HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

PETER HEARNE AND ANOR — APPELLANTS

AND

JOAN STREET AND ORS — RESPONDENTS

Hearne v Street [2008] HCA 36
6 August 2008
S123/2008

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with T G R Parker SC for the appellants (instructed by Clayton Utz)

T A Alexis SC with P M Sibtain for the respondents (instructed by Wise Legal)

CATCHWORDS

Hearne v Street

Courts – Appeal – Jurisdiction – Supreme Court of New South Wales (Court of Appeal) – Civil and criminal contempt of court – Character of contempt charged – Whether civil or criminal – Whether appeal to Court of Appeal precluded by findings and orders of primary judge acquitting alleged contemnors.

Contempt of court – Where implied undertaking by corporate litigant not to use documents prepared by another party otherwise than for purpose of proceedings in which they were prepared – Whether appellants as servants and agents of corporate litigant bound by obligation – Meaning of "implied undertaking" – Whether knowledge of implied undertaking required or whether knowledge of facts generating an obligation imposed by law sufficient.

Contempt of court – *Supreme Court Act* 1970 (NSW), s 101(6) – Whether breach of implied undertaking civil or criminal contempt – Whether statement of charge precluded appeal to New South Wales Court of Appeal.

Contempt of court – Disclosure of documents filed in but not yet received in evidence by court – Whether implied undertaking attached to documents that they would not be disclosed to third parties without leave of court – Where documents disclosed to Minister, a member of Parliament, and staff whether such disclosure protected by law of Parliament – Whether such disclosure protected by public interest defence based upon right of communication with Parliament – Whether such questions should or could be decided by Court on basis of grounds of appeal and in face of disclaimer by alleged contemnors.

Contempt of court – Implied undertaking not to disclose documents filed in court until received in evidence – Whether implied undertaking now a substantive rule of common law – Whether applicable law should be re-expressed – Whether such questions should or could be decided.

Parliament – State Parliament (NSW) – Privileges of – Contempt of – Whether provision of documents to Minister, a member of Parliament, within privileges of Parliament or public interest defence based thereon – Whether such questions could or should be decided in light of record and arguments of parties.

Words and phrases – "implied undertaking".

Supreme Court Act 1970 (NSW), s 101(6).
Supreme Court Rules 1970 (NSW), Pt 55 r 7.

1 GLEESON CJ. The parties to this appeal agreed that it raised two issues for decision. The issues were said to arise "where documents prepared for legal proceedings have been served upon another party to those proceedings, and the party so served is treated as having undertaken to the court not to use the documents otherwise than for the purpose of the proceedings." The documents in question in the appeal were treated as being in the same position, legally, as documents produced pursuant to an order for discovery. It was accepted that they were the subject of what is often described as an "implied undertaking" not to use them for a purpose other than the conduct of the legal proceedings in question[1]. Upon that basis, the issues were formulated as follows:

> "(a) [W]hether a servant or agent of such a party into whose hands the documents come, and who is aware that the documents were prepared for legal proceedings, is to be liable as if he or she had personally given such an undertaking; and
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> (b) [I]f so, is a wilful but not contumacious breach of that undertaking by that servant or agent a 'criminal contempt' for the purposes of s 101(6) of the *Supreme Court Act 1970* (NSW)."

2 The second issue goes to jurisdiction. It turns upon the meaning and effect of s 101(5) and (6) of the *Supreme Court Act*. Those provisions came into effect in 1997. The evident purpose of sub-s (6) was to reflect, in the area of contempt, the general reluctance of the law to permit prosecution appeals against acquittals in criminal proceedings[2]. The distinction between civil and criminal contempt is in some respects unsatisfactory, but the *Supreme Court Act* adopts the distinction for jurisdictional purposes, and therefore it must be applied. The question is whether, on the true construction of s 101 of the Act, the present case falls on the civil or the criminal side of the line. I agree with Hayne, Heydon and Crennan JJ, for the reasons they give, that this is a case of civil contempt, and that the second issue should be decided in favour of the respondents[3].

3 As to the first issue, I agree with Hayne, Heydon and Crennan JJ that the "implied undertaking" is now better understood as a substantive legal obligation. I also agree that a servant or agent of a party, in the position described in the formulation of the first issue, is directly bound by such an obligation, and is not merely potentially liable as an accessory to a breach by the party. In view of the role of the appellants in the conduct of the matter of which the legal proceedings

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1 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

2 See *R v Hillier* (2007) 228 CLR 618; [2007] HCA 13.

3 See also *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 310 per Lord Scarman.

formed an essential part, there is no difficulty in categorising them as agents of Luna Park Sydney Pty Ltd, as the statement of the first issue assumes.

4 Because of the terms in which the first issue is expressed, it is unnecessary to decide how far beyond the class of persons consisting of servants or agents of a party the legal obligation extends; or 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. Both questions could cause difficulties in other cases, but they do not arise in this case.

5 Compulsory pre-trial exchange or disclosure of materials, such as witness statements and experts' reports, is now extensive. The rationale sometimes given for the obligation concerning discovered documents (it is the condition upon which a court compels disclosure of private documents) may not always be applicable to witness statements or experts' reports. There may be little or nothing about them that is private. This, in turn, is connected with the scope of the potential liability of strangers to the litigation into whose hands such materials may come. In this case, however, the appellants were no strangers to the litigation. The issue, as framed, assumes that they were agents of a party, that they were aware that the documents were prepared for legal proceedings, and that the documents were subject to the rule against use other than for purposes of the proceedings. This case does not raise a question whether, in the events that occurred, the documents were used for a collateral purpose, or whether the particular use to which they were put (political lobbying) involved any special considerations.

6 I agree that the first issue also should be decided in favour of the respondents, and that the appeal should be dismissed with costs.

7 KIRBY J. This appeal arises from a judgment of the Court of Appeal of the Supreme Court of New South Wales[4]. That Court, by majority[5], allowed an appeal from orders of Gzell J in the Supreme Court[6]. It set aside his Honour's orders and substituted orders adjudging Mr Peter Hearne and Mr David Tierney ("the appellants") guilty of contempt of court. That finding was based on the first charge brought against each of the appellants in statements of charge filed by the respondents, Ms Joan Street and others ("the residents").

8 The Court of Appeal made consequential orders remitting the residents' notices of motion to Gzell J for hearing as to penalty. By special leave, the appellants have appealed to this Court.

The facts and legislation

9 *The facts*: The factual background to the dispute between the companies with which the appellants are associated and the residents is explained in the reasons of Hayne, Heydon and Crennan JJ ("the joint reasons"). The explanation is expressed in terms that I accept[7]. Those reasons describe the residents' original initiation of proceedings in the Supreme Court of New South Wales claiming relief for the tort of nuisance against Luna Park Sydney Pty Ltd and Metro Edgley Pty Ltd, companies concerned in the operation of Luna Park ("the Park"). This is an amusement park situated on the north shore of Sydney Harbour not far from, and almost opposite to, the central business district of the city.

10 The record reveals that, whilst the nuisance proceedings were on foot, each of the appellants took steps to furnish certain documents to the Minister for Tourism, Sport and Recreation ("the Minister") or her staff. These documents included part of an affidavit sworn by one of the residents and filed, but not yet tendered or read, in the proceedings in the Supreme Court; as well as part of an acoustic report that had been filed on the residents' behalf. A further document detailed what one of the appellants suggested were "ridiculous complaints" that had been submitted to the Park. These documents were said to illustrate the need for new legislation to shield the Park and its operators from proceedings for noise nuisance lest such proceedings drive the Park to closure[8]. Self-evidently, any such closure would diminish the revenues to the government derived from the

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4 *Street v Hearne* [2007] NSWCA 113.

5 Ipp JA and Basten JA; Handley AJA dissenting.

6 *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 624.

7 Joint reasons at [64]-[69].

8 Joint reasons at [70]-[74].

Park and put in serious question the future of the Park as a popular amusement facility for tourists and other patrons.

11 By inference, neither of the appellants, at least initially, regarded their conduct in providing the documents to the Minister and others as wrongful or unlawful.

12 The provision of this material seemingly had its desired effect. As explained in the joint reasons[9], the Minister promptly introduced into Parliament the Luna Park Site Amendment (Noise Control) Bill 2005 (NSW). In the space of a week, the Bill had passed both Houses and received the Royal Assent. The resulting Act commenced operation with effect retrospective to a few days prior to the commencement of the residents' proceedings in the Supreme Court. This forced the residents to reframe their proceedings[10]. They also sought, and obtained, an order for interrogatories directed to Luna Park Sydney Pty Ltd. Ultimately, they filed notices of motion and statements of charge against the appellants, initiating the proceedings that have now found their way to this Court[11].

13 *The legislation*: The reasons and conclusions of the primary judge and of the Court of Appeal are explained in the joint reasons[12]. The critical legislative provisions are s 101(5) and (6) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"). Those sub-sections were inserted a decade before these proceedings commenced by the *Courts Legislation Amendment Act* 1996 (NSW). They provide:

> "(5) An appeal lies to the Court of Appeal from any judgment or order of the Court in a Division in any proceedings that relate to contempt (whether civil or criminal) of the Court or of any other court.
>
> (6) Subsection (5) does not confer on any person a right to appeal from a judgment or order of the Court in a Division in any proceedings that relate to criminal contempt, being a judgment or order by which the person charged with contempt is found not to have committed contempt."

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9 Joint reasons at [75].

10 Joint reasons at [76].

11 Joint reasons at [81].

12 Joint reasons at [89]-[94].

14 Explaining the relevant amendments to the Supreme Court Act, the then Attorney-General (the Hon J W Shaw) said[13]:

> "There is a common law principle that there is no right of appeal from an acquittal in criminal proceedings. However, section 5A(2) of the Criminal Appeal Act provides for the Crown to seek a review of a question of law in criminal proceedings resulting in an acquittal on the basis that the determination on appeal does not reverse the acquittal. This bill makes the same provisions in respect of proceedings for criminal contempt … This provision will apply to criminal contempt matters only and it will not affect or limit the existing rights of the parties in civil contempt proceedings to an appeal."

Questions and issues in the appeal

15 Two questions and two issues are raised by the appeal:

(1) *The parliamentary privilege question*: Given the use made of the court documents which grounds the charges of contempt of court, was the residents' motion to have the appellants dealt with for contempt itself an arguable contempt of the New South Wales Parliament? Would such a contempt or interference in the legislative process of Parliament preclude, on public policy grounds, a finding that the appellants had committed contempt of court as charged? Given the course of the proceedings and the state of the record, ought such questions to be decided by this Court in disposing of the present appeal?

(2) *The re-expression of contempt law question*: Should this Court re-express the law of contempt of court to reflect more current attitudes to public access to information in the possession of the Judicature, as a branch of government? Should such re-expression abandon, or qualify, the legal principles that inhibit the revelation of documents prepared for use in litigation, filed in court and disclosed before such documents are received in evidence at a trial? Is such re-expression open to this Court in these proceedings? Would such re-expression result in the defeat of the charges brought against the appellants?

(3) *The implied undertaking issue*: If the conventional or traditional understanding of the law of contempt of court is to prevail, was the conduct of the appellants capable of constituting contempt of court, as the Court of Appeal determined? In particular, were the majority of the Court

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13 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 17 October 1996 at 4969.

of Appeal correct to hold that the appellants were liable for contempt of court, despite not themselves being bound by the implied personal undertakings of the parties to the underlying action[14]?

(4) *The competency of the appeal issue*: Having regard to s 101(5) and (6) of the Supreme Court Act, did an appeal lie to the Court of Appeal against the primary judge's order dismissing the residents' motions for the appellants to be dealt with for contempt of court? In particular, did the proceedings before the primary judge constitute "proceedings that relate to criminal contempt"[15] for the purposes of s 101(6)?

Civil contempt: the appeal was competent

16 *A threshold jurisdictional question*: Following the dismissal of each of the notices of motion by the primary judge, the residents successfully appealed to the Court of Appeal. However, the appellants now challenge the entitlement of the residents to appeal as they did. They contend that the motions decided by the primary judge were brought in proceedings that "relate[d] to criminal contempt" and that they were not therefore liable to be exposed to double jeopardy in such proceedings, having been acquitted thereon by the primary judge.

