Neutral Citation Number: [2019] EWHC 44 (QB)

Case No: HQ18XO2778

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2019

Before:

ANDREW BURROWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between:

UK DRY RISERS LIMITED	**Claimant**
- and -	
JACK MAHER	**First Defendant**
- and -	
J M FIRE PROTECTION MAINTENANCE LIMITED	**Second Defendant**

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- -

Michael Duggan QC (instructed by **Rollits LLP**) for the **Claimant**
Marc Wilkinson (instructed by **Scott Moncrieff & Associates**) for the **Defendants**

Hearing dates: 10, 11, 12 December 2018

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JUDGMENT

ANDREW BURROWS QC:

1. INTRODUCTION

1. A dry riser is, in essence, an empty pipe running up a high-rise building that, in the event of fire, allows firefighters to pump water up to the higher floors. The claimant, UK Dry Risers Ltd ('UKDR') is the leading UK installer of dry risers. Jack Maher (through his company JM Fire Protection Maintenance Ltd ('JMFPM')) installs dry risers and, until 20 July 2018 and for many years previously, was one of UKDR's main sub-contractors (acting on a labour-only basis in the sense that the components were supplied to him by UKDR). Since then Jack Maher has broken away from UKDR and is providing his installation services direct to customers. The main matters in dispute in this case relate to events in the couple of months prior to that breakaway.

2. There is a bigger picture against which this dispute must be seen. Earlier this year, UKDR brought proceedings (in claim number HQ18X01297) against three of its former employees (Jonathon Cooper, Andrew Power, and Thomas Power) and Andrew Power's wife, Claire Power, and the company that they had formed, PC Dry Risers Ltd ('PC Dry Risers'). Those claims were for breach of the contracts of employment, breach of confidence and economic torts, including conspiracy. Those claims were settled in April 2018 on the basis of the defendants giving undertakings to the court and to UKDR (with damages to be assessed, if not agreed). The central allegations, which were reflected in the undertakings given, were that the defendants were infringing UKDR's confidential information, and were conspiring against UKDR, concerning the intention of Hackney Borough Council ('Hackney BC') and several other London borough councils, through their head-contractors, Wates Group Ltd ('Wates'), to have dry risers installed in all of their high-rise buildings. This plan of action followed the Grenfell Tower disaster in June 2017. UKDR had installed dry risers for Hackney BC, working for Wates, since 2011 and from October 2017 to December 2017 they had installed dry risers at five sites for Hackney BC. In October 2017, Wates had started to sub-contract the project management of dry riser installations to TDK Mechanical Services UK Ltd ('TDK'). It followed that the Wates projects for Hackney BC and other London boroughs involved TDK, as sub-contractors, with TDK sub-contracting the installation work to UKDR. In January 2018, UKDR was led to believe by Wates that it would be awarded their many forthcoming London borough installation contracts. But although surveys on 60 further installations (as I understand it, in Hackney) were carried out in early 2018, no orders were placed with UKDR in relation to those 60 quotations. The conspiracy, which I have referred to above, allegedly involved diverting contracts with TDK away from UKDR to PC Dry Risers Ltd. After the settlement of those proceedings, PC Dry Risers Ltd stopped operations. But Jonathon Cooper, one of the defendants in those proceedings, became an employee of TDK and he is a friend of Jack Maher.

3. Jack Maher was not a party to those legal proceedings earlier this year. He remained a major sub-contractor for UKDR until 20 July 2018. Nevertheless, UKDR was very suspicious of Mr Maher's own conduct (ie it believed that he too might have been involved in the conspiracy); and, in order to avoid legal action being brought against him by UKDR, he agreed to enter into contractual undertakings with UKDR. Without legal advice, he signed those undertakings on 13 April 2018. The essence of those undertakings, which I will need to examine in detail later, is that they prevent Jack Maher/JMFPM using or disclosing UKDR's confidential information.

4. The claim that is now brought by UKDR against Jack Maher/JMFPM puts forward two causes of action: the tort of conversion and breach of contract. Three further claims that were pleaded (for a non-specific economic tort, for the wrong of breach of confidence - independent of breach of contract - and for assisting a breach of confidence) were dropped during the course of the trial. Two remedies, apart from damages and an injunction, that were in the Particulars of Claim - an account of profits and exemplary damages - were also abandoned.

