

[2018] EWHC 1340 (CH)

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM  
BUSINESS LIST (ChD)

D30BM297

Before His Honour Judge Simon Barker QC sitting as a Judge of the High Court

18 July 2017

**BETWEEN**

**WARWICKSHIRE COUNTY COUNCIL**

**Claimant**

**and**

**AMIT MATALIA**

**Defendant**

Mr Tony Watkin, instructed by Warwickshire County Council Legal Services, appeared for the Claimant

Mr Oliver Hyams, directly instructed, appeared for the Defendant

*Trial dates 25 – 27 April 2018*

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## **JUDGMENT**

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*I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript*

**HHJ SIMON BARKER QC :**

- 1 In this action the claimant, Warwickshire County Council, ('WCC') seeks injunctive relief against the defendant, Amit Matalia, ('AM') for allegedly threatened breach of confidence.

- 2 The information the subject of the litigation is the content of 11+ exams devised by the University of Durham Centre for Evaluation and Monitoring ('CEM'). CEM retains the property rights in the 11+ exams and licences the administration of these exams. WCC is responsible for the administration of the 11+ exams for the six grammar schools in Warwickshire. The relevant licensing agreement is dated 24.8.15 and was made between CEM, as intellectual property rights owner and licensor, and The Schools of King Edward VI in Birmingham ('KEVI'), which administer the 11+ exam for eight schools in Birmingham, and WCC as licensees. The licensing agreement is operative until 31.7.20. Under this agreement KEVI's schools and WCC's schools set the same 11+ exam from year to year with the main test date being on a particular date agreed in writing by CEM, WCC and KEVI. The great majority of candidates sit the exam on the same day. However, KEVI and WCC operate different policies for permitting candidates to sit the same 11+ exam on later occasions (for example, because of illness or moving into the area after the exam date). So far as WCC is concerned any 11+ exam may be in current use for up to two years, this is some 9 months longer than KEVI.
- 3 As to content, CEM devises the 11+ exams and retains control over content. Schools may submit comments as to future content via WCC and KEVI, and CEM reports annually to WCC and KEVI on the overall performance of candidates and maintenance of the standard of the 11+ exam. By the licensing agreement, each of CEM, WCC and KEVI acknowledge that it is important to maintain confidentiality in the content of the 11+ exams and they each agree to use their best endeavours to preserve confidentiality. WCC accepts responsibility to CEM for ensuring that schools in Warwickshire use their best endeavours to maintain confidentiality. This includes ensuring that schools return completed exam papers to CEM and destroy uncompleted exam papers. Entry into the public domain of some or all of the exam papers is regarded as a serious breach of security and CEM is obliged to provide an alternative exam.
- 4 In addition to their ordinary schooling, some children are coached or tutored for the 11+ exams. Some children may be tutored at home by family members. There are also private tutors and businesses which specialise in coaching or tutoring. In modern times, such coaching and tutoring services have come to include the provision of information through the internet, including via dedicated websites.
- 5 There are said to be numerous websites aimed at the provision of information about and materials to assist candidates taking 11+ exams. Some are free to use, others are subscription or pay to use based, and yet others sell educational materials on a commercial

basis. It is common ground that AM operates several of these various types of website. Some sites under AM's control are based offshore, for example in India, but the individuals who work on maintaining or updating or editing the accessible content of these sites do so under AM's direction and control.