17 As all parties recognised, the issue of the competency of the residents' appeal to the Court of Appeal raised a question of jurisdiction. It involved the permissibility of further proceedings following the primary judge's determination. It is conventional for courts to deal with matters of jurisdiction at an initial stage, for, without jurisdiction, other issues fall away[16]. If there is no jurisdiction, a court normally has no business entering into arguments about any substantive or procedural questions, except perhaps the consequential disposition of costs.

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14 cf [2007] NSWCA 113 at [199] per Handley AJA.

15 [2007] NSWCA 113 at [82] per Ipp JA, [130] per Basten JA; cf at [167] per Handley AJA.

16 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 495; [1906] HCA 94; *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; [1911] HCA 31; *Cockle v Isaksen* (1957) 99 CLR 155 at 161; [1957] HCA 85; *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 205; [1960] HCA 40; *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1151 [13]; 173 ALR 145 at 149; [2000] HCA 37.

18 Thus, as the judges in the Court of Appeal recognised[17], the objection to the competency of the appeal, whilst requiring some attention to the evidence and a proper understanding of the factual background to the proceedings, raised a threshold or primary question to be resolved before all others.

19 What I have called the fourth issue should therefore be dealt with first. Was the residents' appeal to the Court of Appeal competent? It was not so if the judgment or order of the primary judge was given in "proceedings that relate to criminal contempt". There is no doubt that, in the terms of s 101(6) of the Supreme Court Act, the primary judge found that each of the appellants had not committed "contempt" as charged.

20 As the division of opinions in the Court of Appeal demonstrates, the answer to this question is not clear cut[18]. The theoretical bases for maintaining a distinction between civil and criminal contempt have been described in this Court as "unsatisfactory"[19]. It is a distinction that occasions "very great difficulty"[20] and consequential uncertainty in the law.

21 *Statutory entrenchment of a dichotomy*: Nonetheless, as the joint reasons point out, any suggestion that all proceedings for contempt should now be classified as criminal in nature must, in New South Wales at least, be rejected in light of the express recognition by the State Parliament of a continuing distinction between civil and criminal contempt. The Supreme Court Act provides that particular appellate consequences flow from the accurate classification of proceedings as relating to one or the other category[21]. So such categories must be accepted as part of the law of New South Wales.

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17 [2007] NSWCA 113 at [16]-[82] per Ipp JA, [124]-[130] per Basten JA, [145]-[178] per Handley AJA.

18 cf *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106-109; [1986] HCA 46; *Witham v Holloway* (1995) 183 CLR 525 at 534; [1995] HCA 3.

19 *Mudginberri* (1986) 161 CLR 98 at 107.

20 *Mudginberri* (1986) 161 CLR 98 at 108.

21 Joint reasons at [130]-[132]. I do not pause to consider the consequences of such legislation for the postulate in the *Judiciary Act* 1903 (Cth), s 80 that there is a "common law in Australia" or the holdings of this Court that there is but one such common law: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-564; [1997] HCA 25.

22 When this is recognised, the traditional question must be confronted: were the contempt proceedings here essentially punitive (in which case they will be classified as "criminal"), or were they remedial or coercive (in which case they will be classified as "civil")?

23 In this case, relevant to the classification, as it seems to me, is the relief sought by the residents on their notices of motion; the fact that their motions were filed as interlocutory to the principal (civil) proceedings then current before the Supreme Court; and the apparent concern of the residents that, unless the appellants were dealt with for contempt, they might repeat their contemptuous conduct in the future.

24 Without pretending that the issue is beyond argument, I agree with the conclusion in the joint reasons that the better view of such evidence as is available on the record is that the residents' contempt proceedings were remedial or coercive in nature. The proceedings were thus to be classified as relating to civil contempt. An appeal against the primary judge's determination that such contempt had not been committed was not, therefore, prohibited by s 101(6) of the Supreme Court Act. Instead, an appeal lay to the Court of Appeal in accordance with s 101(5) of that Act. The majority in the Court of Appeal were correct to so decide.

25 *Consequential questions*: This conclusion necessitates consideration of the content, or substance, of the law of civil contempt, and the consequences of its application in the present case. However, as the joint reasons demonstrate, that law, as conventionally understood, lacks conceptual coherence and is replete with uncertainties, inadequacies and fictions. It calls out for re-expression or reform. Despite proposals for legislative change[22], such reform has thus far failed to materialise.

26 In the result, I consider it necessary to examine two questions that appear to be presented by this matter but which do not arise on the grounds of appeal, and which were, in fact, disclaimed by the appellants during argument.

Issues and non-issues: the scope of the appeal

27 *Approach: competing principles*: At this point I must address certain principles affecting the judicial function, derived ultimately from the Constitution. Arguably, they arise in this appeal.

28 This Court is here engaged in determining an appeal from a judgment of the Supreme Court of a State. Such an appeal has been described as a strict

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22 Australian Law Reform Commission, *Contempt*, Report No 35, (1987).

appeal[23]. In such an appeal, this Court decides whether or not error has been shown in the decision of the court below. In the nature of things, that consideration ordinarily focuses attention on the issues decided in that court, in turn, reflecting the controversies which the parties brought to that court for its resolution.

29 Notwithstanding opinions to the contrary[24], this Court has held that it may enlarge the issues on appeal, in exceptional circumstances, beyond the controversies decided earlier. Normally, however, it is for the parties to define the ambit of their dispute. This is conventionally done by the pleadings, and by the manner in which the hearing is conducted. In respect of an appeal, the grounds of appeal contained in the notice of appeal, unless varied or departed from by agreement or conduct, define the issues for decision.

30 This Court has repeatedly said that it will not provide advisory opinions; nor will it decide theoretical questions or points no longer in real controversy[25]. What, then, is to happen where, in an appeal, it appears to a judge of this Court that the parties have ignored an important constitutional impediment that appears to arise; have overlooked an important legal argument; have agreed to confine their submissions in an artificial, needless or erroneous way; or have made assumptions about the state of the governing law that the judge is disinclined to accept?

31 Sometimes, where a constitutional difficulty presents, the judge, giving due notice, may decline to accept a shared assumption of the parties, out of a recognition of the special duty of the Justices of this Court to uphold the Constitution, whatever the parties choose to argue in a particular case[26]. Sometimes, where to consider such issues would inflict a procedural unfairness on a party, the judge may swallow any doubts and proceed to deal with the issues in the way in which the parties present them. Sometimes the judge will do so for the practical reason that, in the absence of submissions and effective assistance from the parties, it would be dangerous or even impossible for the judge,

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23 See *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35.

24 *Gipp v The Queen* (1998) 194 CLR 106 at 126-129 [57]-[65] per McHugh and Hayne JJ; [1998] HCA 21; cf *Crampton v The Queen* (2000) 206 CLR 161 at 173 [20], 203 [113]; [2000] HCA 60.

25 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 570 [164]; [1999] HCA 14; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 614-615 [118], 619 [134]; [2007] HCA 29.

26 *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]; [2002] HCA 57.

unaided, to embark upon a consideration of a question that is of apparent concern.

32 *Two underlying questions*: In the present appeal, there are two questions that are of concern to me. The first is what I have called the parliamentary privilege question. The second is what I have called the re-expression of contempt law question.

33 Each of these questions was clearly raised during oral argument in this appeal. The first was raised in questions addressed by me to the appellants' counsel. In answer to those questions, counsel made it clear that the appellants were not advancing any argument based on the law of Parliament or on any public policy principle of parliamentary privilege to the effect that the actions of the appellants were not such as to attract the law of contempt of court[27]. Nor were the appellants seeking to contend that any enforcement of the law of contempt of court would, in these proceedings, contravene the common law of Parliament by entering what is properly Parliament's domain[28]. Specifically, the appellants disclaimed any reliance on the observations of Handley AJA in the Court of Appeal on these issues[29].

34 Thus, the appellants' counsel made it plain that they were content to argue the appeal within the conventional legal paradigm. This was so despite the admitted fiction involved in attributing an "implied undertaking" to the appellants, and grounding their legal liability for contempt upon breach of such an "undertaking"[30]. Unlike an express undertaking, an implied undertaking is not identified and its ambit is not defined in open court. It might not actually be known to the person later held in law to be bound by the imputed "undertaking" and guilty of contempt of court for that reason.

35 Various factors that might favour reconsideration of this branch of the common law were put to counsel. However, the need for re-expression of the law relevant to these proceedings was not accepted. In part, this was doubtless because of the manner in which the proceedings were developed and the issues refined below, and the limitations of the grounds of appeal upon which special leave had been provided by the special leave panel.

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27 [2008] HCATrans 195 at 32 [1331]-[1337].

28 [2008] HCATrans 195 at 32 [1344]-[1347].

29 [2008] HCATrans 195 at 32 [1339]-[1342].

30 See eg [2008] HCATrans 195 at 5 [116]-[124], 6 [138]-[145], 7 [211]-[223], 12 [414]-[436].

36 The foregoing is not intended as a criticism of the appellants or their legal representatives. Instead, it is mentioned to illustrate the difficulties that face a judge, asked to grapple with two important issues of legal principle upon the basis of assumptions, and arguments, that leave the judge dissatisfied about the footing upon which those issues are to be decided. To indicate why I feel uneasy about being asked to decide this appeal on the basis argued, I will identify the source of my unease and why the questions thus raised are legally important and relevant.

Non-issues: the parliamentary privilege question

37 *A potential issue*: In his dissenting reasons in the Court of Appeal, Handley AJA remarked that even if, contrary to his own opinion, the residents' appeal against the orders of the primary judge were competent, and the appellants were in fact bound by an implied undertaking, he would still have been of the view that there existed[31]:

> "a real question as to whether the transmission of documents covered by the undertaking to a Government Minister for parliamentary purposes was a breach of the undertaking. Would a Minister who knowingly used documents covered by the undertaking be guilty of contempt of court? I am inclined to think that proceedings against the Minister for contempt of court would be a contempt of the Parliament. It is even possible that these proceedings are a contempt of the Parliament."

38 Handley AJA continued[32]:

> "The point was not taken but I would not have been prepared to make a finding of contempt based on disclosures to the Minister and her staff without hearing proper argument on the point after notice to the Attorney General."

39 After citing authority to support the proposition that "unsolicited disclosures to the Minister and her staff became connected with proceedings in Parliament when the Minister used them to promote the Act"[33], Handley AJA concluded[34]:

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31 [2007] NSWCA 113 at [205].

32 [2007] NSWCA 113 at [206].

33 [2007] NSWCA 113 at [207] citing *Rivlin v Bilainkin* [1953] 1 QB 485 at 488 and *Rowley v O'Chee* [2000] 1 Qd R 207 at 220-221.

34 [2007] NSWCA 113 at [208].

> "Unless such uses are protected by Parliamentary privilege or by an exception in the implied undertaking such as that recognised for the use of the material in criminal proceedings[35], the Australian Government [S]olicitor and the State Crown [S]olicitor could not advise their Governments that pending proceedings had demonstrated the need for legislation. I would need to be persuaded that the implied undertaking could have that operation."

40 Courts and lawyers are understandably vigilant to defend and uphold their own privileges. However, they sometimes need to be reminded of the equal requirement to defend and uphold the privileges of Parliament[36]. In this respect, I share the concerns which Handley AJA expressed in the above passages.

41 The privileges of Parliament, including of a State Parliament in the Commonwealth of Australia, do not exist for the benefit of parliamentarians and their staff and officials alone, or even primarily. In this respect they resemble what the common law called "legal professional privilege" and which the *Uniform Evidence Acts* (Pt 3.10, Div 1) more accurately describe as "client legal privilege". Parliamentary privilege exists for the benefit of the people who are governed by laws made by the Parliament concerned. Indeed, the privileges of a Parliament are closely inter-connected with the historical privileges of the people. In *Mann v O'Neill*, I remarked[37]:

> "The right of an individual in our form of society to petition government is certainly an important right. It is long recognised in our legal system. As Burger CJ pointed out in the Supreme Court of the United States[38], the historical roots of the legal entitlement to petition the organs of government for redress antedate the express provisions of the right of petition in the First Amendment to the United States Constitution and reach back to English constitutional law:
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> > 'In 1689, the Bill of Rights exacted of William and Mary stated: '[I]t is the Right of the Subjects to petition the King.' 1 Wm & Mary, Sess 2, ch 2. This idea reappeared in the Colonies when the

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35 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 442, 447.