5. As regards the cause of action for the tort of conversion, it is alleged that Jack Maher stole dry riser components, worth £3690.72, belonging to UKDR. As regards the cause of action for breach of contract, it is alleged that, in breach of their April contractual undertakings to UKDR, Jack Maher/JMFPM carried out two dry riser installations (using those stolen components) one at Dunmore Point in Tower Hamlets (in late May/early June 2018) and the other at Granard House in Hackney (in late June/early July 2018). UKDR has not pleaded the loss which it claims it suffered from the alleged breach of contract although Michael Duggan QC, for UKDR, sought to overcome that deficiency by making some suggestions in his closing submissions as to what the loss might be. I agree with the submissions of Marc Wilkinson, counsel for the defendants, that UKDR's failure to provide a schedule of loss, or any other non-speculative evidence of the loss suffered by UKDR, means that the court has no proper basis for assessing damages for any breach of contract. It follows that, if I hold that there has been a breach of contract, the damages will be nominal only. It would appear, however, that the main remedy which UKDR is seeking in relation to the alleged breach of contract is not damages but an injunction to restrain further breach.

6. The second defendant (JMFPM) brings a counterclaim against UKDR alleging that UKDR has not paid invoices in respect of work done in July 2018 for UKDR by Mr Maher, operating through the second defendant. The sum counterclaimed is £14,508 plus VAT but the defendants conceded at trial that there should be deductions of £880 from that sum so that the counterclaim is for £13,628 plus VAT. I shall deal with this counterclaim towards the end of this judgment.

7. I should add that, by an order of this court dated 9 August 2018, the defendants gave undertakings to the court that are the equivalent of an interim injunction (although the order does not expressly specify this, it must be implied that the undertakings are to last only until trial or further order). The claimant gave the usual cross-undertaking in damages in the event of those undertakings not being justified and causing loss to the defendants or third parties.

8. Finally by way of introduction, I need to clarify the standard of proof to be applied in this case. There is no dispute about this. The claimant is making the very serious allegation that Mr Maher/JMFPM stole its property. Although the civil standard of proof applies (ie the claimant must satisfy the court on the balance of probabilities), it is important that I have in mind the stronger evidence required where an allegation of dishonesty (especially criminal dishonesty) is made. As Lord Nicholls expressed it in the leading case of *Re H (Minors) (Sexual Abuse; Standard of Proof)* [1996] AC 563, at 586:

'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to

whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury…Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.'

Mr Duggan accepted that, although it might be possible for the court to find that Mr Maher carried out the installations without stealing UKDR's property, or vice versa, the primary case put forward by the claimant is that Mr Maher used the stolen materials in carrying out the two installations. It follows that (subject to coming back to this question if, applying the requirement for stronger evidence, I find that Mr Maher did not carry out the installation work) I am looking throughout for the stronger evidence needed for the claimant to satisfy me on the balance of probabilities that the defendants have committed the tort of conversion and the breach of contract alleged.

2. THE TWO MAIN WITNESSES

9. Although there are some points of law that need to be clarified, my primary task in this case is to resolve a factual dispute. In particular, I must decide whether Mr Maher is telling the truth when he denies stealing the dry riser components from UKDR and denies installing the dry riser systems at Dunmore Point and Granard House. The evidence against Mr Maher is circumstantial in the sense that there is no evidence from anyone who saw him steal the items or carry out the installations and there is no CCTV footage to assist.

10. I should clarify at the outset my impressions of the two witnesses who gave oral evidence before me. Michael Charlton gave evidence for UKDR. He is a director of UKDR and has been for several years. From September 2017 he was working two days a week although very recently he went back to working full-time. He was clear and straight to the point in his answers, which displayed his long experience in the dry riser business (albeit that he has never himself installed a dry riser system). He was on top of all the material and events. I regarded him as honest and reliable. Having said that, he was deeply suspicious of the behaviour of Mr Maher and I accept Mr Wilkinson's submission that this did lead him, on a few occasions, to testify as if it were a fact what was in reality his own suspicion.