- 6 There is some 'history' between WCC and AM and this has been instrumental in establishing where the law draws the line between permissible activity in relation to information about 11+ exams content and breach of confidence.
- 7 Events following the 11+ candidacy of one of AM's sons for the Lawrence Sheriff School, one of the six grammar schools in Warwickshire, led to harassment proceedings by the school against AM and a judgment, after a trial in the County Court at Coventry, in which AM did not fare well. In the present action, WCC sought to rely on findings in that action adverse to AM, particularly those as to his character and reliability. At a pre-trial hearing, I made clear that I would not consider or base my view of AM on those findings unless, and then only to the extent that, they could be shown to be relevant to the present action. In the event, no attempt was made to refer or rely on any findings in that judgment.
- 8 More cogently, there has been litigation between WCC and AM about confidentiality in previous 11+ exams administered by WCC. These exams were also the property of CEM but were licensed only to WCC. The trial of that action was decided by Newey J, as he then was, who gave judgment on 27.2.15. AM's appeal was decided on 13.7.17. Richards LJ gave a judgment with which Black LJ, as she then was, and Lindblom LJ agreed. On 22.1.18, the Supreme Court (Lord Kerr, Lord Carnworth and Lord Hughes) refused AM permission to appeal and added observations that WCC plainly had standing to litigate and the Court of Appeal had correctly applied the test for breach of confidence in Coco v A N Clark (Engineers) Ltd [1969] RPC 41.
- 9 Before turning to the particular circumstances of and issues arising in this action, it is relevant to refer in some detail to Newey J's judgment and to the judgment of the Court of Appeal.
- 10 Newey J rejected AM's argument that any confidentiality in the 11+ exams was lost after the first sitting day. That children might have told their parents what they could remember about the exams and that 11+ exams were the subject of discussion and speculation as to content on a number of websites did not amount to good reason for concluding that information about the content of the exams was widely known or available, and thus in the public domain. Newey J also rejected AM's contention that he had a public interest defence to any breach of

confidence; AM had contended that he had sought to expose what was, to his thinking, an inherent flaw and injustice by setting the same exams on more than one occasion.

- 11 The order made by Newey J included injunctive relief which was not, for obvious reasons, confined to prohibiting AM from publishing information. The injunction ordered also prohibited disclosure or instructing or encouraging disclosure of specified information, including the content of a series of 11+ exams (those having first sittings in September 2013, 2014 and 2015) for three years from the date of the first sitting.
- 12 The judgment of the Court of Appeal included that :
  - (1) *"any reasonable person knows that unauthorised disclosure of the contents of an examination or test yet to be taken, in a way that may come to the attention of candidates, risks undermining the purpose and integrity of the examination, and that such information is therefore confidential. An injunction to restrain such disclosure is not therefore on the face of it surprising"* [3];
  - (2) where the party seeking to enforce an obligation of confidence is the licensee of a copyright work containing confidential information *"it makes no difference whether the licence was exclusive or non-exclusive"* [23];
  - (3) *"there is no principled reason why a right to enforce confidence should be treated as analogous to the enforcement of property rights"* [26];
  - (4) *"Whether a duty of confidence arises in favour of a claimant will always depend on the precise circumstances of the case, but if confidential information is imparted by A to B in circumstances where B knows or ought to know that it is imparted in confidence, that may and often will be sufficient to affect the conscience of B in equity so as to impose on him a duty to keep the information confidential. ... breach of confidence is a broad doctrine"* [29];
  - (5) in relation to the 11+ exams commissioned by WCC for use by grammar schools in Warwickshire *"it was too obvious to need stating that the tests had to be kept confidential until they were taken by all pupils sitting them. If all or part of the contents of the tests were made public, there was at least the risk that the integrity of the tests and public confidence in them would be undermined. As the provider and administrator of the tests [WCC] had a substantial and legitimate interest in the maintenance of their confidentiality. There was no particular reason for [CEM] to do so"* [30];
  - (6) Newey J *"was right to say "it would have been obvious to [AM], and to any other reasonable person, that [WCC] did not want information about the contents of the 11 Plus test to be disseminated""* and in so doing Newey J was referring to *"a substantial and legitimate interest in preventing the dissemination of the contents of the judgment"* [31];
  - (7) *"it seems highly improbable that a 10 or 11-year old child would be prohibited from discussing the test with their parents, but that gets [AM] nowhere. .... It does not follow that because a child can tell his or her parents about questions in the test they have taken, the parents are free to publish that information, knowing that other candidates are yet to take the test. ... it would in my judgment be entirely consistent with principle to impose the duty of confidentiality on the parents"* [49]; and,

(8) *"As to the information being available from other sources, [Newey J] specifically found .... That after the first sitting on 7 September 2013 the contents of the tests had not become so generally accessible as to cease to be confidential. ... In my view, there are no grounds for interfering with the judge's findings" [57].*

13 Against that introduction and background, I turn to the facts which prompted this action and the issues raised at trial.