36 See eg *Egan v Willis* (1998) 195 CLR 424 at 496-506 [142]-[162]; [1998] HCA 71; *Sue v Hill* (1999) 199 CLR 462 at 557-558 [250]-[251]; [1999] HCA 30; *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473 at 478-479 [23]-[27]; [2001] HCA 54.

37 (1997) 191 CLR 204 at 265-266; [1997] HCA 28.

38 *McDonald v Smith* 472 US 479 at 482-483 (1985).

> Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. … And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. See, eg, Pennsylvania Declaration of Rights (1776).'

In *Halsbury's Laws of England*[39] it is explained that the provision of the first section of the Bill of Rights of 1688 was found to be necessary because of the *Seven Bishops' Trial*[40]. That was one of the causes of the revolutionary expulsion of King James II from the Kingdom. Thus, for a long time, the right of petition has been part of the law and was received into Australia on settlement.

> In *Harrison v Bush*[41] Lord Campbell CJ explained:
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> 'In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it.'

Although originally expressed as being the right of the subject to petition the Sovereign, in modern Australian circumstances, it may be accepted that the right extends to an entitlement of anyone to petition the Parliament and the Executive Government for redress."

42 I see no reason for the right of "petition", referred to in *Mann*, to be confined to the formulation of grievances in any particular way or manifested in any specific form of engrossment. There are numerous reasons why that right might extend, in contemporary Australian circumstances, to the type of conduct in which the appellants engaged in the present case. After all, the most that they were found to have done was to provide documents that had been supplied by the residents themselves; presumably drafted with their personal input and approved (if not actually drawn up) by the lawyers advising them; made available to the registry of a public court of law; and repeatedly declared by the lawyers representing the residents to be documents, produced in accordance with court

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39 4th ed, vol 8, par 923. Exceptions existed for "tumultuous petitioning". See also Handley, "Petitioning Parliament", (1993) 21 *Federal Law Review* 290 at 291.

40 (1688) 12 St Tr 183 [see now *O'Donoghue v Ireland* (2008) 82 ALJR 680 at 711 [178]; 244 ALR 404 at 443; [2008] HCA 14].

41 (1855) 5 El & Bl 344 at 349 [119 ER 509 at 512].

directions, containing "the evidence these witnesses would be giving at the hearing of the proceedings"[42].

43 I would reject the suggestion (if that were intended[43]) that the important right to petition Parliament and the Executive Government is a relic of the previously undemocratic franchise in England. Any such suggestion would be patently incorrect given the important ongoing parliamentary practice with respect to formal petitions. It would also display an excessive faith in intermittent elections and a naïve want of awareness of the manner in which electoral democracy actually operates in contemporary Australia.

44 *Reasonably arguable questions*: In such circumstances, it is certainly arguable, in my view, that the use of such documents by a "petitioner" to government and Parliament, in support of that person's proposals for legislation protective of that person's interests against what are suggested to be unjustifiable demands and litigation, attracts the protection of the law and privileges of Parliament. It might do so upon one or other of the alternative bases identified by Handley AJA, namely: (1) that it is legally impermissible to proceed with a motion charging the appellants with contempt of court in respect of communications of the kind that occurred in the present case because any such process would itself constitute a contempt of Parliament and of the parliamentary process[44]; or (2) that a public interest defence might arguably arise in respect of the privilege attaching to a petition to Parliament or to communications with a Minister and the Minister's staff and officials designed to secure parliamentary redress[45]. This is what appears to have happened as a result of the communications. Those communications led directly and quickly to the enactment of the *Luna Park Site Amendment (Noise Control) Act* 2005 (NSW).

45 *Conclusion: adherence to record*: It follows that, along with Handley AJA, I regard the foregoing considerations as strongly arguable in these proceedings to rebut, or provide a defence to, the charges of contempt of court filed against the appellants. Nevertheless, I am forced in this appeal to deal differently with the issues presented to this Court, the appellants having declined to argue the points raised by Handley AJA. I do so despite having repeatedly raised the questions during argument before this Court, the appellants having just as repeatedly declined to seek leave to enlarge the grounds of (and thus the issues in) the appeal.

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42 See joint reasons at [78], [87].

43 cf joint reasons at [85].

44 [2007] NSWCA 113 at [205].

45 [2007] NSWCA 113 at [208].

Non-issues: fundamental re-expression of contempt law

46 *A need for re-expression?* The joint reasons also demonstrate the historical origins of the "implied undertaking" in respect of documents filed in court but not yet tendered or read in evidence; the uncertainty of the language of "implied undertakings"; the controversy as to the identification of the persons imputed to be bound by any such "undertakings"; and the coalescence of opinion to the effect that the so-called "implied undertaking" of non-disclosure should now be viewed as, in truth, an obligation imposed by the law on those subject to its requirements[46].

47 Upon this basis, it is arguable that there is a need for a fundamental reconceptualisation of the relevant legal categories and the re-expression of the common law in less fictitious and artificial language. On the face of things (and in default of legislation), the time appears ripe for a "root and branch" re-expression of the governing law. Such revisions are not unknown in this Court with its special, national responsibility for declaring and, where necessary, re-expressing the common law applicable throughout Australia[47].

48 The re-expression of the applicable common law would not, in all probability, have been open to an intermediate appellate court, still less to a trial judge grappling with a case such as the present. At least arguably, a long line of authority in Australia and in England has treated documents generated for use in a future trial before a court as subject to an "implied undertaking". Arguably, such authority could only be displaced by Parliament or by a re-expression of the relevant common law legal doctrine by this Court[48]. Nevertheless, when special leave to appeal to this Court is granted in a case of this kind, it is necessary for the parties, and their advisers, to consider whether it is appropriate and desirable to advocate a re-expression of the law, such as this Court can undertake in the discharge of its function as the ultimate repository of the common law of Australia.

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46 Joint reasons at [102], [105]-[108], [120], [128].

47 See eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7; [1985] HCA 3; *McKinney v The Queen* (1991) 171 CLR 468; [1991] HCA 6; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; [1992] HCA 23; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29.

48 See *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 548 citing *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672 [3]; 152 ALR 416 at 416; [1998] HCA 17; cf *Nguyen v Nguyen* (1990) 169 CLR 245 at 269; [1990] HCA 9 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 418 [58]; [1998] HCA 48.

49 In the event, as I have noted, the appellants declined to press for any such fundamental re-expression of the common law. They were content to argue their appeal by reference to the conventional, and traditional, concept of an "implied undertaking". This was so notwithstanding that, as they were themselves forced to acknowledge, there has been a recognition, in England and elsewhere (including to some extent in the Court of Appeal in this case), that the fiction of an "implied undertaking" is looking rather threadbare. Arguably, this is why courts today recognise and express the governing law in terms of what it "in reality"[49] obliges.

50 *Support for previous approach*: Once again, I am left unconvinced that the arguments of the parties necessarily reflect an approach to the common law of contempt that this Court should continue to uphold and enforce.

51 Of course, I recognise that there are arguments supporting the retention of the "implied undertaking" concept, or at least of a substantive prohibition on the release of documents such as those in question in this appeal. For example:

- Materials prepared for use in court may sometimes be provided under legal compulsion and are deserving of protection on that basis;

- Such materials may occasionally disclose private, confidential or secret information in respect of which the disclosing party might wish to seek protection at the trial from the court concerned;

- The material is not, as such, evidence in court until formally received, and some such material might be excluded by the court as irrelevant, objectionable, unfairly prejudicial or otherwise inadmissible; and

- Judicial supervision of the admission of evidence in a trial affords protection not only to those providing the evidence and to the parties to the proceedings, but also to third parties and the public, whose interests might be affected adversely by the privileged publication, and consequent republication, of the evidence.

52 *Support for re-expression*: As against these considerations, there are many that favour the re-expression of the governing common law in a fundamental way:

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49 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 764-765; [1991] 3 All ER 878 at 885-886 approved in *Mahon v Rahn* [1998] QB 424 at 431-432, 454. See joint reasons at [108].

- The growing willingness of courts, in Australia and elsewhere, to drop the fiction of "implied undertakings" suggests that the process of re-expression has already begun;

- The rule to which that fiction gives rise is burdensome on free expression in contemporary Australian society, and is arguably too absolute;

- The arguable need to limit the disclosure of documents prepared for use in court may not justify the strict prohibitions hitherto enforced, which may reflect outdated attitudes to the disclosure of information in official hands;

- In the circumstances of the present case, a relevantly total embargo on the use of the subject documents was arguably inappropriate or disproportionate given that the documents were prepared by the residents themselves; were apparently drafted by their lawyers, who had inferentially provided full and competent legal advice; and were repeatedly stated to encapsulate the evidence to be given by the residents in the trial; and

- The rapid expansion in recent decades of obligations to prepare and file evidence and argument in written form has significantly altered the environment in which the issue of contempt of court, and other issues, arise for decision in litigation. Arguably, a more nuanced rule to govern the use of such written materials needs to be fashioned by this Court if the law is to be adapted to this shift.

53 *Conclusion: confinement of appeal*: I do not endeavour to resolve these considerations and arguments. I mention some of them to indicate why I regard it as seriously unsatisfactory to be obliged to consider, and decide, this appeal on the basis of decisional law which, virtually without exception, has been developed in the context of a fiction of "implied undertakings"[50]. Especially so where the conventional or traditional approach to the law in question derives from English authority starting in the middle of the nineteenth century, without any significant or fresh consideration by this Court of what the common law of Australia is, or should be, in a case where (as here) a decision on the point is essential for dispositive orders which are coercive and potentially most burdensome on the appellants.

54 This is not a case where the matter to be determined arises under the Constitution. In such cases, there are special reasons why this Court may feel

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50 See joint reasons at [105] citing *Williams v Prince of Wales Life &c Co* (1857) 23 Beav 338 at 340 [53 ER 133 at 133] and *Reynolds v Godlee* (1858) 4 K & J 88 at 92 [70 ER 37 at 39].

obliged to decide a point that it can fairly address, whatever the parties proffer by way of argument[51]. In this appeal, there can be no doubt that both parties were on notice of the first of the foregoing issues, given that it was discussed by Handley AJA in the Court of Appeal. The second of the issues was clearly raised during argument of the appeal.

55 Notwithstanding the unsatisfactoriness of the issues that are left for resolution, I am constrained in deciding the appeal to proceed as the appellants insist, and to address the issues presented in the form in which they have been tendered.

The resulting issue, conclusion and orders

56 *Resulting issue*: The remaining substantive issue is therefore whether the "implied undertaking", now to be viewed as imposed by a rule of law[52], given to the Supreme Court by the corporate parties (with which the appellants were associated) extends to the appellants themselves. Did such "undertakings" forbid the disclosure of the relevant documents by the appellants to third parties, without prior leave of the Supreme Court, such that the disclosure amounted to contempt of court?

57 Within the assumptions that are inherent in the way the issue is thus framed, and without going beyond the submissions that are addressed by the parties to that issue, I agree in the conclusions that the joint reasons have expressed, and for the same reasons[53].

58 Because I also agree with their Honours that the residents' appeal to the Court of Appeal was competent, it follows that I am brought to the outcome that contempt of court on the part of the appellants, as charged, has been proved.

59 I have taken pains to explain my hesitations in reaching that conclusion, given the two points that I have identified but which the appellants omitted, or declined, to argue. It is an unpleasant thing for a judge to be required to reach a conclusion upon a legal basis about which the judge has serious reservations. That is the position I am now in. I have therefore explained my reservations in the hope that, by mentioning them, it may ultimately encourage future attention to their merits. These questions should not be allowed "forever to pass under the

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51 cf *Roberts* (2002) 212 CLR 1 at 54 [143].