11. For the most part, I also regarded Mr Maher as honest and reliable. However, on the crucial questions, he was evasive or gave answers that were unconvincing. For example, although he has clearly done a large number of dry riser installations, so that it is understandable that he may not be able to remember all their precise locations, it is hard to believe that his memory failed him as regards both the relevant installations, at Dunmore Point and Granard House, for which we have a certificate proving his involvement in testing the system only some six or seven months ago. His evidence was that he could not remember the second of those at all; and, when initially asked about

the first on the phone by Mr Charlton, his evidence was that he could not remember that either but later did recall that it was a testing job that he had done as a favour to Jonathon Cooper (by then working for TDK). So, on the crucial questions, much of his evidence was unreliable.

3. MAIN FINDINGS OF FACT

12. Given that we have the test certificates with his name as the tester, it is not in dispute that Mr Maher issued dry riser test certificates for Dunmore Point on 5 June 2018 and for Granard House on 10 July 2018. Most of the other central facts are in dispute. My main findings of fact are as follows:

(i) It was UKDR's stock of dry riser components that was used for the installations at Dunmore Point and Granard House. I arrive at this finding for the following reasons. It is not in dispute that the components and the suppliers of those components, which were used for Dunmore Point and Granard House, were accurately listed in an identical exhibit to the witness statements of, for example, Stephen Walker (the managing director of Hydrotech, dated 26 November 2018), Graham Wilkins (a regional director of Shawston International Ltd ('Shawston'), dated 3 December 2018) and Bradley Rothwell (an employee of UKDR, dated 30 November 2018). That list shows that most of the components were supplied by Hydrotech with the rest being supplied by JD Fire Ltd ('JD Fire'), Shawston, and Victaulic. Very importantly, the witness statement of Stephen Walker of Hydrotech says the following:

'I confirm that Hydrotech has never supplied such component parts to [Jack Maher] or [JM Fire Protection and Maintenance Ltd] or to companies known as TDK Mechanical Services (UK) Ltd or to a company known as PC Dry Risers Ltd or to a Mr Jon Cooper. I confirm that Hydrotech however is a regular supplier to UK Dry Risers Ltd of the Hydrotech component parts referred to in the lists exhibited … I should point out that Hydrotech supply the market only via two distributors (Shawston International Ltd and Lenpart Ltd) and the only company it supplied directly is UK Dry Risers Ltd.'

The witness statement of Graham Wilkins of Shawston also confirms that Shawston has never supplied the listed components to the defendants or TDK or PC Dry Risers or Mr Cooper. Subject to a qualification as regards supplying PC Dry Risers, the same evidence as regards their respective companies is also contained in a witness statement of Sean Siddons (a director of Lenpart Ltd, dated 29 November 2018) and David Lamb (the managing director of JD Fire, dated 30 November 2018). The qualification as regards supplying PC Dry Risers related to quantities supplied in late March/early April 2018. But as regards the Lenpart supplies to PC Dry Risers, they were probably fully used up on jobs that had been carried out by PC Dry Risers (see bundle 2/470). And as regards the supply to PC Dry Risers by JD Fire, Mr Maher had prepared an inventory on 25 April 2018 for Mr Charlton of UKDR (see bundle 2/438). That inventory showed that there was relatively little of that PC Dry Risers stock left but, in any event, the inventory correlated to JD Fire's invoice to UKDR dated 22 May 2018 by which UKDR was buying what was left of the PC Dry Risers stock (see bundle 2/439 and 2/440). In other words, once the invoice of 22 May 2018 had been paid, it is likely that there was no PC Dry Risers stock left. The relatively small amount of stock had all been bought by UKDR.

(ii) Although it could have been as late as 5 June 2018, it is more likely than not that the dry riser installation at Dunmore Point was carried out (albeit not tested) between 22 May and 24 May. This follows from the facts that there was an email at 8.31 on 22 May from the head-contractor, Engie, instructing TDK to proceed (see bundle 2/613); and that TDK's invoice to Engie for the dry riser installation was issued on May 24 (see bundle 2/610).

