SUPREME COURT OF QUEENSLAND

CITATION:	*Northbuild Constructions P/L v Discovery Beach Project P/L* [2009] QCA 345
PARTIES:	**NORTHBUILD CONSTRUCTIONS PTY LTD** ACN 011 063 764 (plaintiff/appellant) **v** **DISCOVERY BEACH PROJECT PTY LTD** ACN 100 500 981 (defendant/respondent)
FILE NO/S:	Appeal No 5115 of 2009 SC No 3756 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2009
JUDGE:	McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed with costs to be assessed on the standard basis.** **2. The order of the primary judge is set aside and instead it is ordered that the appellant have leave to use:** **(a) the financial statements and records provided by the respondent in proceeding BS 3756 of 2005 (pursuant to the order of Martin J on 26 November 2008);** **(b) the instructions given by the respondent's directors to Mr Bell QC in November 2006;** **(c) Mr Bell QC's advice to the respondent dated 29 November 2006; and** **(d) the affidavits filed in proceeding BS3756 of 2005, together with their exhibits (with the exception of the two affidavits of Lloyd Sydney Nash filed on 16 and 24 February 2009, which were sealed by an order of White J on 24 February 2009)** **for the purpose of cross-examination of witnesses as to credit in an expert determination between the appellant and the respondent known as the Category 1 dispute.** **3. The parties' costs of and incidental to the application before the primary judge on 6 April 2009 are reserved.**

CATCHWORDS: APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF THE COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – the appellant obtained an interim freezing order against the respondent with an undertaking that it "not publish the terms or substance of this order to any person" – the appellant sought an order releasing it from this undertaking and to cross-examine respondent witnesses by raising matters in the documents – the trial division judge dismissed the application – the judge found that the documents in question would not be amenable to subpoena – whether the trial judge was mistaken in finding that the documents were not amenable to subpoena – whether the special circumstances warranted the appellant's release from its undertaking – whether the appeal should be allowed

Alister v The Queen (1984) 154 CLR 404; [1984] HCA 85, cited
Ainsworth v Hanrahan (1991) 25 NSWLR 155, cited
Alterskye v Scott (1948) 1 All ER 469, cited
British American Tobacco Ltd v Cowell (No 2) (2003) 8 VR 571; [2003] VSCA 43, considered
Crest Homes Plc v Marks [1987] AC 829, cited
Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd [1975] QB 613, cited
Esso Australia Resources Ltd v Plowman (1994) 183 CLR 10; [1995] HCA 19, cited
Fried & Ors v National Australia Bank & Ors (2000) 175 ALR 194; [2000] FCA 911, cited
Hearne v Street (2008) 235 CLR 125; [2008] HCA 36, considered
Home Office v Harman [1983] AC 280, considered
Minister for Education v Bailey (2000) 23 WAR 149; [2000] WASCA 377, cited
R v Spizzirri [2001] 2 Qd R 686; [2000] QCA 469, cited
Riddick v Thames Board Mills Ltd [1977] 1 QB 881, cited
Springfield Nominees Pty Ltd & Ors v Bridgelands Securities Ltd & Ors (1992) 38 FCR 217; (1992) 110 ALR 685, cited

COUNSEL: D Savage SC, and C Wilkins, for the appellant
B Porter for the respondent

SOLICITORS: Crouch & Lyndon for the appellant
Clayton Utz for the respondent

[1] **McMURDO P:** The respondent, Discovery Beach Project Pty Ltd, which I shall call "the redeveloper", engaged the appellant, Northbuild Construction Pty Ltd, which I shall call "the builder", to carry out building work on its Surfair complex on Queensland's Sunshine Coast in 2003. Their business arrangements led to a dispute about payments. Attempts to resolve the dispute have been and are the subject of arbitration and expert determinations outside the court system with occasional skirmishes in it. This appeal is part of one such skirmish.

[2] On 9 May 2005, the builder obtained, by consent, an interim freezing order[1] against the redeveloper from Byrne J. Under that order, subject to certain qualifications, the redeveloper was required to not dispose of net assets of $3,665,585.29. The builder undertook to "not publish the terms or substance of this order to any person except the [redeveloper]". That order remained operative on 26 November 2008 when Martin J, on the builder's application, varied the freezing order and ordered the redeveloper to provide the builder with a copy of its secondary accounting records for the financial years ended 30 June 2005, 2006, 2007 and 2008.