52 *Prudential Assurance* [1991] 1 WLR 756 at 764-765; [1991] 3 All ER 878 at 885-886; see joint reasons at [108].

53 Joint reasons at [105]-[129].

radar"[54] simply because parties, presumably due to perceptions of private forensic advantage, choose not to argue them.

60 *Order: appeal dismissed*: Putting my reservations aside, and deciding this appeal on the issues pleaded and on the traditional or conventional basis, as this Court was asked to do, I agree with the joint reasons that the appeal should be dismissed with costs.

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54 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 81 ALJR 1622 at 1652 [135]; 237 ALR 512 at 550; [2007] HCA 38.

61 HAYNE, HEYDON AND CRENNAN JJ. Where a corporate litigant is bound by an "implied undertaking" not to use affidavits or witness statements served by another party on it otherwise than for the purpose of the proceedings in which they were prepared, in what circumstances can servants and agents of the litigant who use the affidavits or witness statements in that way be liable for contempt of court? One issue in this appeal is whether either or both of the appellants was bound by such an implied undertaking.

62 The respondents ("the residents") filed a notice of motion and statement of charge against the first appellant alleging the commission of contempt of court. They filed a similar notice of motion and statement of charge against the second appellant. The Supreme Court of New South Wales (Gzell J) dismissed those notices of motion and statements of charge with costs[55]. The Court of Appeal of the Supreme Court of New South Wales by majority (Ipp and Basten JJA; Handley AJA dissenting) allowed appeals by the residents with costs[56]. The Court of Appeal made orders adjudging each appellant to be guilty of the contempt of court alleged in the first charge appearing in the statement of charge against him, and remitted the notices of motion for hearing as to penalty and costs of the hearing at first instance.

63 The appeal against these orders should be dismissed for the following reasons.

Factual background

64 *The origins of the proceedings.* Luna Park was opened in 1935 and has since operated as an amusement park. It is located on the north side of Sydney Harbour, just west of the Sydney Harbour Bridge. It is adjacent to densely populated residential areas. For a period before April 2004 it had been closed. When it reopened, persons living nearby became dissatisfied with various types of noise emanating from Luna Park – music, loud speaker announcements, mechanical noise and the screams and shrieks of patrons using the rides offered. These dissatisfied neighbours include the residents. On 5 April 2005 the residents[57] commenced proceedings in the Equity Division of the Supreme Court of New South Wales by filing a summons and 15 affidavits in support. The

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55 *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 624.

56 *Street v Hearne* [2007] NSWCA 113.

57 The proceedings began with four residents. Four more were added later. In particular, Mrs Hesse was joined as fifth plaintiff on 1 July 2005.

initiating process complained about the tort of nuisance arising from the noise. On 6 April 2005, the documents were served on the first defendant, Luna Park Sydney Pty Ltd, the lessee and operator of Luna Park. The second defendant is Metro Edgley Pty Ltd. It owned 50 percent of the shares in Luna Park Sydney Pty Ltd. Metro on George Pty Ltd, a company of which the first appellant, Mr Hearne, was director and 50 percent shareholder, owned 34 percent of the shares in Luna Park Sydney Pty Ltd.

65 *The appellants.* The first appellant was the managing director and chief executive officer of Luna Park Sydney Pty Ltd. He was selected by that company as the appropriate person to swear an affidavit verifying certain answers to interrogatories which are the source of the present appeal. The second appellant, Mr Tierney, was employed as development manager of, and strategic "advisor" to, Multiplex Developments Australia Pty Ltd. He was a director of the ultimate holding company of that company, Multiplex Ltd, which was also the ultimate holding company of Metro Edgley Pty Ltd. Like the first appellant, Mr Hearne, Mr Tierney acted on behalf of the two defendants in dealing with the New South Wales State Government in overtures to be described below. It was Mr Hearne and Mr Tierney who gave the instructions to the solicitors for Luna Park Sydney Pty Ltd which formed the basis for the explanations they offered on 9 March 2006[58] for two admitted contempts of court that the company committed on 25 July 2005 and 13 October 2005[59].

66 *The orders for affidavits and experts' reports.* On the day the summons was returnable, 15 April 2005, White J made orders for the filing of further affidavits and experts' reports to be used in the proceedings.

67 *The Daily Telegraph article.* On 18 April 2005 the *Daily Telegraph*, a mass circulation newspaper, published an article under the headline: "The NUMBY* files". The asterisk directed attention to the statement "***NUMBY: Not Under My Balcony**. The city cousin of the NIMBY (Not in My Backyard)". Below the headline appeared the words: "Why Luna Park's neighbours aren't smiling". Below appeared a photograph of six unsmiling neighbours (including two of the residents). The article then said: "Well-heeled residents battling Luna Park have made some quirky, if not bizarre, claims". The article proper opened:

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58 See below at [79].

59 See below at [70] and [74].

> "DISRUPTED violin lessons, entrapped Chinese herbal medicine fumes and smoking daughters have been cited by residents as reasons why Luna Park should shut down rides.
>
> *The Daily Telegraph* has seen several affidavits filed in the Supreme Court by Milsons Point residents against the amusement park, which re-opened in April last year.
>
> Here is a summary of some of the residents' affidavits, which make interesting reading.
>
> The court is likely to decide in July whether to grant the residents' injunction order to close down five rides.
>
> Luna Park says this order, if granted, could cause it major financial pain."

As Ipp JA said, the article went on to refer, "in fairly disparaging terms, to allegations made by local residents about the noise from Luna Park and how it interfered with their lives."

68 *The aftermath of the Daily Telegraph article.* On 19 April 2005 the solicitors for the residents complained that Luna Park Sydney Pty Ltd had released affidavits filed on behalf of the residents to the *Daily Telegraph*. That letter requested an undertaking not to release any unread affidavits to the media or any other person not properly connected to the proceedings. On 20 April 2005 the solicitors for Luna Park Sydney Pty Ltd replied. Their letter contained an unreserved apology from Luna Park Sydney Pty Ltd for releasing affidavits to the media. It also provided the undertaking sought, which extended to directors of Luna Park Sydney Pty Ltd acting in that capacity.

69 *The response to the orders of 15 April 2005.* Among the material filed in response to White J's orders of 15 April 2005 was a "noise impact assessment report" dated 26 May 2005 by Dr Renzo Tonin, an acoustic expert, and an affidavit dated 30 June 2005 sworn by Mrs Hesse. On 1 July 2005 Young CJ in Eq listed the proceedings for a 10 day trial commencing on 31 October 2005. The report was served on Luna Park Sydney Pty Ltd on 27 May 2005, and Mrs Hesse's affidavit was served on that company on or about 4 July 2005.

70 *The overtures of the appellants to the State Government.* In the period 25 July 2005 to 18 October 2005, Mr Hearne, Mr Tierney and Mr Gold (described as "an agent employed by" Luna Park Sydney Pty Ltd) had some dealings with the Minister for Tourism, Sport and Recreation and four people in her office; with a person in the office of the Minister for Planning; and with two officers of the Premier's Department. Two key communications took place on

25 July 2005. One of them was a request from Mr Hearne to the Minister for Tourism, Sport and Recreation to consider introducing legislation which would amend the *Luna Park Site Act* 1990 (NSW) so as to ensure that the operations of Luna Park would be protected against the complaints which were the subject of the noise nuisance proceedings, and any future complaints about the emission of noise from Luna Park. The other was an email from Mr Hearne to a person in the office of the Minister for Tourism, Sport and Recreation, a copy of which was transmitted to Mr Tierney. That email said:

> "Please find attached the following:
>
> 1. List of some of the more spurious noise complaints;
>
> 2. copy of article in Telegraph of 18th April 2005;
>
> 3. copy of section of affidavit of one of the plaintiffs and their acoustic report commenting on the reduction of the mechanical noise of the Ranger ride after we had reduced the noise by 9dB(A) ie 50%".

71 The "section of affidavit of one of the plaintiffs" was one and one half pages of Mrs Hesse's affidavit. The section of the acoustic report was one page of Dr Tonin's report. Each had handwritten annotations indicating their nature.

72 On 11 August 2005 an email was sent on behalf of Mr Tierney to an officer of the Luna Park Reserve Trust, from whom Luna Park Sydney Pty Ltd leased Luna Park, enclosing some "Luna Park Briefing Notes". One of the enclosed documents, "Briefing to the Luna Park Reserve Trust", analysed threats to the "viability" of Luna Park on "three scenarios", described thus:

> "1. Luna Park loses the court case.
>
> 2. Luna Park wins the court case.
>
> 3. Current detrimental impacts pending the Court hearing."

The document made numerous references to the proceedings, and appeared in the following passage to contemplate legislation nullifying them:

> "Retrospectivity is required to prevent the court in the current case awarding damages as a result of any noise impacts the court determines in the last 18 months of trading. It also prevents future damages claims from other residents taking action."

73 On 11 October 2005 the New South Wales State Government announced that it would be introducing the Luna Park Site Amendment (Noise Control) Bill. On the same day a Media Release quoted Mr Hearne as congratulating the government on that course, which he described as an "initiative to save Luna Park which has been under serious threat from the vexatious court action brought by a few well-heeled residents and a property developer". He said: "Notwithstanding this decisive action, it is a day of mixed emotions for us given that the vocal minority have been appeased by this compromise." The Media Release said that the "legislation would be backdated to 30 March 2004, the eve of the Park's official re-opening", but also said that the legislation "is not retrospective".

74 On 13 October 2005 Mr Tierney sent an email and attachments to Paul O'Grady of the office of the Minister for Tourism, Sport and Recreation. The attachments were the 25 July 2005 email and its attachments. Mr Tierney said the attachments could be "used as good 'rhetorical' or debating" material in the Legislative Assembly. Mr Tierney said that that material included "some of the more ridiculous complaints" received. He also said that it included "some key lines" from the affidavit of one of the residents, but said that this could not be quoted "as it could be in contempt of court".

75 The Luna Park Site Amendment (Noise Control) Bill 2005 (NSW), which had been introduced into Parliament on 12 October 2005, passed through both Houses by 18 October 2005, and was given Royal Assent on 19 October 2005. It was retrospective to 30 March 2004, when Luna Park had reopened. Thus the efforts of Mr Hearne and Mr Tierney, commencing with Mr Hearne's request to the Minister for Tourism, Sport and Recreation on 25 July 2005, had eventually borne fruit.

76 *The effect of the legislation on the proceedings.* The enactment of the Bill prevented the residents from succeeding in the proceedings as they were then framed. On 20 October 2005 Brereton J, the trial judge in the proceedings, vacated the hearing dates for the trial, fixed to commence on 31 October 2005. The residents abandoned their claims based on noise nuisance, but amended their claim so as to allege breaches of the *Trade Practices Act* 1974 (Cth) and the *Crown Lands Act* 1989 (NSW).

77 *The interrogatories.* On 14 December 2005 Brereton J ordered Luna Park Sydney Pty Ltd to answer some interrogatories about the dealings between that company and the State Government. He did so on the application of the residents. They wished to seek an order for the costs thrown away by reason of what they saw as the tardiness with which the dealings between Luna Park Sydney Pty Ltd and the State Government were revealed to them – only in the press releases from the State Government and Luna Park Sydney Pty Ltd on

11 October 2005 announcing the impending introduction of the Luna Park Site Amendment (Noise Control) Bill. The interrogatories were directed to the email of 25 July 2005, among other things. On 5 January 2006 the answers were provided. Those answers, although obtained in this adventitious way, exposed much of the factual material relied upon before the primary judge in the contempt application.

78 *The solicitors' correspondence.* On 2 March 2006 the solicitors for the residents wrote a letter to the solicitors for the defendants in the proceedings. It began:

> "We are instructed to write to you in relation to certain conduct of Mr P Hearne, as a director of the First Defendant and Mr D Tierney, as a director of the ultimate holding company of the Second Defendant, assuming that your firm acts for them. If our assumption is incorrect, would you kindly let us know, so that we may write to them directly."