(iii) It is not in dispute that the dry riser installation at Granard House was carried out by 9 July (because post-installation survey photos, which were attached to the first witness statement of Daniel Teden dated 1 November 2018, were taken on 9 July by Mr Cooper). I find that, in the light of an email dated 27 June from Mr Cooper to Mr Maher instructing or requesting installation work at Granard House, that installation was carried out (albeit not tested) at some date between 27 June and 9 July (and it is noteworthy that that email of 27 June suggests that, at the time it was sent, it was not envisaged that the whole new dry riser, which was ultimately installed, would be required).

(iv) I accept the evidence of Mr Charlton that it was very much the normal practice for the engineer who installed the dry riser system also to carry out the test and issue the test certificate. But he accepted that there were rare exceptions (and, in relation to the counterclaim, he himself gave an example of an exception: see bundle 2/448, note 3).

(v) Mr Charlton and Mr Maher were in agreement that at all relevant times the stock control and guarding at UKDR's main warehouse in Bury was lax. There were eight or nine teams of UKDR sub-contractors who would pick up components from Bury. UKDR also had a container in Hackney where dry riser components were stored. The container was in a gated compound controlled by Wates. I accept Mr Maher's evidence that, apart from himself, other UKDR sub-contractors – and there were, as I understood it, three or four other teams of UKDR sub-contractors working in the Hackney area - would be allowed access to the container by Wates; and some components were stored outside alongside the container. But Mr Maher was the main person who, on his own evidence, supervised deliveries to the UKDR container. Although it is conceivable that other UKDR sub-contractors stole the components from the Hackney container or from the Bury warehouse, there is no evidence linking any other UKDR sub-contractor to the dry riser installation at Dunmore Point or Granard House.

(vi) Following on from the above findings, I conclude that either Mr Maher stole the materials from UKDR and installed them at Dunmore Point and Granard House on the instructions of Mr Cooper (acting for TDK); or Mr Cooper did so. As between the two of them, it is clear that, on the balance of probabilities (and I emphasise the need for strong evidence as explained in paragraph 8 above), it was Mr Maher. Mr Maher had control of the UKDR stock, Mr Cooper did not. It was Mr Maher's name on the test certificates not Mr Cooper's. And although Mr Cooper had been an installation engineer until 2015, he was working for TDK who project-managed installations - and sub-contracted out the installations - rather than holding themselves out as installation engineers. While it is my view that Mr Cooper was involved (on behalf of TDK) in instructing/requesting Mr Maher to do the work, it was, on the balance of probabilities, Mr Maher who stole the components and installed them at Dunmore Point and Granard House (and was paid by TDK).

(vii) Two further considerations tend to support, or, at least, are consistent with, that central finding that Mr Maher stole the materials and installed them at Dunmore Point and Granard House:

(a) As I have already said in paragraph 11, it is hard to believe that on the two installations for which we have documentary evidence that he was the tester, Mr Maher cannot recall the second and initially could not recall the first either.

(b) Given the windows of time for each installation job set out in (ii) and (iii) above, it was perfectly possible, because he was largely in the London area during those periods, for Mr Maher to have carried out the installations at Dunmore Point and Granard House alongside the other jobs that he recorded in his notebook and invoiced to UKDR. Although it was submitted on behalf of Mr Maher that, at least on July 9, he could not have done the Granard House installation because he was working at Astor College in London, there is an email from Mr Maher to Michael Heydon (of UKDR), at 17.08 on 9 July, in which Mr Maher explained that they had not done much at Astor College that day as they had got there late.

(viii) I am conscious that my conclusion is partly contradicted by the third witness statement of Daniel Teden the director of TDK, dated 7 December 2018, and wholly contradicted by the two witness statements of Mr Cooper, dated 31 October 2018 and 7 December 2018. Mr Teden in his third witness statement says that, as regards Granard House, neither of the defendants installed the dry riser system which was installed by Mr Cooper, an employee of TDK. But note that that is a very bare assertion without any dates given for the installation or any further details. Mr Cooper's second witness statement is again a bare assertion that neither of the defendants installed the dry riser system at Granard House which he had installed along with employees of TDK. In his first witness statement, Mr Cooper after explaining that he was a friend of Mr Maher and had worked with him in a professional capacity for a number of years went on to say:

'On or around 12 June 2018, I confirm that I installed a thirteen story dry riser at Dunmore Point, Tower Hamlets… After the installation was completed (by me), I called [Jack Maher] to ask him to lend me some testing equipment as I did not have any at the time. [Jack Maher] arrived and tested the system for me that same day.'