[3] One area of dispute between the parties is whether an oral agreement of 23 May 2003, between Derek Williams (also known as McCartney) and Craig Dowling on behalf of the redeveloper, and Paul Boddington on behalf of the builder, varied their written contract. Mr Boddington denies making any such oral agreement and the builder challenges the credit of the redeveloper's witnesses Mr Williams and Jennifer English (also known as McCartney). The parties refer to the process for determining this particular dispute as "the Category 1 expert determination".

The proceedings before the primary court

[4] The builder sought an order releasing it from its undertaking made on 9 May 2005 (not to publish the terms or substance of the freezing order to anyone other than the redeveloper); for leave to use specified documents it obtained in the freezing order proceeding (including documents obtained by subpoenas) and by the order of Martin J on 26 November 2008; and to cross-examine Mr Williams and Ms English in the Category 1 expert determination as to their credit by raising matters in those documents.

[5] Dutney J heard and determined that application on 17 April 2009. His Honour ordered that the builder be released from its undertaking not to publish the terms or substance of the freezing order to anyone other than the respondent, but otherwise dismissed the application.

[6] His Honour's reasons for refusing to allow the builder to use the documents to cross-examine in the Category 1 expert determination were as follows. In that pending determination, the builder contended that the redeveloper was reducing the assets which were subject to the freezing order to zero. The builder alleged that the redeveloper's principal officer had stated an intention to divest the redeveloper of assets so that any judgment ultimately obtained by the builder would be worthless. The credit of the redeveloper's Mr Williams was in issue. The question was whether cross-examination of Mr Williams should be permitted where it turns on the use of documents compulsorily obtained in the freezing order proceedings. His Honour, referring to *Hearne v Street*,[2] noted that the builder required the court's leave to use those documents for any purpose other than the purpose for which they were obtained (the freezing order proceedings). To be relieved of its implied undertaking, the builder should ordinarily demonstrate special circumstances: *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*.[3] The builder relied on the following matters to do that. The freezing order proceedings were in aid of its claim in the Category 1 expert determination concerning its contractual entitlements against the redeveloper. These proceedings were contemplated in the freezing order

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1 *Uniform Civil Procedure Rules* 1999, ch 8 div 2.

2 (2008) 235 CLR 125 at 154-155 [96].

3 (1992) 38 FCR 217 at 225.

proceedings. Without that material, the builder would be inhibited in cross-examining the redeveloper's witnesses as to their credit in the Category 1 expert determination. Some of the documents were already in the public domain having been used in other litigation. Dutney J considered that those matters, neither alone nor in combination, amounted to sufficiently special circumstances to warrant releasing the builder from the terms of the freezing order.

[7] His Honour added:

> "… the most compelling discretionary reason why the implied undertaking should not be set aside in this case is that the documents would not be subject to disclosure or amenable to subpoena even if the proceedings in which it is sought to use them were proceedings in this Court. They do not go to any fact in issue between the parties but are limited to the collateral issue of the credit of Mr McCartney and perhaps another witness, a Ms English.
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> It seems to me that I should not permit documents to which the [builder] would not have access in ordinary Court proceedings, even if the [builder] knew of their existence, to be used by the [builder] simply because it has managed to obtain them in different, albeit it in some respects, related proceedings."

The builder's contentions in this appeal

[8] This appeal is only from that part of the primary judge's order dismissing the builder's application. The question for the judge was whether the builder showed special circumstances justifying it being granted leave to use the specified documents and to cross-examine on them.[4]

[9] The builder contends that his Honour erred in a number of ways. The judge wrongly considered that, because the builder sought to use the specified documents to cross-examine the redeveloper's officers solely as to credit, it should not be entitled to use those documents in that cross-examination. The judge further erred by applying an incorrect test, namely, whether the specified documents would be subject to disclosure or amenable to subpoena if the proceeding in which they were to be used was a proceeding in court. The judge did not comprehend that some of the specified documents (Mr Bell QC's written advice to the redeveloper of 29 November 2006 and the instructions the redeveloper gave to him on 3 November 2006) were not obtained by the builder through discovery or a court order. The redeveloper chose to refer to those documents in the freezing order proceedings to defend its conduct, thereby waiving legal professional privilege. Further, the judge erred in not considering that the specified documents were in the public domain. As they had been received into evidence in proceedings in open court, the public was entitled to search the file and to copy them.