The letter then pointed out that Mrs Hesse's affidavit and Dr Tonin's report "had been served on you in accordance with Court directions and contained the evidence these witnesses would be giving at the hearing of the proceedings." It then alleged that the publication of the extracts from Dr Tonin's report and Mrs Hesse's affidavit in the 25 July 2005 email to the Minister for Tourism, Sport and Recreation was "in breach of the implied undertaking not to use [them] for any purpose not directly connected with the conduct of the proceedings and a contempt of Court."

79 On 9 March 2006 the solicitors for Luna Park Sydney Pty Ltd responded on behalf of that company. The letter said that the solicitors did not have instructions to act on behalf of Mr Hearne or Mr Tierney in their individual capacities. The letter said that "Mr Hearne and Mr Tierney were under the impression that only the public dissemination of the affidavits would amount to contempt. This is why Mr Tierney said in his e-mail that the affidavits could not be quoted." The letter admitted that the 25 July 2005 email:

> "was a breach of our client's undertaking to the Court to use those affidavits solely for the purposes of the proceedings. We have explained to Mr Tierney and Mr Hearne that their impression was mistaken and any dissemination, whether public or not, of material produced on discovery or served in accordance with the Court's directions which is not in the public domain is contempt. Our client unreservedly apologises for any such contempt it may have committed."

80 On 10 March 2006 the solicitors for the residents said:

> "It is no answer for another party to extend an apology for the conduct and then expect us not to proceed against Mr Hearne and/or Mr Tierney on the basis of that third party apology.
>
> Our clients have instructed us to proceed against Mr Hearne and Mr Tierney despite the apology from your firm on behalf of Luna Park Sydney Pty Limited."

81 On 15 March 2006 the notice of motion and statement of charge against each appellant was filed in the proceedings, conformably with the Supreme Court Rules 1970, Pt 55 r 7.

82 According to a letter of 21 April 2006 from the solicitors for Luna Park Sydney Pty Ltd, also written on behalf of Messrs Hearne and Tierney, on 20 March 2006 counsel for Luna Park Sydney Pty Ltd "made a full apology" to Brereton J on its behalf "for any contempt that may have been committed."

Issues not in controversy

83 The appellants accepted that when a part of Mrs Hesse's affidavit and a part of Dr Tonin's report were transmitted by Mr Hearne to the Minister on 25 July 2005, and by Mr Tierney to the Minister on 13 October 2005, Mr Hearne and Mr Tierney caused Luna Park Sydney Pty Ltd, by their actions as its servants or agents, to breach its "implied undertaking" to the court not to use those materials otherwise than for the purposes of the proceedings. Further, they did not challenge the conclusion of the Court of Appeal, which was well-grounded in the evidence, that Mr Hearne and Mr Tierney each knew that the affidavit and the report had been produced in the course of the noise nuisance proceedings.

84 In addition, it was not argued that the use of the affidavit and the report to advance the cause of the defendants on the political front, in negotiations with the State Government to procure the introduction of favourable legislation, was incapable of being contempt of court.

85 Nor was it argued that the appellants' conduct was prevented from being contempt by reason of any principle of parliamentary privilege. It was not suggested by any party that the conduct in which the appellants engaged was a contemporary example of a "right of petition" to Parliament[60]. That is not

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60 See reasons of Kirby J at [41]-[43].

surprising since the right to petition Parliament was a corollary of an undemocratic franchise.

86 Finally, no argument took place on the question of what exceptions to the rule forbidding disclosure exist – for example, in relation to the disclosure of criminal conduct.

The charge

87 Only one charge is now persisted in against each appellant. That charge is:

> "[T]hat by his conduct as particularised below he breached the implied undertaking to the Court not to use affidavits or expert reports served on behalf of the Plaintiffs, in whole or in part, or the information contained in them, for any purpose not directly connected with the conduct of the proceedings and is thereby guilty of contempt of this Honourable Court."

In the case of Mr Hearne, particular (a) alleged that he was managing director of the first defendant. Particular (b) alleged:

> "By the First Defendant's participation in the proceedings, Mr Hearne gave an implied undertaking to the Court not to use affidavits or expert reports served on behalf of the Plaintiffs, in whole or in part, or the information contained in them, for any purpose not directly connected with the conduct of the proceedings."

Particular (c) alleged that pursuant to court directions, the plaintiffs served on the first defendant Mrs Hesse's affidavit and Dr Tonin's report, and alleged that those documents contained the evidence which Mrs Hesse and Dr Tonin would be giving at the hearing of the proceedings. Particular (e) recited Mr Hearne's oral request of the Minister on 25 July 2005, and particular (f) alleged that Mr Hearne transmitted the email of 25 July 2005, with its three attachments. Particular (h) alleged that by transmitting extracts from Mrs Hesse's affidavit and Dr Tonin's report, Mr Hearne was using them "for a purpose not directly connected with the conduct of the proceedings, namely to support the request particularised in paragraph (e) hereof." Particular (i) alleged, further or in the alternative, that by transmitting the *Daily Telegraph* article, "Mr Hearne republished the contents of the Plaintiffs' affidavits referred to in the said article and used those affidavits for

a purpose not directly connected with the conduct of the proceedings namely to support the request particularised in paragraph ... (e) hereof."[61]

88 The material particulars to the charge against Mr Tierney were similar.

Proceedings before the primary judge

89 The appellants did not give evidence before the primary judge. Indeed, apart from documentary exhibits, the only evidence before him was an affidavit of a solicitor acting for the residents, who was cross-examined.

90 The primary judge held that the forwarding by Mr Hearne of part of Mrs Hesse's affidavit on 25 July 2005 was a breach of an "implied undertaking" given by Luna Park Sydney Pty Ltd. But he held that, contrary to particular (b) of the charge, neither Mr Hearne nor Mr Tierney had given any undertaking to the court. He also held that neither Mr Hearne nor Mr Tierney had any "knowledge of the implied undertaking given by" Luna Park Sydney Pty Ltd and its solicitors. He said that he was not satisfied that Mr Hearne knew "the documents had been discovered" (ie generated for use in legal proceedings), although he was satisfied Mr Tierney did. He said that that knowledge was not particularised as an element of the charge against either Mr Hearne or Mr Tierney.

The reasoning of Ipp JA and Basten JA

91 There were two issues before the Court of Appeal.

92 The first issue before the Court of Appeal was whether the "implied undertaking" was binding on Messrs Hearne and Tierney. Ipp JA held that the "implied undertaking" was not an undertaking of a voluntary kind, but an obligation imposed by law in particular circumstances. He said that Messrs Hearne and Tierney did not dispute that Mrs Hesse's affidavit and Dr Tonin's report were subject to that obligation. He held that the obligation applies to all persons into whose hands the documents to which it applies come, if they know that they were obtained "by way of discovery or other compulsory court process." He denied that Mr Hearne and Mr Tierney had to know of the "implied undertaking". The residents "only had to prove [knowledge of] the facts that

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61 The primary judge rejected that allegation. Since the matter was apparently not debated in the Court of Appeal, and was not debated in this Court, the detail and correctness of his reasoning need not be considered.

gave rise to the obligation imposed on Mr Hearne and Mr Tierney by law."[62] He was satisfied that each knew that the proceedings were pending, and that the documents had been produced in accordance with the court's processes[63]. Basten JA, after adding some remarks, agreed with Ipp JA[64].

93 The second issue was whether an appeal against a dismissal of contempt charges was competent. That issue arose from the terms of s 101(5) and (6) of the *Supreme Court Act* 1970 (NSW):

> "(5) An appeal lies to the Court of Appeal from any judgment or order of the Court in a Division in any proceedings that relate to contempt (whether civil or criminal) of the Court or of any other court.
>
> (6) Subsection (5) does not confer on any person a right to appeal from a judgment or order of the Court in a Division in any proceedings that relate to criminal contempt, being a judgment or order by which the person charged with contempt is found not to have committed contempt."

Ipp JA held that the residents' "allegations [were] of breaches of an implied undertaking that were wilful but not contumacious in the broad sense – and were merely casual, accidental or unintentional". Hence the contempts alleged were prima facie civil. He concluded that that prima facie conclusion had not been rebutted. In particular he held that the residents' purposes were not punitive, and

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62 Since it was common ground that Mr Hearne and Mr Tierney had that knowledge, it was not necessary for the parties to debate whether forms of notice other than knowledge would suffice.

63 The ground of appeal directed to this reasoning was:

> "The Court of Appeal erred in holding that as a consequence of the participation by Luna Park Sydney Pty Limited in the proceedings, the First and Second Appellants gave implied personal undertakings not to use, otherwise than for the purposes of the proceedings, affidavits that had been filed in Court."

That is not what the Court of Appeal in fact held.

64 The appellants contended that in some respects Basten JA's reasoning differed from that of Ipp JA. It is unnecessary to examine the extent and significance of any differences.

that two important purposes could still be achieved in taking steps to deter breach of the "implied undertaking" in future. One was that the residents "are entitled to protect their privacy by seeking orders that would deter Mr Hearne and Mr Tierney from acting in the same way again." The other was:

> "[P]ublic opinion about the noise may, at any time, become capable of affecting the interests of those who operate Luna Park. As has been seen in the past, the [residents'] documents that are subject to the implied undertaking are capable of being used to influence public opinion against those who complain about the noise levels at Luna Park."

Ipp JA also found that:

> "[T]here is a reasonable possibility that, should circumstances change, and should it be to [the] advantage of [Mr Hearne and Mr Tierney] to disclose the materials subject to the implied undertaking again, they may do so."

Basten JA, after some brief observations, agreed with Ipp JA on this issue also.

94 Handley AJA disagreed with the majority on both issues. In relation to whether Mr Hearne and Mr Tierney were bound by the "implied undertaking", he held that it only bound the person who gave it and that person's solicitor or industrial advocate; in particular it did not bind servants or agents of the person who gave it. In relation to the competency of the appeal, he considered that the proceedings were not "remedial or coercive"[65] in the interests of the residents, but punitive, and hence criminal.

The extent of the "implied undertaking"

95 Before turning to the appellants' submissions in relation to the extent and enforceability of the "implied undertaking", it is desirable to set out some background legal principles which were not in controversy.

96 Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise[66], to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given

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65 See *Witham v Holloway* (1995) 183 CLR 525 at 532 per Brennan, Deane, Toohey and Gaudron JJ; [1995] HCA 3.

66 *Bourns Inc v Raychem Corp* [1999] 1 All ER 908 at 916 [19]; affd [1999] 3 All ER 154 at 169-170.

unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery[67], answers to interrogatories[68], documents produced on subpoena[69], documents produced for the purposes of taxation of costs[70], documents produced pursuant to a direction from an arbitrator[71], documents seized pursuant to an *Anton Piller* order[72], witness statements served pursuant to a judicial direction[73] and affidavits[74]. The appellants did not dispute the existence of this principle, and in particular did not dispute its potential application to the affidavit of Mrs Hesse and the witness statement of Dr Tonin.

97 It is common to speak of the relevant obligation as flowing from an "implied undertaking"[75].

98 It may be noted that the general law protection is often buttressed by protection from rules of court. Thus until 15 August 2005, the New South Wales Supreme Court Rules 1970, Pt 65 r 7, prevented strangers to litigation from having access to documents or things on the court file without the leave of the

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67 *Riddick v Thames Board Mills Ltd* [1977] QB 881; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 32-33; [1995] HCA 19.

68 *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509 at 510-511; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155.

69 *Eltran Pty Ltd v Westpac Banking Corporation* (1990) 25 FCR 322.

70 *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 at 169-170.

71 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33, 39, 46-47 and 48.

72 *Cobra Golf Inc v Rata* [1996] FSR 819.

73 *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509; *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 223; *State Bank of South Australia v Smoothdale (No 2) Ltd* (1995) 64 SASR 224 at 229.

74 *Medway v Doublelock Ltd* [1978] 1 WLR 710; [1978] 1 All ER 1261; *Re Addstone Pty Ltd (in liq); Ex parte Macks* (1998) 30 ACSR 156.

75 Eg, *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 304, 309, 319, 320 and 321; *Crest Homes Plc v Marks* [1987] AC 829 at 853.