Apart from the fact that the date of 12 June was clearly wrong, Mr Cooper sent an email to Mr Maher headed 'Dunmore Point' on 4 June at 15.38 giving the address of Dunmore Point and saying 'I'll see you in the morning'. That is plainly inconsistent with his witness statement saying that he called Mr Maher who tested the system *that same day*. But there are more general reasons for not placing any real weight on those witness statements of Mr Teden and Mr Cooper. Those witnesses were not called by the defendants. Their witness statements therefore fall within the hearsay provisions of the Civil Evidence Act 1995, s 2, and CPR 33.2. Notice of the intention to rely on hearsay evidence was not given by the defendants. It follows that, although such statements are admissible, the failure to give notice is a matter affecting the weight (if any) to be given to that evidence: see Civil Evidence Act 1995, ss 2(4) and 4. Most importantly, the failure to call those witnesses has meant that Mr Duggan has been deprived of the opportunity to cross-examine them so as to test their statements and to explore the apparent weaknesses in them. Mr Wilkinson submitted that I could regard the statements as reliable because Mr Teden and Mr Cooper had everything to lose and

nothing to gain by making those statements. I do not agree. Admittedly, by accepting that he himself installed the system at Dunmore Point and Granard House, Mr Cooper may have been putting himself at risk of being in breach of the undertakings given to the court and UKDR in the earlier proceedings brought against him by UKDR that I have mentioned in paragraph 2 above. But as against that, Mr Cooper is a friend of Mr Maher. Naturally he would be inclined to be partial to him. In any event, precisely because he has been sued by UKDR in the earlier proceedings, he has every reason to dislike UKDR and hence has a reason to counter allegations made by UKDR against his friend. As regards Mr Teden, it is possible that he is supporting his employee in a situation where the relationship between TDK and UKDR is under strain. The important point, however, is that the claimant has been deprived of the opportunity to test these sorts of issues. My conclusion is that I should place virtually no weight on those witness statements; and certainly their weight is nowhere near sufficient to undermine the reasoning I have set out above in reaching my central finding.

(ix) I therefore reiterate that my central finding, drawn from my other findings of fact, is that Mr Maher stole the materials from UKDR and installed them at Dunmore Point and Granard House.

4. THE RELEVANT LAW AND ITS APPLICATION TO THE FACTS

13. It follows from what I have decided above that the defendants are liable to UKDR for the tort of conversion. Plainly, their theft of UKDR's dry riser components constitutes the tort of conversion. As I have said in paragraph 5 above, the value of those materials is £3690.72 so that the claimant is entitled to damages for the conversion of £3690.72 (plus interest).

14. What about the claim for breach of contract? Did Mr Maher's installation of the dry riser systems at Dunmore Point and Granard House constitute a breach of the defendants' contractual undertakings to UKDR which he signed on 13 April 2018? Mr Duggan submitted that, in line with the pleadings, the installation was in breach of the undertakings in paragraphs 5 and 6 read along with the definition of 'confidential information' in paragraph 17. These undertakings are as follows (and I underline the words which Mr Duggan primarily relied on: see paragraph 17 of his skeleton argument):

'5. I shall not use or disclose to any person, firm, company or other organisation whatsoever any confidential information belonging to UKDR, or UK Dry Riser (Maintenance) Limited. This shall, without prejudice to the generality of the foregoing, include any information about UKDR's confidential information, clients or finances, or any business dealings, transactions or affairs, including information which came to my knowledge, whether directly or indirectly, from Andrew Power and/or Jonathan Cooper and/or Thomas Power and/or PC Dry Risers Limited. In particular (without prejudice to the generality of the foregoing) confidential information relating to Hackney Borough Council's intentions to install dry riser systems in all of its high rise buildings.

