It therefore found that the addresses had been sourced ultimately from the Workstation. No matter how few in number they were, they were found to be part of the database. 54. Finally, the appellants contended that the Royal Court had failed to consider whether at the time that the names and addresses were initially copied to the second appellant's Gmail account, such copying was done with the consent of Nautech such that subsequent use would not be a breach of copyright. It does not appear that any evidence was led by the appellants to support a case of specific consent or implied permission which would have entitled the Royal Court to have considered the possibility of such a

conclusion.

55. For all these reasons I am of the view that the appeal in respect of breach of copyright fails.

Conclusion

56. I would therefore allow the appeal on the limited basis which I have suggested and remit to the Royal Court the question as to whether the contacts used in the five emails were taken from any of the works specified in Schedule F; allowing the Royal Court to permit such further evidence to be adduced as it thinks fit and reserving to the Royal Court all issues as to costs including the costs of this appeal. 57. I would wish to add some comments, notwithstanding the general approach in this jurisdiction to the framing of injunctions by reference to the whole of the Order of Justice, as outlined by the learned Commissioner at paragraph 11 where he stated:- " It needs to be borne in mind, however, that in England interim orders are often without the benefit of the claimant's pleaded case and in that sense are free standing. In this jurisdiction, an interim injunction forms part of the Order of Justice and whilst it must be expressed in clear, certain and unambiguous language, it may be necessary to interpret the same in the context of the Order of Justice particularly where, as here, words or expressions have been defined in the body of the Order of Justice." 58. In my opinion the requirement that interim injunctions be expressed in clear, certain and unambiguous language necessitates that the form of wording of the injunction itself should be so. The language used should be so precise that no issue of interpretation should be required save where terms of art or terms from a contractual lexicon are used. Had that approach been adopted in the present case my impression is that much of the proceedings below would not have been required. 59. PERRY JA:- I agree. 60. MARTIN JA:- I agree. Authorities Nautech Services Limited-v-CSS Limited and Others

[2014] JRC 159 . Pell Frischmann v Bow Valley Iran Limited

[2008] JCA 146 . Pell Frischmann-v-Bow Valley Iran Limited

[2008] JLR 311 . AG v Evans

[1965] JJ 527 . AG v Edmond-O'Brien

[2006] JLR 133 . Thomas Marshall Limited v Guinie

[1979] 1 Ch 227. Page Last Updated: 27 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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