Court: see also Practice Note No 97[76]. From 1 March 2006, Practice Note SC Gen 2 prescribed procedures in relation to access to Supreme Court files. The most important paragraphs are:

> "6. Access to material in any proceedings is restricted to parties, except with the leave of the Court.
>
> 7. Access will normally be granted to non-parties in respect of:
>
> - pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;
> - documents that record what was said or done in open court;
> - material that was admitted into evidence; and
> - information that would have been heard or seen by any person present in open court,
>
> unless the Judge or registrar dealing with the application considers that the material or portions of it should be kept confidential. Access to other material will not be allowed unless a registrar or Judge is satisfied that exceptional circumstances exist."

The appellants' arguments

99 The appellants argued that the case propounded in each statement of charge was that (i) each appellant had given an implied undertaking to the court (particular (b) of Mr Hearne's case and particular (d) of Mr Tierney's) and (ii) each had "breached the implied undertaking". The appellants stressed that the statements of charge did not allege that Luna Park Sydney Pty Ltd had breached an implied undertaking given by it and did not allege that they had been party to any such breach. The appellants argued that an implied undertaking to the court is equivalent to an injunction granted by the court. The undertaking creates an obligation on the person who gave it (just as the injunction creates an obligation on the person against whom it is granted). The relevant obligation is on that person, not that person's servants or agents[77]. The servants and agents are

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76 (1998) 43 NSWLR 1.

77 Citing *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 at 407.

only liable if they knowingly assist the person bound to breach the undertaking[78]. Hence in order to convict the servant or agent of contempt, it would be necessary to establish that the servant or agent had knowledge of "all of the material facts going to make up the contempt"[79]. It would be necessary to establish that the servant or agent had knowledge of the fact that the undertaking had been given or the injunction granted, and hence that the conduct had been forbidden by the court[80].

100 These submissions contradicted the majority view in the Court of Appeal, which was that the "implied undertaking" reflected an obligation imposed by the general law in particular circumstances, and that the residents did not have to prove that Mr Hearne and Mr Tierney knew of the implied undertaking – only that they knew the facts that generated the obligation imposed by the general law. The appellants criticised that conclusion on particular grounds to be examined below; however, it is convenient at this point to deal with certain problems of principle facing the appellants' submissions.

The appellants' arguments: problems in principle

101 There are two propositions which are damaging to the appellants' arguments.

102 The first is that to call the obligation of the litigant who has received material generated by litigious processes one which arises from an "implied undertaking" is misleading unless it is understood that in truth it is an obligation of law arising from circumstances in which the material was generated and received.

103 The second is that that obligation would be of very limited protection if it were only personal to the litigant, which is why it is often said to be extended also to a litigant's solicitor, industrial advocate or barrister, and also to third

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78 Citing *Seaward v Paterson* [1897] 1 Ch 545 at 554-556.

79 Citing *Hamilton v Whitehead* (1988) 166 CLR 121 at 128; [1988] HCA 65.

80 Citing *Ronson Products Ltd v Ronson Furniture Ltd* [1966] Ch 603 at 617. Although it is not necessary for the decision of this appeal to say this, to avoid doubt it should be recorded that the appellants' submission that contempt of court cannot be proved against a person who has not complied with an injunction (or an express undertaking to the court) unless it is shown that that person appreciated the unlawfulness of non-compliance is quite incorrect.

parties like a shorthand writer or court officer. For that reason the authorities recognise a broader principle by which persons who, knowing that material was generated in legal proceedings, use it for purposes other than those of the proceedings are in contempt of court.

104 Each of these propositions will be examined in turn.

"Implied undertaking" is an obligation of substantive law

105 Originally the restriction on the use of documents generated by litigious processes depended on an express undertaking[81]. Then in *Williams v The Prince of Wales Life, &c, Co*[82], Sir John Romilly MR, while requiring an express undertaking, put the matter in terms of legal rights: "[I]t is not the right of a Plaintiff, who has obtained access to the Defendants' papers, to make them public." The following year the protection was not said to rest on an express undertaking, but on a "rule" that "where documents have been produced in obedience to an order of this Court, the Court has a right to say to the person who has obtained their production: 'Those documents shall never be used by you except under the authority of the Court'"[83]. In *Alterskye v Scott*[84], although Jenkins J referred to a concession by counsel that his client obtained discovery on an "implied undertaking", in the operative part of his reasoning he did not analyse the matter in terms of "undertaking", either express or implied, but in terms of an "implied obligation not to make an improper use of the documents." And other judges have preferred to the language of "implied undertaking" the

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81 *Richardson v Hastings* (1844) 7 Beav 354 [49 ER 1102]; *Hopkinson v Lord Burghley* (1867) LR 2 Ch App 447.

82 (1857) 23 Beav 338 at 340 [53 ER 133].

83 *Reynolds v Godlee* (1858) 4 K & J 88 at 92 [70 ER 37 at 39] per Sir William Page Wood V-C.

84 [1948] 1 All ER 469 at 470-471. Cf the reading given to the case in *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613 at 618; *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 896; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 at 163.

words "implied obligation"[85] or "obligation"[86] or "duty"[87]. Another formula is that the party obtaining discovery is "*taken to undertake* to the court that the documents obtained on discovery will not be used for any purpose other than the action in which they are produced"[88]. In *Harman v Secretary of State for the Home Department*[89] Lords Simon of Glaisdale and Scarman, who accepted the general rule of limited use but disagreed with the majority about applying it to documents read in open court, said:

> "*Imposed by law* the *obligation* is *formulated* as arising from an undertaking exacted by the court from the party and his solicitor to whom the documents are disclosed. It is the *condition* upon which discovery is ordered." (emphasis added)

Lord Denning MR in *Riddick v Thames Board Mills Ltd*[90] said:

> "A party who seeks discovery of documents gets it on *condition* that he will make use of them only for the purpose of that action, and no other purpose." (emphasis added)

106 The fact that the role of the word "undertaking" is merely to indicate the way in which an "obligation" which is "imposed by law" as a "condition" of discovery binds the disclosee highlights the substantive nature of the obligation. There is nothing voluntary about the "undertaking".

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85 *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 901 per Stephenson LJ; *Home Office v Harman* [1981] QB 534 at 541 and 545 per Park J and 563-564 per Dunn LJ.

86 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 312 per Lords Simon of Glaisdale and Scarman; *State Bank of South Australia v Smoothdale (No 2) Ltd* (1995) 64 SASR 224 at 229 per King CJ; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 548 per Mason P.

87 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 302 per Lord Diplock and 314 per Lords Simon of Glaisdale and Scarman.

88 *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 38 per Hayne JA (emphasis added).

89 [1983] 1 AC 280 at 313.

90 [1977] QB 881 at 896.

> "The implied undertaking not to make collateral use of documents disclosed on discovery arises automatically as an incident of the discovery process. It is in no sense implied as a result of dealings between the parties. The discloser may well not have thought of the implications of giving discovery and the disclosee may well not have turned his mind to the matter of what use he can make of the documents outside the action. Had he thought of it, he might well have wanted full freedom to do what he liked with the material, particularly if his own discovery is non-existent or very limited. So the obligation is not to be likened to a term implied in a contract between the parties to the litigation. On the contrary, it is an obligation to the court, not the other party, which is implied. It is for that reason that its breach is treated as contempt. The obligation is imposed as a matter of law."[91]

107 The expression "implied undertaking" is thus merely a formula through which the law ensures that there is not placed upon litigants, who in giving discovery are suffering "a very serious invasion of the privacy and confidentiality of [their] affairs", any burden which is "harsher or more oppressive ... than is strictly required for the purpose of securing that justice is done."[92] To that statement by Lord Keith of Kinkel of the purpose of the "implied undertaking" may be added others. In *Riddick v Thames Board Mills Ltd*[93] Lord Denning MR said:

> "Compulsion [to disclose on discovery] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."

In *Harman v Secretary of State for the Home Department*[94] Lord Diplock said:

> "The use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself; it is an inroad that calls for safeguards against abuse, and these

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91 *Bourns Inc v Raychem Corp* [1999] 1 All ER 908 at 915 [16] per Laddie J.

92 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 308.

93 [1977] QB 881 at 896.

94 [1983] 1 AC 280 at 300.

> the English legal system provides ... through its rules about abuse of process and contempt of court."

In *Watkins v A J Wright (Electrical) Ltd*[95] Blackburne J said:

> "In my judgment, a serious inroad into [the safeguards referred to by Lord Diplock] and, therefore, into the utility of the discovery process in the just disposal of civil litigation would occur if it were open to a litigant (or his solicitor) to enjoy the fruits of discovery provided by the other side, but avoid the risk of committal for contempt for acting in breach of the countervailing implied obligation on the ground that he was unaware of the existence of the undertaking. I take the view that it does not lie in the mouth of a person to plead ignorance of the legal consequences of the discovery process."

To speak in terms of "undertaking" serves:

> "a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court."[96]

Staughton LJ said: "[A]lthough described as an implied undertaking it is a rule which neither party can unilaterally disclaim."[97] The importance with which the courts have viewed the obligation under discussion is indicated by the fact that although it can be released or modified by the court, that dispensing power is not freely exercised, and will only be exercised where special circumstances appear[98].

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95 [1996] 3 All ER 31 at 42.

96 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 764-765 per Hobhouse J; [1991] 3 All ER 878 at 885.

97 *Mahon v Rahn* [1998] QB 424 at 453.

98 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 37.

> "Circumstances under which that relaxation would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party."[99]

108 Hence Hobhouse J[100] was correct to conclude:

> "The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information."

Third party obligations

109 The primary person bound by the relevant obligation is the litigant who receives documents or information from the other side pursuant to litigious processes. The implied undertaking also binds others to whom documents and information are given. For example, expert witnesses, who are not parties, commonly receive such documents and information and are bound by the obligation. It is likely that, in the future, documents and information will be provided to persons funding litigation, who will likewise be bound by the obligation. In *Harman v Secretary of State for the Home Department* the person in contempt was the party's solicitor[101]. In *Hamersley Iron Pty Ltd v Lovell*[102] it was the party's industrial advocate. In *Watkins v A J Wright (Electrical) Ltd*[103] it was a person who was not qualified as a solicitor in the forum, but engaged in day-to-day conduct of the litigation. Laddie J thought "it would be just as much a contempt of court for, say, a shorthand writer or court usher to disclose discovery documents outside the action as it would be for one of the parties to do

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99 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 775 per Hobhouse J; [1991] 3 All ER 878 at 895.

100 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 764; [1991] 3 All ER 878 at 885, approved in *Mahon v Rahn* [1998] QB 424 at 454 per Staughton LJ.

101 [1983] 1 AC 280 at 300.

102 (1998) 19 WAR 316.

103 [1996] 3 All ER 31 at 43.

so."[104] In both England and Australia, these instances have been broadened into a wider and coherent principle. Thus Hobhouse J said: "[A]ny person who knowingly ... does acts which are inconsistent with the undertaking is himself in contempt and liable to sanctions"[105]. In *Watkins v A J Wright (Electrical) Ltd*[106] Blackburne J said:

> "I cannot accept the submission that ignorance of the implied undertaking provides a person with a defence to proceedings for contempt arising out of his breach of the implied undertaking. As is well known, the implied undertaking arises by implication of law on the giving of discovery in the course of a civil action where discovery is required to be given."

He also rejected a submission that third parties could not be bound by the obligations created by the "implied undertaking". He said[107]: "I see no basis for confining the scope of the undertaking to those who are parties to the action, to whom discovery has been given, and to the solicitor or solicitors on the record." As noted above, he held that a person engaged in day-to-day conduct of litigation on behalf of a litigant was bound – an expression not irrelevant to Messrs Hearne and Tierney, who were certainly engaged in day-to-day conduct of a struggle which included but was wider than litigation, and included an attempt to nullify the litigation by legislative means.

110 Turning to Australian authorities, in *Esso Australia Resources Ltd v Plowman*[108], Mason CJ (with whom Dawson and McHugh JJ agreed) said:

> "It would be inequitable if a party were compelled by court process to produce private documents for the purposes of the litigation yet be exposed to publication of them for other purposes. No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, eg discovery and

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104 *Bourns Inc v Raychem Corp* [1999] 1 All ER 908 at 916 [18].