6. I shall immediately cease all activities which commenced using the confidential information belonging to [UKDR], or UK Dry Riser (Maintenance) Limited, and, if activities have not yet commenced, I shall not carry out any activities which involve the

use of any Confidential Information. In particular (without prejudice to the generality of the foregoing) I shall not:

…

6.4 Directly, or indirectly for my benefit or that of any third party solicit, or accept any order from TDK Mechanical Services Limited, or Wates Property Services Limited, or Hackney Borough Council, or any other contractor engaged by Hackney Borough Council for the supply and installation of a dry riser system to any building owned by Hackney Borough Council.

17. For the purposes of these undertakings, confidential information shall mean:

17.1 All information which came to the attention of myself, in circumstances of confidentiality, [from] Andrew Power and/or Jonathan Cooper and/or Thomas Power in consequence of the employment of each of them with UKDR and which is the property of UKDR and/or UK Dry Riser (Maintenance) Limited, which is not in the public domain.

17.2 Without prejudice to the generality of the foregoing, all details and information relating to the UKDR and/or UK Dry Riser (Maintenance) Limited of its:

(1) Customers, Hackney BC and other London Boroughs.

(2) Customer trading history.

(3) Details of systems previously supplied to that customer.

(4) Details of customer intentions for future installations.

(5) All surveys carried out by the Applicant …, working notes and documents and all documentation relating to the preparation of quotations.

(6) Prices paid by customers, Hackney BC.

(7) Identity of the Applicant's suppliers.

(8) The prices paid by the Applicant and/or UK Dry Riser Maintenance to its component suppliers.

(9) Documents such as "Quote build up forms", which set out all relevant dry riser components and enabled quotes to be quickly prepared and submitted.

(10) Work in progress documents which detail all ongoing contract work.

(11) UKDR's sales order book.

(12) All quotations provided by UKDR and/or UK Dry Riser (Maintenance) Ltd.

(13) All orders received by UKDR and/or UK Dry Riser (Maintenance) Ltd.'

15. Mr Wilkinson submitted that, even assuming (as I have now found) that Mr Maher did install the dry risers at Dunmore Point and Granard House, that did not constitute a breach of his contractual undertakings as alleged. That was because those contractual obligations were all concerned with the use or disclosure of UKDR's confidential information. As a matter of contractual interpretation, any more specific undertaking, in particular paragraphs 6.4 and 17.2(1), are not free-standing but must be read as limited by the more general undertakings (in paragraphs 5 and 6) - they are expressly meant to be specific instances of those general undertakings - which are concerned to protect UKDR's confidential information. Merely by installing a dry riser system, on the instructions of TDK (through Mr Cooper), did not involve Mr Maher using or disclosing any confidential information of UKDR. Even if he were wrong about that in relation to paragraph 6.4, that paragraph only applied to any building owned by Hackney BC, so that it did not extend to Dunmore Point which is owned by Tower Hamlets Borough Council.

16. Mr Duggan made the following main submissions. Mr Maher was using UKDR's confidential information by installing the dry risers because the relevant confidential information was the information Mr Charlton for UKDR had found out in January 2018 that Hackney BC and several other London borough councils, through their head-contractors, Wates, were going to install dry risers in all of their high-rise buildings. Whenever Mr Maher installed a dry riser system for Hackney BC or those other London borough councils he was automatically making use of that confidential information. This was made specific in paragraphs 6.4 and 17.2(1) of the undertakings. UKDR would succeed even if one did not read those paragraphs as free-standing; but, if he was wrong about that, they should be interpreted as free-standing and, if free-standing, UKDR would clearly succeed. Paragraph 6.4 was confined to Hackney BC and therefore did not cover Dunmore Point but paragraph 17.2(1) was more general and included all other London boroughs so that buildings owned by Tower Hamlets Borough Council, including Dunmore Point, were covered. Mr Duggan frankly recognised that the undertakings were so wide that there might have been concerns that those undertakings were infringing the restraint of trade doctrine (not least because there were no express time limits). But he said that that was not now a matter that the defendants could raise in a situation where they had given those undertakings in a settlement agreement, embodied in a consent order, to avoid claims being pursued against them. In this regard he referred me to the case of *Capgemini India Private Ltd v Krishna* [2014] EWHC 1092 (QB). That case concerned whether interim injunctions should be granted to enforce contractual undertakings, given by employees after termination of their employment, preventing them working for rival businesses. In granting the interim injunctions sought, Robert Owen QC, sitting as judge of the High Court, looked carefully at the question of the extent to which the defendants could raise restraint of trade objections to contractual undertakings they had given in settlement of the dispute. As it will transpire, I do not need to decide the interesting question of whether (and, if so, the extent to which) the contractual undertakings in this case can now be challenged on the ground that they contravene the restraint of trade doctrine. I simply note here that, in contrast to *Capgemini India Private Ltd v Krishna*, this is the trial of the action and we are not merely concerned with an interim injunction maintaining the status quo until trial.