14 Following the judgment given by Newey J on 27.2.15, WCC continued to have concerns that AM was contravening, or at least testing and attempting to stretch the limits of, the injunction made against him. This included by AM asking detailed questions aimed at ascertaining content of 11+ exams to which the response would be neither to confirm nor to deny. An example is an email from AM to WCC's in-house solicitor, Ms Kate Hiller ('KH'), on 3.1.17 which began :

"I have no intention to publish, but I do wish to inform the grammar schools individually of the attitude of WCC and provide them information.

The information I passed on to the school was in good faith and has been available for many months in the public domain on other webpages.

There has been no attempt by WCC to remove alleged content from other sites. After many months a reasonable person would then believe it is not content.

If WCC accept I have not seen the paper, it must accept I do not know what the content is. If what I alerted a school of is content, then questions would be raised why it has not been removed from other websites and why an injunction has not been sought against these organisations. Can you explain why? Is it because it is not content or [does] WCC wish to harass me alone? I cannot think of any other explanation".

The email continues :

"... The injunction forbids publication of content and not something that is believed to be content and is not in fact content.

...

So to prevent me breaching an injunction please inform me which parts that I sent to the school I may not publish, or parts which I may.

You need to confirm actual content. So are the words "aristocrat" and "dam" on the test, yes or no?

Unless you confirm they are on the test assume they are not as removal has not been sought. I then would be allowed to use the data as I see fit.

...

I think both parties should raise this at the appeal on [18.1.17]".

15 Viewed in the light the injunction ordered by Newey J, AM's email (and the above is not an isolated instance) appears to have been an attempt to undermine, or at least push at the

boundaries of, the judgment and order of Newey J and to recast the ambit of AM's appeal, which was heard on 18.1.17.

- 16 AM's reference to other websites included, in particular, to [www.elevenplusexams.co.uk](http://www.elevenplusexams.co.uk) ('11+EPE') which runs a moderated forum of suggestions as to 11+ exams content from contributors and by reference to which AM claimed to be seeking clarification from WCC. AM also raised in the present action allegations of racist discrimination by WCC in not seeking to sue or control 11+EPE. AM's explanation for alleged racial discrimination is that 11+EPE is said by AM to be run by white people whereas he is Asian. WCC's position is that it has an acceptable working relationship with 11+EPE which removes material from its website if asked so to do and also is not aimed at undermining the integrity of the 11+ exams created and licensed by CEM. It appears from the evidence that WCC may well have a different relationship with 11+EPE than it does with AM. That, in no small measure, appears to be because 11+EPE's activities are viewed as being confined to the provision of a service supporting coaching or tutoring for 11+ exams whereas AM's activities are viewed as including attempts to discredit and undermine the integrity of 11+ exams. My view of the evidence referred to during the trial before me is that there is no proper basis for alleging racist or otherwise unjustifiable differentiation by WCC in its dealings with 11+EPE when compared to its dealings with AM.
- 17 WCC's evidence included that, in June 2017, WCC's 11+ admissions coordinator, Amy Taylor, received an email from an unknown person (signed off as 'Brotherhood', email address : sender@5ymail.com) which referred to a website under AM's control, [www.warwickshire11plus.co.uk](http://www.warwickshire11plus.co.uk).
- 18 WCC's evidence was that this website was viewed on 22.6.17. Under the headline "Help us prove the dishonesty of [CEM] and [WCC]" the text began :  
"The practice of reusing the same test for late sitters is ridiculous as children clearly remember content to make a difference to late sitters. This makes testing unfair".  
This set the tone. At that time, the Court of Appeal had reserved judgment. After asserting that WCC had perverted the course of justice in the action tried by Newey J and was engaging in a personal vendetta against the website, the material published on the site continued :  
"There is no known injunction for any 11+ tests around the country for 2017 tests. We ask you for help. **Once your child finishes the test and gets home, write (sic) ask them to write down everything they remember about the test content and send it to us.** We will then be in a position to challenge CEM Centre and WCC put a stop to organised cheating. Help us to help you. ....