105 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 765; [1991] 3 All ER 878 at 886.

106 [1996] 3 All ER 31 at 41.

107 [1996] 3 All ER 31 at 43.

108 (1995) 183 CLR 10 at 33.

> inspection, but that circumstance is not a reason for denying the existence of the implied obligation."

In *Hamersley Iron Pty Ltd v Lovell*[109] Anderson J (Pidgeon and Ipp JJ concurring) said: "The implied undertaking is binding upon anyone into whose hands the discovered documents come, if he knows that they were obtained by way of discovery". And Ryan J said in *Spalla v St George Motor Finance Ltd*[110]: "To be effective, the undertaking must bind the litigant by whom it is given and his or her privies."

111 If this principle did not exist, the "implied undertaking" or obligation on the litigant would be of little value because it could be evaded easily. That is why Lord Denning MR said in *Riddick v Thames Board Mills Ltd*[111]: "The courts should ... not allow the other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."[112] And in the same case[113] Stephenson LJ also said: "[I]t is important to the public and in the public interest that the protection should be enforced against anybody who makes improper use of it." Use with knowledge of the circumstances would be improper use.

112 There is no support in the authorities for the idea that knowledge of anything more than the origins of the material in legal proceedings need be established. In particular, there is no support for the idea that knowledge of the "implied undertaking" and its consequences should be proved, for that would be to require proof of knowledge of the law, and generally ignorance of the law does not prevent liability arising.

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109 (1998) 19 WAR 316 at 334-335.

110 (2004) 209 ALR 703 at 717 [40].

111 [1977] QB 881 at 896.

112 Does the failure of Lord Denning MR to refer to notice indicate that it is not necessary? In the present case the question does not matter. There was notice, and the residents did not contend that there could be liability without notice: indeed they submitted that knowledge that the documents were obtained by compulsory court process was necessary.

113 [1977] QB 881 at 902.

113 The two principles just discussed[114] are inherent in the substance of, and largely consistent with the detail of, the reasoning of the Court of Appeal majority. If they are sound, the appellants' contentions must fail.

114 It is convenient now to deal with certain specific criticisms which the appellants made of the majority reasoning and of those principles.

Change from voluntary undertaking to obligation imposed by law

115 The appellants submitted: "The majority did not explain how and when the nature of the obligation changed from one voluntarily undertaken by a litigant to one imposed as a matter of law." *When* did the change take place? No later than 1948, the year of Jenkins J's judgment in *Alterskye v Scott*[115]; it has been repeatedly evidenced since then[116]. *How* did the change take place? Through the tendency of judges increasingly to regard the language of "implied undertaking" as unrealistic, and on balance unmeritorious.

Express undertakings in place of implied

116 The appellants submitted that the majority approach did not sit comfortably with the fact that an express undertaking may be given in place of an implied undertaking. They did not say why not. The point of insisting on an express undertaking, commonly employed in relation to documents which it is particularly desired to keep secret, is to bring explicitly home to the minds of those giving it how important it is that the documents only be used for the purpose of proceedings. It does not follow that the obligation in question does not exist in more routine cases without the need for an express undertaking. If the appellants' stance were sound, it would be necessary for litigants, in order to obtain protection partially, but not completely, as effective as that given by the approach urged by the residents, to seek express undertakings to the court from all servants and agents of a party, from all potential lay and expert witnesses, and from all other persons into whose hands documents generated in the proceedings may come. At present this happens in exceptional cases for particular reasons. If it were necessary for that general practice to develop, it would be extremely cumbersome, and extremely wasteful of time, energy and money.

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114 In [101]-[112].

115 [1948] 1 All ER 469.

116 See above at [105]-[106].

Implied undertaking expressly modified by court

117 The appellants submitted that the majority approach did not sit comfortably with the fact that an implied undertaking may be expressly modified by the court. Again, they did not say why not. Modification is not common. While legal obligations are not usually modified by courts to suit the interests of particular parties, it can happen, for example under companies and trustee legislation.

Differing degrees of knowledge

118 The appellants submitted that there is no reason in principle why the degree of knowledge necessary to sustain a prosecution of a third party for contempt of an undertaking in connection with the production of documents to the court should depend on whether the undertaking was given expressly or by implication. The relevant reason of principle is that while liability in relation to an express undertaking relates to the giving of that undertaking at a particular time and in particular precise terms, varying from case to case, which third parties have very limited means of finding out about, liability in relation to an "implied undertaking" arises in uniform terms in all cases where documents are produced to the court. A key objective factual integer, knowledge of which is necessary to prove liability, is in one case the terms of the express undertaking, in the other the events giving rise to the "implied undertaking" or legal obligation.

Is the Court of Appeal majority's approach harsh?

119 The appellants submitted that the majority approach was harsh, in that it meant that any person into whose hands discovered documents came and who used them for purposes extraneous to the proceedings could be guilty of contempt on proof only of knowledge on the part of that person that the documents originated in legal proceedings, even if that person had "no idea of the legal significance of that fact". But a person who behaved in that way in relation to documents the subject of an express undertaking could be liable for contempt, even though that person was equally ignorant of the legal significance of the express undertaking.

Is the approach of the Court of Appeal majority necessary?

120 One theme of the reasoning employed by the majority of the Court of Appeal was that it was necessary to hold third parties, who had knowledge that material had been generated in connection with legal proceedings and who used that material for purposes beyond those of the proceedings, in contempt of court. It was necessary because without that control there was a risk that information

generated in connection with court procedures would be wrongly used. The appellants contended that the Court of Appeal overstated that risk. First, it was said that adequate sanctions could always be imposed directly on the litigant: but this was of little avail in this very case, where even though Luna Park Sydney Pty Ltd committed an admitted contempt of court by handing affidavits over to the *Daily Telegraph* in April 2005 and undertook not to repeat it, its managing director, Mr Hearne, committed a further contempt in July, and Mr Tierney did so in October. Secondly, it was said that individual servants or agents of a corporate litigant in breach of the "implied undertaking" could be made subject to personal sanctions if they knew of the obligations on the corporate litigant created by the "implied undertaking". But this begs two questions – one, whether it is legally necessary to make those obligations known, and, secondly, whether they could be made known sufficiently commonly to create protection. Thirdly, it was said that an individual receiving material the subject of the "implied undertaking" could be restrained from using it by injunction. That is less advantageous than enforcing the "implied undertaking" without instituting an additional set of proceedings. The fact is that because in reality the "implied undertaking" is an obligation imposed as a matter of law, it would be very hard to prove knowledge of that matter of law against lay persons. The narrower the avenue of liability against third parties, the weaker the incentive for litigants to give full discovery and to provide all relevant evidence. "The interests of the proper administration of justice require that there should be no disincentive to full and frank discovery"[117] – or to full employment of all of the court's procedures directed to accurate fact finding in litigation.

121 The appellants submitted that the principle advocated by the residents and adopted by the majority of the Court of Appeal was unnecessary for another reason. They submitted that adequate protection could be obtained, where litigants were in breach of the "implied undertaking", by proceedings for contempt against the servants or agents of those litigants who had knowingly assisted them to breach the undertaking. If the appellants are right in submitting, as they did, that it was necessary to prove knowledge of the "undertaking" and conscious adversion to the unlawfulness of the conduct, as distinct from proving only knowledge of the origin of the relevant information in litigation, the protection is very narrow. Even if they are not right about that (and they are not), the protection does not extend to control the behaviour of persons who are not servants or agents of the litigants.

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117 *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 912 per Waller LJ.

Appellants' criticisms of the authorities

122 *Status of Distillers' case.* The appellants criticised the reliance by the Court of Appeal majority, and by the Full Court of the Supreme Court of Western Australia in *Hamersley Iron Pty Ltd v Lovell*[118], on what Talbot J said in *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd*[119]:

> "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. ... [T]his protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced."

One point the appellants made was that the judges criticised had relied on what Talbot J said "without adverting to the fact that" the proceedings before Talbot J were not contempt proceedings. Instead they were proceedings seeking an interlocutory injunction against an apprehended publication by a newspaper of documents disclosed on discovery to certain persons claiming to be the victims of torts, which had been handed over to the newspaper by an expert adviser to the victims. Another was that by the time the injunction was sought the newspaper "had been put on notice of their origin in discovery and *the obligation to use them only for the purposes of the proceedings*" (emphasis added). It may be accepted that the appellants have demonstrated that what Talbot J said was obiter dicta. But the appellants did not demonstrate that what Talbot J said in injunction proceedings was wrong when applied in the field of contempt. Nor is there any force in the emphasised words just quoted, given that 16 months after the newspaper undertook not to use any of the discovered documents, it terminated the undertaking.

123 *Status of Hamersley case.* The appellants also argued that what was said in *Hamersley Iron Pty Ltd v Lovell*[120] was open to criticism because "it was not argued on the facts that [the defendant] was unaware of the implied undertaking in relation to discovered documents". This may make what Anderson J said dicta: it does not show those dicta to be incorrect.

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118 (1998) 19 WAR 316 at 334-335.

119 [1975] QB 613 at 621.

120 (1998) 19 WAR 316: at [110] above.

124 *Status of Lord Roskill's opinion in Harman's case.* The appellants argued that in *Harman v Secretary of State for the Home Department* the only Law Lord to have treated the "implied undertaking" as extending beyond the litigant and the litigant's solicitor was Lord Roskill, who spoke of the undertaking as arising on the part of "the solicitors and other agents" of the parties[121]. The appellants criticised Blackburne J in *Watkins v A J Wright (Electrical) Ltd*[122] for relying "upon the dictum of Lord Roskill ... without noting its limitations" – ie, that *Harman's* case concerned a solicitor only. The appellants also said that while in *Watkins'* case the person bound by the "implied undertaking" was not a solicitor admitted in England, he was admitted in Scotland and was acting as a solicitor. Finally, they said that Blackburne J's decision "was ... only a first instance decision and as such of limited persuasive value".

125 First, the circumstance that *Harman's* case concerned a solicitor only is a sufficient explanation for why the Law Lords other than Lord Roskill did not deal with persons other than solicitors. Secondly, while that circumstance shows that Lord Roskill's remark was only a dictum, it does not reveal it to be untrue. Thirdly, the same is true in relation to Blackburne J's opinion so far as it extends beyond the facts before him – a Scottish solicitor not admitted in the forum who had taken upon himself "the day-to-day conduct of the litigation". Fourthly, the status of a decision of a court in an appellate hierarchy does not affect its persuasiveness – only its binding quality. Whilst it was not necessarily always so[123] the current position is that no English decision is binding on Australian courts. On the other hand, irrespective of the position of an English court in the English appellate hierarchy, its decision can be persuasive for Australian courts. The reasoning on which Blackburne J's opinion about third party liability rests is highly persuasive. The opinion was expressed to rest not only on Lord Roskill's dictum, but also on the "underlying rationale for the existence of the implied undertaking"[124] and the inutility of the contrary view.

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121 [1983] 1 AC 280 at 320. Lord Diplock at 304, Lord Keith of Kinkel at 309 and Lords Simon of Glaisdale and Scarman at 312-313 spoke only of an implied undertaking by the party or his solicitor.

122 [1996] 3 All ER 31 at 43.

123 *Cook v Cook* (1986) 162 CLR 376 at 390; [1986] HCA 73.

124 *Watkins v A J Wright (Electrical) Ltd* [1996] 3 All ER 31 at 43.

The terms of the statements of charge

126 Putting aside the terms of the statements of charge, it is clear that the Court of Appeal majority were correct to conclude that Mr Hearne and Mr Tierney had each committed contempt of court by using material for purposes other than the legal proceedings in which that material was generated and served on interests connected with them where they knew that that was the origin of the material.

127 However, the appellants argued that the terms of the statements of charge precluded the allowing of the appeal to the Court of Appeal. It was submitted that contrary to the particulars (particular (b) for Mr Hearne and particular (d) for Mr Tierney), neither appellant had given an implied undertaking to the court. That being the only "implied undertaking" referred to, the allegation in the main body of the charge that each appellant "breached *the* implied undertaking" had to fail. There was no allegation that the appellants were guilty of contempt in procuring a breach of the relevant obligation by Luna Park Sydney Pty Ltd. Hence, it was submitted, the Court of Appeal should have dismissed the appeal.