17. The following points set out the correct relevant law, regarding the breach of contract claim, and its application to the facts in this case:

(i) The court must interpret the contractual undertakings applying the law on contractual interpretation. The correct modern approach in English law to contractual interpretation can be briefly summarised as follows (see also my summary of the law in *Harry Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) at [11]). The court must ascertain the meaning of the words used by applying an objective and contextual approach. The court must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases recognising the modern approach include *Investments Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL, especially at 912-913 (per Lord Hoffmann giving the leading speech), and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. The Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, clarified that the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at [14], Lord Hodge, with whom the other Supreme Court Justices agreed, said that there was no inconsistency between the approach in *Rainy Sky* and that in *Arnold v Britton*: 'On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing.'

(ii) It is clear, as a matter of objective contextual interpretation, and even if one goes on to take into account business common sense and purpose, that paragraphs 6.4 and 17.2(1) of the undertakings are not free-standing but are dependent on there being use (or disclosure) of UKDR's confidential information. In other words, they are specific instances of the general provisions in paragraphs 5 and 6, and therefore require there to have been use (or disclosure) of UKDR's confidential information.

(iii) Again as a matter of contractual interpretation – although the same point applies to the law on breach of confidence as an equitable wrong distinct from breach of contract – information plainly cannot be confidential once it is in the public domain. Indeed that is expressly stated in paragraph 17.1. The correct interpretation of the contract, therefore, is that the contractual undertakings applied only so long as the information in question was confidential and not in the public domain.

(iv) What was the alleged confidential information? Although this was not made entirely clear in the Particulars of Claim in this case, it is set out in paragraphs 22-26 of the Particulars of Claim in the earlier proceedings (referred to in paragraph 2 above) which were attached as an exhibit to the first witness statement of Mr Charlton (dated 1 August 2018) in this case. In essence, and in line with Mr Duggan's submissions, Mr Charlton found out information in January 2018 about the intentions of Hackney and other London boroughs to install dry risers in all of their high-rise buildings. It may be accepted that, for a period of time, that was information confidential to UKDR (although, as mentioned in (v) immediately below, that information cannot have been confidential as against TDK any more than it could have been confidential as against Wates). Had the information remained confidential, one can again accept that it would have given UKDR a very valuable competitive advantage in being able to secure many

dry riser installation contracts before any rivals knew what was happening. However, that information did not remain confidential at the time of the events with which we are concerned in this case (late May 2018). By then, I take judicial notice of the fact (and certainly there was no evidence put forward by the claimant to contradict this) that that information must have been in the public domain. It must have been apparent to anyone with any interest in dry risers that, in the light of the Grenfell Tower disaster, the London boroughs were installing, and would continue to install, large numbers of dry risers in their high-rise buildings.

(v) However, even if I am wrong about the information being in the public domain and no longer being confidential by May 2018, UKDR faces another difficulty in relation to the alleged breach of confidence. This concerns the role of TDK. As I have mentioned in paragraph 2 above, after October 2017, the work in Hackney BC and, as I understand it, in other London boroughs, came down from Wates (or other head-contractors, such as Engie) through TDK to UKDR. Being higher in the 'chain of command' than UKDR, TDK must itself have known of the intentions of Hackney BC and the other London boroughs in relation to the installation of dry risers. TDK must have been free to use that information in deciding who should carry out the dry riser installations. I have found in paragraph 12 point (vi) above that Mr Maher carried out the installations at Dunmore Point and Granard House on the instructions, or at the request of, TDK (acting through Mr Cooper). In so doing, Mr Maher was making use of information given him by TDK that was its own information and was not the confidential information of UKDR.