[10] The builder contends that one or more of these errors resulted in the primary judge's exercise of discretion miscarrying and that this Court should now re-exercise the discretion in its favour. It has refined the orders it sought at first instance. It now seeks orders giving it leave to use, for the purpose of cross-examination of witnesses as to credit in the Category 1 expert determination, the financial statements and records provided by the redeveloper in the proceedings before

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4 *Hearne v Street* (2008) 235 CLR 125 at 158-160 [107].

Martin J on 26 November 2008; the instructions given by the redeveloper's directors to Mr Bell QC in November 2006 and Mr Bell QC's resulting advice; and the affidavits filed in the proceedings before Martin J on 26 November 2008 (with the exception of those sealed by an order of White J on 24 February 2009). Despite much longer previous estimates, the builder has assured this Court that any such cross-examination will take no more than half a day in total.

[11] The builder submits that the special circumstances warranting its release from its implied undertaking and the granting of these orders are these. The freezing order and the Category 1 expert determination were closely linked. The specified documents were not of a commercially sensitive or highly confidential nature. Some of the documents were already in the public domain while others were created for use in the freezing order proceedings and were effectively in the public domain. The builder especially emphasises as special the following features of this case. The documents were likely to be significant and highly relevant in achieving justice between the parties. Without them, the builder would be unable to cross-examine the redeveloper's key witnesses as to their credit in the Category 1 expert determination. The documents showed that the redeveloper's directors, in part through the redeveloper's financier (Capital Finance Australia Limited), had reduced the redeveloper's net assets from the $3,665,585.29 stated in the freezing order to zero not only by paying legal costs as permitted under the freezing order but also by disposing of property at under-value and by repatriating capital in late 2006 and early 2007. The builder wished to establish that the redeveloper's directors had done this to thwart its recovery of any assets if its claim against them was successful; and that the redeveloper's directors had thereby breached their statutory and fiduciary duties. These conclusions were supported by a concession made by the redeveloper's counsel, Mr Bell QC, in his November 2006 advice that the redeveloper had disposed of assets at under-value in late 2006 and early 2007. The Category 1 expert determination will require witnesses to be cross-examined about the purported oral agreement. Their credit will be in issue. The right to cross-examine a witness about their credit is essential to the administration of justice. The builder ought not be restricted in its cross-examination or in using the specified documents in conducting the cross-examination because of the freezing order.

The redeveloper's contentions in this appeal

[12] Counsel for the redeveloper in this appeal conceded that the primary judge erred in finding that a compelling discretionary reason for not setting aside the builder's implied undertaking was that none of the specified documents were amenable to subpoena.[5] But he submitted that this was not an error requiring the setting aside of the primary judge's decision, as the judge correctly found that there were no special circumstances warranting the granting of leave to the builder to withdraw from its undertaking. He emphasised the public policy behind the implied undertaking not to allow a party to use documents obtained in one proceeding. These considerations were emphasised by the High Court in *Hearne v Street*.[6] The circumstances relied on by the builder were not sufficiently special to set off these important public policy considerations and the appeal should be dismissed.

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5 This aspect of the primary judge's reasons is set out in these reasons at [7].

6 (2008) 235 CLR 125, Gleeson CJ at 131 [3], Hayne, Heydon and Crennan JJ at 157-160 [105]-[108].

Conclusion

[13] The dispute between the parties has been long, expensive and bitterly fought. One thing that is common ground is that the builder was restrained from using the documents it obtained or became aware of through discovery in the freezing order proceedings for any purpose other than those proceedings, unless and until it was relieved of that obligation by the court. This obligation is commonly called an implied undertaking, but which is in fact a substantive legal obligation to the court: *Hearne v Street*;[7] *Minister for Education v Bailey*.[8] The onus is on the builder to establish why it should be relieved from it. Discharging that onus and persuading the court to relax or waive those obligations is no easy matter. The public policy considerations behind them are to ensure that, in compelling specified conduct (in this case, the production of documents in proceedings for a freezing order) privacy and confidentiality are not invaded more than is absolutely necessary for the purpose of securing that justice is done: *Hearne v Street*;[9] *Home Office v Harman*;[10] *Minister for Education v Bailey*.[11] Whilst all parties are expected to comply with court practice, procedure and orders, the implied undertaking is thought to encourage frank and full compliance: *Home Office v Harman*;[12] *Hearne v Street*.[13]