128 Leaving aside the particulars, if the words "implied undertaking" at the start of each charge are read as referring to an obligation imposed by law binding on the appellants, not to use affidavits or expert reports served on behalf of the residents for purposes other than the proceedings, it was correct to allege that each appellant breached that obligation. The statement of charge does not allege a knowing breach, but the evidence showed clearly that each breach was a knowing breach, and the appellants do not contest the Court of Appeal's findings to that effect.

129 In short, the case proved was narrower than the case alleged. The case proved is a case falling within the rules for establishing contempt of court. The case alleged was not. It was open to the appellants to have the case alleged struck out. There are indications that the appellants pursued this course, but on what grounds is not clear. Nor is it clear why that course failed. The case alleged having proceeded to a primary hearing and an appeal, it was incumbent on the appellants to demonstrate why the case of contempt which has been proved does not justly sustain the orders of the Court of Appeal. In particular, it was incumbent on them to demonstrate why there should be a stricter degree of accuracy in charging contempts of court than in charging conventional crimes. This they did not do. It was said that some additional evidence might have been called that was germane to the issue of knowledge, and that different decisions about whether to call the appellants might have been made had the form of the charges been different. But the possession by the appellants of the only knowledge which was relevant – knowledge that the affidavit and statement were supplied by the residents in legal proceedings – was incontrovertible, and no

other potential evidence relevant to liability (as distinct from whether the appeal to the Court of Appeal was competent) was pointed to.

Was the appeal to the Court of Appeal competent?

130 The parties supplied very detailed submissions about the meaning, correctness and application of the authorities on the distinction between civil and criminal contempt. In particular, there was a division between the parties about whether the following statements by Ipp JA were correct:

> "(c) Generally, however (and I understand this to mean prima facie), a breach of an injunctive order or an undertaking that is wilful but not contumacious in the broad sense – and is not merely casual, accidental or unintentional – is regarded as a civil contempt (this being the traditional distinction between civil and criminal contempt which still has significance).
>
> (d) The fact that the application for an order that contempt has been committed is made within the main action, and not by a stranger to the suit, would tend to show that the contempt is civil in nature."

131 The present appeal does not present an appropriate occasion either to deal with the appellants' attacks on these passages or to deal with all the other issues of law raised.

132 It is necessary, however, first to put aside a suggestion by the appellants that all proceedings for contempt "must realistically be seen as criminal in nature". The quoted words[125] were used to support a conclusion by this Court that all charges of contempt must be proved beyond reasonable doubt[126]. The reaching of that conclusion eliminates one possible difference between civil and criminal contempt. It does not affect the question of appellate rights. Section 101(6) assumes that there is a difference, in relation to appellate rights, between civil and criminal contempts. A legislative assumption about the general law can be ignored on the ground that it is wrong, but the conclusion that it is wrong is not lightly to be reached. The appellants accepted that in relation to rights to appeal against the dismissal of contempt proceedings the distinction remained.

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125 From *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 49; [1987] HCA 56.

126 *Witham v Holloway* (1995) 183 CLR 525 at 534. The precise words in *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 49 were actually: "must realistically be seen as *essentially* criminal in nature" (emphasis added).

133 In the end the appellants departed from any suggestion that all contempts were criminal by supporting the dissenting opinion of Handley AJA that the question whether an appeal lay to the Court of Appeal from the dismissal of proceedings for contempt depended on whether "it clearly appears that the proceedings are remedial or coercive in nature" as distinct from being punitive[127]. The distinction between that which is remedial or coercive on the one hand and that which is punitive on the other corresponds with the distinction between seeking to ensure compliance with the relevant obligation and seeking to punish for past breaches of it. It is a distinction to be applied, as the parties agreed, bearing in mind the need to approach the application of the person seeking the remedies for contempt by reference to its substantial character, not to merely formal or incidental features[128]. On the facts, Handley AJA considered that the purpose was not remedial or coercive, but punitive. On the other hand, the analysis of the facts made by the majority led them to the opposite view[129].

134 In approaching the task of characterisation, neither majority nor minority were assisted by any direct evidence from either the residents or the appellants. The better view is that of the majority, in the light of the history as the residents must have perceived it. That history was as follows.

135 First, Luna Park Sydney Pty Ltd had, no more than 12 days after the institution of the noise nuisance proceedings on 5 April 2005, given at least some of the affidavits on which the residents were relying to the *Daily Telegraph*, which employed them to publish a rather derisive article. Within one day of that

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127 *Witham v Holloway* (1995) 183 CLR 525 at 532 per Brennan, Deane, Toohey and Gaudron JJ.

128 In the latter category may be placed the form of relief sought in the notices of motion – an adjudication that each appellant was in contempt, such further or other orders as the court thought fit, and costs. On the one hand, that leaves open the possibility of very serious sanctions like imprisonment; on the other hand, the orders were in a form common in civil proceedings, and included the possibility of injunctions against future breaches. The question of whether claims for relief in contempt proceedings should normally be more specific is an important one, but it can be put on one side in the present case.

129 A question was raised whether the only relevant time for assessing the character of the proceedings is at the time of their commencement, or whether findings of fact by the primary judge are also relevant. It is not a question which need be answered in this case.

article, the solicitors for the residents had asked Luna Park Sydney Pty Ltd for, and by the next day, 20 April 2005, had obtained, an unreserved apology, and an undertaking not to release unread affidavits to any person not properly connected with the proceedings. That undertaking extended to directors of Luna Park Sydney Pty Ltd acting in that capacity.

136 Secondly, it is common ground that on 25 July 2005 and 13 October 2005 Luna Park Sydney Pty Ltd breached that undertaking, and those breaches were caused by Mr Hearne and Mr Tierney[130]. They were clandestine. They only came to the residents' attention by chance. Contempt proceedings could reasonably be seen as having a deterrent purpose not achieved by the undertaking of 20 April 2005.

137 Thirdly, although, when pressed for an explanation of the conduct of Mr Hearne and Mr Tierney, the solicitors for Luna Park Sydney Pty Ltd offered an apology for the company, they offered no apology on behalf of Mr Hearne and Mr Tierney. In addition, the apology offered for the company was qualified: it extended only to "any such contempt it may have committed."[131] The apology offered to Brereton J on 20 March 2006 was similarly qualified[132]. Indeed, there was no direct response on behalf of Mr Hearne and Mr Tierney at all, although Mr Hearne, as the managing director of Luna Park Sydney Pty Ltd, must have been cognisant of the problem and, with Mr Tierney, in a position to enlist the aid of the solicitors for the company, as they later did. While there was a response from solicitors who said they were not acting for Mr Hearne and Mr Tierney, there was no direct response from those gentlemen to the correspondence. There was no response before Brereton J on 20 March 2006. Thus there was no denial, no explanation, no admission of error, no apology and no undertaking to avoid repetition. In due course, by 21 April 2006, the solicitors for Luna Park Sydney Pty Ltd were acting for Mr Hearne and Mr Tierney, but although a letter written on that date recorded Luna Park Sydney Pty Ltd's apology to Brereton J, it did not convey any apology or undertaking on behalf of Mr Hearne or Mr Tierney. A similar point made by Ipp JA was said by the appellants to be "unfair": it was submitted that the apologies were in those qualified terms "because there was uncertainty as to what material had passed into the public domain". Perhaps that is so, although there is no testimonial evidence of it or any direct assertion of it by Mr Hearne or Mr Tierney or by

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130 See [83] above.

131 See [79] above.

132 Above at [82].

anyone acting on their behalf. The residents were entitled, on the strength of the correspondence as it stood, to infer that they were being treated somewhat evasively by the appellants. That is an inference or perception which might yield to contrary evidence from those who had given the instructions on the basis of which the solicitors for Luna Park Sydney Pty Ltd wrote the letters, but so far there has been none. The appellants in this Court complained that, before the contempt proceedings were instituted, "no attempt had been made to communicate with the appellants personally". The letter of 2 March 2006 was an attempt to communicate with the appellants personally through a solicitor; and if the appellants had anything to communicate to the residents it would have been very easy for them to do so, since it could hardly be supposed that Mr Hearne and Mr Tierney were not aware of the letters from the solicitors for the residents, and the replies. The appellants also submitted:

> "If the respondents' purpose was only to obtain assurances that the undertaking would not be breached in future, pursuing just Mr Hearne and Mr Tierney personally would not necessarily achieve that purpose, as assurances from them would not cover other servants or agents of [Luna Park Sydney Pty Ltd]".

Leaving aside a possible inference that this reveals an intention on the part of other servants or agents of Luna Park Sydney Pty Ltd to follow in the footsteps of Messrs Hearne and Tierney, in all the circumstances it hardly lies in the mouths of the appellants to be criticising the forensic tactics of the residents, and drawing inferences adverse to the residents from a supposed lack of sense in those tactics.

138 Fourthly, the residents had, and continue to have, a legitimate interest in relation to the use of documents being generated for the purposes of the main proceedings, which at the time when the contempt proceedings were instituted remained on foot. That legitimate interest is an interest in protecting the privacy of the affidavits and statements they provided or procured others to provide. When Mr Hearne and Mr Tierney caused Luna Park Sydney Pty Ltd to breach its undertaking of 20 April 2005 they did so by deploying affidavits and statements made by or at the instance of the residents to denigrate their complaints about noise from Luna Park, and by deploying a newspaper article making derisive use of some of those affidavits. Of course the consequence of filing and serving affidavits and statements in legal proceedings is that one day their contents might become open to the public when read in open court. But it was not illegitimate to seek to ensure that before that time the defendants, Luna Park Sydney Pty Ltd and Metro Edgley Pty Ltd, and persons acting in their interests, did not abuse their access to the documents in employing them for a purpose outside the proceedings.

139 Fifthly, there was a real possibility at the time when the contempt proceedings were instituted that, unless the residents had success in those proceedings, Luna Park Sydney Pty Ltd, Metro Edgley Pty Ltd and those acting for those companies would again breach the obligations arising either from the express undertaking of 20 April 2005 or from the "implied undertaking" consequential on the provision of the affidavits and statements. That is because although the use of those materials in furtherance of the goal of obtaining legislative immunity from the noise nuisance proceedings had succeeded, the proceedings were continuing in another form. Underlying the residents' prosecution of the proceedings in the new form was their aim to reduce the noise from Luna Park to what they saw as compatible with enjoyment of their residences and protection of the value of those residences. Underlying the defence of those proceedings no doubt was the aim of Luna Park Sydney Pty Ltd and Metro Edgley Pty Ltd of ensuring that as much noise was emitted as was necessary for the profitable operation of Luna Park. The attitude of the local council is relevant to both those conflicting aims. The attitudes of local government institutions can be affected by public opinion as much as the attitudes of State Government institutions. Public opinion can be affected by the use of the residents' affidavits and statements. Two attempts have already been made to affect public opinion by that means. Two attempts have been made to affect State Government institutions by that means. When the contempt proceedings began, there was no reason to suppose that similar attempts might not be made in future. Handley AJA reasoned that after the various contempts committed by Luna Park Sydney Pty Ltd in 2005, and the admissions and apologies in its solicitors' letters of 20 April 2005 and 9 March 2006, any further breaches by that company would in all probability attract severe punishment, which "was likely to cause financial loss to the company and its owners apart from the risks the [appellants] would face personally under the principles in *Seaward v Paterson*[133]. These were powerful deterrents against any further breaches of the undertakings." There were similar risks after 20 April 2005, but they did not deter the breaches of 25 July 2005 and 13 October 2005.

140 Sixthly, it cannot be inferred from the fact that the residents applied for contempts of court to be dealt with rather than seeking an injunction against repetition of those contempts that the proceedings were punitive. Their notices of motion left open the possibility of seeking injunctions after the facts were found.

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133 [1897] 1 Ch 545.

141 For those factual reasons, which correspond largely with those advanced by the majority in the Court of Appeal, their conclusion that the proceedings were not punitive, and hence were civil, was correct.

Orders

142 The appeal should be dismissed with costs.