(vi) In my view, therefore, the defendants were not in breach of their contractual undertakings to UKDR because the correct interpretation of the contractual obligations is that they are not free-standing but require there to be the use (or disclosure) of confidential information; and Mr Maher was not using confidential information of UKDR by installing the dry risers at Dunmore Point and Granard House. By that time, the alleged confidential information of UKDR was in the public domain and therefore no longer confidential: but, even if I am wrong on that, Mr Maher was using information given him by TDK that was its own information and not the confidential information of UKDR.

(vii) It follows that I do not need to consider the case of *Capgemini India Private Ltd v Krishna* [2014] EWHC 1092 (QB) or any issues arising from the restraint of trade doctrine. All that I will say is that, if I had decided that the defendants were in breach of their contractual undertakings, I would have been concerned as to whether the injunctions that the claimant was seeking in this case went beyond what is permitted under the restraint of trade doctrine.

5. THE COUNTERCLAIM

18. As I have mentioned at paragraph 6 above, the second defendant (JMFPM) brings a counterclaim against UKDR alleging that UKDR has not paid invoices for the first three weeks of 2018 (see invoice no 0018 at bundle 3/868) for work done for UKDR by Mr Maher, operating through the second defendant. The sum counterclaimed is £14,508 plus VAT but the defendants conceded at trial that there should be deductions of £880 from that sum so that the counterclaim is for £13,628 plus VAT.

19. The claimant's defence to the counterclaim was that, although the work was undertaken by Mr Maher, money was being withheld for various reasons such as that the amount of time spent was overstated or that no test had been carried out or that the job was incomplete. Although not set out in any pleadings, the deductions made by UKDR were each briefly summarised in a single line explained in a table set out as exhibit 11 to the second witness statement of Mr Charlton. However, it became clear in his cross-examination that Mr Charlton did not himself know whether those deductions were justified and was entirely relying for them on the word of his colleague, Michael Heydon, who has given no evidence on these matters. In contrast, Mr Maher directly disputed those deductions in his evidence (subject to deductions of £880 as I have mentioned in paragraphs 6 and 18 above). Without proper evidence to contradict Mr Maher, I accept his evidence that those deductions (except as to £880) should not have been made.

20. However, even if those specific deductions were unjustified, Mr Charlton's evidence was that UKDR had a defence to all the sums counterclaimed, including the balance (after making the specific deductions) of £5765 plus VAT (ie £6918), because:

'TDK are currently snagging every job which UKDR have completed on their behalf (which includes those undertaken by Mr Maher)…'

But no snagging list has ever been shown to Mr Maher despite requests for it and despite the fact that the work was undertaken by Mr Maher many months ago. Although the terms on which the defendants worked for UKDR were not in evidence before me, I think it likely that one could imply a term to the effect that payment could be delayed pending 'snagging' for a short period of time. But any such justification passed many months ago.

21. I therefore decide that UKDR has provided no defence to the counterclaim and the counterclaim therefore succeeds for the sum of £13,628 plus VAT (plus interest).

6. CONCLUSIONS

22. My central conclusions are therefore as follows:

(i) The claimant succeeds in its claim for the tort of conversion because Mr Maher did steal UKDR's dry riser components. The claimant is therefore entitled to damages of £3690.72 (plus interest) as the value of those components.

(ii) The claimant fails in its claims for breach of Mr Maher's contractual undertakings because, although Mr Maher did carry out the alleged dry riser installations at Dunmore Point and Granard House, he did not use UKDR's confidential information in so doing.

(iii) Now that we have had the trial, the undertakings given by Mr Maher to the court on 9 August 2018, as the equivalent of an interim injunction, should be discharged.

(iv) The second defendant succeeds in its counterclaim for the sum of £13,628 plus VAT (plus interest).

23. I thank counsel for their helpful submissions.