[14] It is also common ground that, because of the public policy considerations to which I have referred, the builder was required to show what are conveniently termed as special circumstances before this Court would release it from its implied undertaking: *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*.[14]

[15] As the redeveloper rightly concedes in this appeal, the judge wrongly considered that none of the specified documents would be amenable to subpoena, even if the Category 1 expert determination were to be heard in court. Documents which go only to credit may be subpoenaed as long as they are required for some sufficiently disclosed legitimate forensic purpose: *Alister v The Queen*;[15] *R v Spizzirri*;[16] *Fried & Ors v National Australia Bank & Ors*.[17] The judge stated that this was a compelling reason for not setting aside the builder's implied undertaking. In light of his Honour's expressly stated reasons,[18] the redeveloper's contention (that this error did not substantially affect his Honour's rationale in refusing to give leave to the builder to both use the documents and to cross-examine the redeveloper's witnesses about issues raised in them) is untenable. It follows that the appeal must be allowed unless this Court, in exercising its own discretion, reaches the same conclusion as his Honour.

[16] The important public policy considerations behind implied undertakings of this kind are about securing justice between the parties and maintaining public confidence in the justice system. It follows then that courts will usually relieve a party from its

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7 (2008) 235 CLR 125, Gleeson CJ at 131 [3]; Hayne, Heydon and Crennan JJ at 160 [108].
8 (2000) 23 WAR 149, Steytler J at 156 [25], Parker J agreeing.
9 (2008) 235 CLR 125, Hayne, Heydon and Crennan JJ at 158-160 [107].
10 [1983] 1 AC 280, Lord Diplock at 304-305, Lord Keith of Kinkel at 308-309; Lord Roskill at 326.
11 (2000) 23 WAR 149.
12 [1983] 1 AC 280, Lord Keith of Kinkel at 308-309; Lord Roskill at 326.
13 (2008) 235 CLR 125, Kirby J at 143.
14 (1992) 38 FCR 217.
15 (1984) 154 CLR 404.
16 [2001] 2 Qd R 686.
17 (2000) 175 ALR 194.
18 Set out at [7] of these reasons.

implied undertaking where, after giving proper consideration to the public policy reasons behind it, the circumstances of the case demonstrate this is plainly in the interests of justice: *Springfield Nominees Pty Ltd v Bridgelands Securities*;[19] *Minister for Education v Bailey*.[20]

[17] It is significant in considering whether special circumstances exist in this case that the freezing order proceedings and the Category 1 expert determination in which the builder wishes to use the specified documents are closely related and raise interlocking issues. Although the builder proposes to rely on the specified documents only to cross-examine the redeveloper's witnesses as to their credit, their credit is central to the key dispute between the parties: whether the written contract was varied by an oral agreement. It is highly relevant that, if the builder is not released from its implied undertaking, its cross-examination of the redeveloper's witnesses (Mr Williams and perhaps Ms English) about the alleged oral agreement could be farcically hamstrung. The redeveloper could argue that any cross-examination of Mr Williams and Ms English as to their credit was impermissible as it was being conducted on information obtained in the freezing order proceedings. This would especially be so if the cross-examination touched on the alleged dishonest dissipation of the redeveloper's assets. It is also relevant that the specified documents are not commercially sensitive. They appear potentially significant and relevant to the central issue in the Category 1 dispute determination: whether the key witnesses are honest.

[18] Whilst not as compelling on its own, another relevant circumstance is that under UCPR r 981 any person, upon paying the prescribed fee, could search the file pertaining to the freezing order proceedings and obtain copies of many of the documents the builder now seeks leave to use in the Category 1 expert determination (other than those sealed by an order of White J on 24 February 2009). Many of the specified documents are, in that sense, in the public domain. Of course, the fact that others who have access to the documents are not bound by the implied undertaking does not in itself warrant the builder's release from it.

[19] It is also relevant that the documents relating to Mr Bell's advice were not obtained through discovery. The redeveloper waived privilege by using them to explain its actions in the freezing order proceedings. That seems plainly correct, but, it is arguable that the implied undertaking nevertheless extends to those documents. For the purpose of determining this appeal, I am prepared to assume it does.

[20] The redeveloper places emphasis on the cases of *Home Office v Harman* and *British American Tobacco Ltd v Cowell (No 2)*[21] where parties were not relieved from their implied undertakings to the court. Those cases turned on their own peculiar facts and are easily and clearly distinguishable from the present case.

[21] Giving due weight to the important public policy considerations applicable in cases of this kind, the combined circumstances to which I have referred demonstrate that the interests of justice, both between the parties and systemically, are best served by releasing the builder from its implied undertaking and allowing it to use the specified documents to cross-examine the redeveloper's witnesses in the Category 1 expert determination. The combined circumstances are sufficiently special to

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19 (1992) 38 FCR 217 at 225.
20 (2000) 23 WAR 149 at 156.
21 (2003) 8 VR 571.

warrant this Court taking the extraordinary step of giving leave to the builder to allow it to depart from its implied undertaking in respect of the documents it obtained and became aware of in the freezing order proceedings. I hope that the parties' lawyers can now assist them to speedily finalise all aspects of this lengthy and costly dispute. Otherwise the matter could become of institutional concern.

[22] For these reasons, I would allow the appeal and make the following orders:

1. The appeal is allowed with costs to be assessed on the standard basis.

2. The order of the primary judge is set aside and instead it is ordered that the appellant have leave to use:

   (a) the financial statements and records provided by the respondent in proceeding BS3756 of 2005 (pursuant to the order of Martin J on 26 November 2008);

   (b) the instructions given by the respondent's directors to Mr Bell QC in November 2006;

   (c) Mr Bell QC's advice to the respondent dated 29 November 2006; and

   (d) the affidavits filed in proceeding BS3756 of 2005, together with their exhibits (with the exception of the two affidavits of Lloyd Sydney Nash filed on 16 and 24 February 2009, which were sealed by an order of White J on 24 February 2009)

   for the purpose of cross-examination of witnesses as to credit in an expert determination between the appellant and the respondent known as the Category 1 dispute.

3. The parties' costs of and incidental to the application before the primary judge on 6 April 2009 are reserved.

[23] **MUIR JA:** I agree with the reasons of McMurdo P and with the orders she proposes.

[24] **CHESTERMAN JA**: I agree with the orders proposed by the President and with her Honour’s reasons for thinking that the appellant should have leave to cross-examine the respondent’s officers by reference to the materials described in the order.

[25] There is as well a basis for concluding that the appellant did not need leave to use the documents for the cross-examination. The ground was only lightly touched upon in argument but is worth exploring.

[26] The scope of the undertaking as to what use may be made of documents produced on discovery has been differently expressed in the cases, although the variations are slight, and the concept described by the different expressions is obviously the same. The variations in expression give some indication of the width of the use.

[27] In *Alterskye v Scott* [1948] 1 All ER 469 Jenkins J said (470):

> "The discussion before me makes it clear that there is room for considerable argument what a collateral or ulterior purpose is. Counsel … does not dispute that his client obtained discovery on an implied undertaking … that the documents disclosed would not be used for any collateral or ulterior purpose, but he points out the difficulty of deciding whether or not any given use of a particular document might be said to be ulterior or collateral in its purpose or other than reasonably necessary for the conduct of the action."

[28] Lord Diplock in *Home Office v Harman* [1983] 1 AC 280 explained (302) that the contempt of court in that case was in allowing a journalist access to documents disclosed by the Home Office:

> "… not for any purpose connected with the conduct of that action, but for some collateral or ulterior purpose of her own".

His Lordship then posed the question raised by the appeal:

> "… whether it is the duty of the solicitor … who in the course of discovery in … litigation has obtained possession of … documents belonging to the other party … to refrain from using the advantage enjoyed by virtue of such possession for some collateral or ulterior purpose of his own not reasonably necessary for the proper conduct of the action on his client's behalf".

[29] The question was, of course, answered affirmatively. The formulation of the terms of the undertaking is important as showing that the documents were to be used only for a "purpose connected with the conduct of the action" or a purpose which was "reasonably necessary for the proper conduct of the action".

[30] In *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 Kirby P, speaking of the use to which answers to interrogatories might be put, noted that *Harman* had established that:

> [t]he provision of documents produced on discovery for an extraneous or ulterior purpose unconnected with the litigation for which they were produced, is a contempt." (164)

[31] In *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613 Talbot J (618) noted the submission that:

> "… it was an established principle that a party to litigation was under an obligation not to make improper use of documents disclosed in an action …" and "… disclosure of such documents for purposes other than the litigation in question was an improper use."

[32] His Lordship expressed his own opinion (621):

> "Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed."

[33] The judgment in *Distillers* was approved by the Court of Appeal in *Riddick v Thames Board Mills Ltd* [1977] QB 881, Lord Denning remarking (896):

> "A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed by Talbot J in *Distillers*".

[34] In *Crest Homes Plc v Marks* [1987] 1 AC 829 Lord Oliver said of material obtained on discovery, that:

> "It must not be used for any 'collateral or ulterior' purpose, to use the words of Jenkins J in *Alterskye* … approved and adopted by Lord Diplock in *Harman's* case… . Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick*".

[35] In *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 Mason CJ (with whom Dawson and McHugh JJ agreed) spoke (32) of the implied undertaking not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed. His Honour referred to *Alterskye*, *Distillers Co*, *Riddick* and *Harman* and quoted from *Bray on Discovery* (1st ed 1885):

> "A party who has obtained access to his adversary's documents … has no right to make their contents public or communicate them to any stranger to the suit … nor to use them … for any collateral object".

[36] In *Hearne v Street* (2008) 235 CLR 125 Gleeson CJ spoke of the undertaking:

> "… not to use them for a purpose other than the conduct of the legal proceedings in question." (130)

and noted (131) that in some cases there may be argument about:

> "… the scope of the concept of use of a document for purposes other than the conduct of the legal proceedings in which the party is involved."

[37] In *Minister for Education v Bailey* (2000) 23 WAR 149 Steytler J (with whom Parker J agreed) said (156-157):

> "It is only for that limited purpose that discovery is required to be given and it is no doubt for that reason that other uses of a discovered document have, in the cases … been described as 'ulterior or collateral'. This expression is said by Borrie and Lowe, *The Law of Contempt* … to have originated in *Seton's Judgments and Orders* … which referred to 'vexatious or improper use' for a 'collateral object' (although the phrase 'collateral object' appeared in *Bray on Discovery* … That, in turn, appears to have led to the use of the expression 'collateral or ulterior purpose' in the judgment of Jenkins J in *Alterskye*)".

[38] One gleans from this review of some of the authorities that what a party to litigation may not do with documents produced pursuant to compulsive processes is to utilise them for purposes "unconnected" with the litigation; or "unrelated" to it; or for a purpose "not reasonably necessary for the conduct of the litigation."

[39] The scope of the undertaking is, I think, not entirely accurately expressed in the narrower phrase; "for the purposes of that action" or "use in the action in which they are disclosed".

[40] The wider designation has the support of Mason CJ in *Esso* and Kirby P in *Ainsworth* as well as Lord Diplock in *Harman*. The undertaking will not be broken unless the disclosure which is impugned can be seen to be for a "collateral

purpose", or an "ulterior purpose". Both terms indicate some disconnection between the proper conduct of the proceedings or litigation, and the use to which the documents are put.

[41] One can gain some understanding of what may constitute collateral or ulterior purpose by a consideration of the facts in the particular cases. *Bailey* and *Riddick* were both instances of a document disclosed in one legal proceeding between two parties being used in later, separate, proceedings between the same parties. Bailey sought and obtained leave to use a document obtained in an action for breach of contract of employment in a subsequent action alleging misfeasance in public office by the Minister who had dismissed him. Riddick obtained from his employer a document in his action for wrongful arrest and false imprisonment arising out of the manner in which he was dismissed from his employment. He brought a second action against his employer for defamation based upon the disclosed document. The use was held improper.

[42] Distillers were the makers and distributors of thalidomide. It had been sued by persons who suffered from the drug and in that suit discovered documents damaging to its case. The documents were given to an expert advising those claimants. The expert later sold the documents, or information contained in them, to a newspaper. An injunction was granted against the use of the information by the newspaper. *Harman*, too was a case in which a solicitor provided discovered documents to a newspaper. In *British American Tobacco Ltd v Cowell (No 2)* (2003) 8 VR 571 the executors of the estate of a plaintiff who had obtained documents on discovery from the tobacco manufacturer she had sued were restrained from delivering the documents to government health agencies in the United States of America.

[43] *Ainsworth* was a case in which answers to interrogatories by a defendant in an action for defamation were given by the plaintiff, a police officer, to government officials opposing the defendant's application for a gaming licence in the Licensing Court.

[44] In all these cases the purpose to which the disclosed documents were put had no connection with the prosecution of the proceedings in which and for which the documents were produced. The use was therefore improper, and in breach of the implied undertaking. In each case the impugned use can be easily described as ulterior or collateral to the purpose behind the documents' production.

[45] These cases are all very different from the present case in which the documents are sought to be used between the same parties and with respect to the same dispute. As the President has pointed out the application for a freezing order was made so as to protect the value of the cause of action which the appellants are pursuing in the expert determination. The successful application for an order restraining the respondent from dissipating its assets was a means of ensuring that success in the determination would not result in a pyrrhic victory.

[46] I would not regard the purpose of the production of the documents in the application for the freezing order as being limited to the conduct of that application. It was ancillary to, and an adjunct of, the wider dispute between the parties to be determined by the expert. They were "connected", and each "related" to the other. It was, in my opinion, reasonably necessary for the conduct of the proceedings between the parties that the documents produced in the application for the freezing order be used in the expert determination.

[47] When one comes to answer the question: are documents produced on discovery being used for a purpose unrelated to or unconnected with the proceeding, or litigation, in question or not for a purpose reasonably necessary for the conduct of the litigation? One must analyse what is the litigation or proceeding in question. One should not take any narrow or technical approach to the analysis.

[48] If the parties here had kept their dispute in the court, where it commenced, and not embraced alternative dispute resolution there can be no doubt that the documents produced in the application for the freezing order could have been used in the cross-examination of witnesses at the trial. The "proceedings" or "litigation" in which the documents were produced would not have been confined to the interlocutory application for the freezing order. The purposes of the litigation would encompass all the disputes arising out of or occurring in the conduct of the action from the commencement to judgment.

[49] The position cannot be any different where the parties commit a part, even the major part, of their dispute to arbitration or determination. To take such a view would be to ascertain the scope of the undertaking not by reference to the purpose for which documents were used but by the forum in which the dispute was to be adjudicated. The authorities make it plain that it is purpose which is the determinant of whether or not use is permitted.

[50] The scope of the undertaking may be better expressed by saying that documents produced on discovery or other compulsive process may only be used for a purpose connected with or related to the determination of the dispute in which the parties are engaged and to assist in the resolution of which the documents were required. Such a formulation extends to the determination of disputed rights other than by trial.

[51] It is instructive that in the context of using documents disclosed in one proceeding to advance another Lord Oliver in *Crest Homes* described the improper purpose as the use of documents in another "different and wholly unrelated proceeding". The proceedings here, curial and non-curial, are not relevantly different and are closely related.

[52] The rationale for the law's imposition of the undertaking was described, by reference to the authorities, in *Bailey* (156):

> "… the policy consideration is that of minimising invasions into the privacy and confidentiality of others.
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> A like rationale … was … that the … basis for the rule is that where one party compels another … to disclose documents or information … the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them. To similar effect are the comments … that the implied undertaking should not be seen merely as an inducement to a litigation to disclose documents which … he might otherwise have been inclined to conceal but that it was more a matter of justice and fairness to ensure that privacy and confidentiality were not invaded more than was absolutely necessary for the purposes of justice.
>
> It is apparent from the terms in which the implied undertaking or obligation has been formulated, and from this last rationale which

> has been offered for it, that the invasion of privacy and confidentiality inherent in the giving of discovery is … justified for the purpose of doing justice in the proceedings in which discovery is given."

[53] To use the documents produced under compulsion in the application for the freezing order in the expert determination of whether, pursuant to the contract between them, the appellant is entitled to payment for the work done at the request of the respondent cannot sensibly be regarded as an invasion of the respondent's privacy or confidentiality, or as for any purpose other than the doing of justice between the parties in the ongoing alternative dispute resolution processes in which they have chosen to engage. The rationale for imposing the undertaking will not be offended by holding that the documents may be used for the cross-examination.

[54] Here documents produced in an interlocutory proceeding in court, the necessity for which arose from the need to protect the integrity of the non-curial determination, are relevant to an inquiry into an issue which is at the heart of the parties' dispute. It would be absurd to describe the use of the documents in that determination as being for a collateral or ulterior purpose.

[55] For these reasons I conclude that the use of the documents in cross-examination by the appellant would not have breached the implied undertaking. However as the appeal was argued principally on the basis that the appellant should have leave to use the documents for cross-examination I agree with the orders proposed by the President.