...

We have under-covered blatant dishonesty and what we believe is clear evidence of perverting the course of justice. We have evidence of conflicting data as to who owned copyright and intellectual property and believe evidence exists to prove WCC and their witnesses : Amy Taylor and Craig Pratt misled the Court, as did their legal team. ...”.

- 19 WCC contended that the warwickshire11plus domain name suggested a connection with WCC. That may be so by reference to the domain name alone, however a reader of any material on the site would be disabused of any such thought very quickly. WCC’s alternative point, that the name would be likely to attract those having a connection with the 11+ exams in Warwickshire, including parents, is a more valid point and, presumably, the motivation for the choice of domain name.
- 20 On 17.7.17, four days after the Court of Appeal gave judgment, AM sent another email to KH. AM repeated the allegation that WCC had misled the Court, raised the question of whether WCC’s counsel, Mr Watkin, who appears for WCC in the present action, was complicit and in contempt of court, and assured KH that such allegations would be raised in the Supreme Court. AM concluded the email with an invitation to WCC to settle so as to avoid his application to the Supreme Court for permission to appeal.
- 21 An extract from AM’s warwickshire11plus website viewed on 17.7.17 had the same content as that on 22.6.17, including that the Court of Appeal judgment was pending (in fact it had been delivered). A reasonable inference is that throughout the period 22.6.17 to 17.7.17 AM’s online exhortation to parents remained unchanged.
- 22 On 18.7.17, KH replied that WCC was aware that AM was “actively encouraging parents to provide [AM] with content from the 2017 Warwickshire 11+ test and in so doing [had] demonstrated a clear intention to compromise the integrity of that examination” and after notifying AM that WCC intended to take legal action to protect the 2017 and future 11+ exams, gave AM a three day window to consider agreeing to give an undertaking.
- 23 Mr Hyams, AM’s counsel, cross-examined KH about this exchange of emails and postulated that there was no love lost between AM and KH. KH readily agreed. In his closing submissions, Mr Hyams sought to utilise this frank admission as a basis for suggesting that there was a degree of personal hostility to AM underlying WCC’s claim. I do not accept that suggestion; there is nothing in the evidence to support such a suggestion or contention. My view of KH is that in her conduct of this case she has endeavoured to focus on WCC’s legitimate interests and avoid being side-tracked by AM’s obsessive conduct and, at times, intemperate language.

- 24 On 2.8.17, WCC again viewed AM's warwickshire11plus website. Notwithstanding the judgment of the Court of Appeal, AM maintained his allegations of perversion of the course of justice and that WCC was engaging in a personal vendetta against AM's website which constituted harassment. In relation to 2017 11+ exams the text had been modified in part from that viewed in June and July :

"There is no known injunction for any 11+ tests around the country for 2017 tests, but the issue is whether 10-year old children can report what was on a test. .... **Once your child finishes the test and gets home, ask them to write down everything they remember about the test content and send it to their local authority, grammar school or [CEM] directly. Ask them to confirm whether the information was on the test and whether it would compromise testing for late sitters. The Freedom of Information Act can be used to find out reports. Please let us know what their response is. But we do not encourage you to publish content. Our view is you should NOT publish the content.** One can then challenge [CEM's] and WCC's stance that content children remember will not make a difference to late sitters. ...."

AM again made allegations over several paragraphs that WCC witnesses, this time including KH, gave false evidence in the proceedings which led to the Court of Appeal judgment, stated that he intended to seek permission to appeal to the Supreme Court, and opined that the courts should not treat false evidence as of little importance but should prosecute allegedly false statements of truth for contempt of court. AM then continued:

**"For the sake of clarity we do not intend to publish the content of any tests while they are still used even though [CEM] confirmed under the FOIA they would not consider it a breach of confidence. We have no intention to disrupt any tests. ...".**

- 25 On 3.8.17, AM sent an email to KH assuring her that his criticism of her and Mr Pratt was not personal. AM reiterated that he had no intention of "uploading 2017 content while the test is being used as it is clear that [WCC] object".
- 26 On 4.8.17, WCC replied by letter. WCC acknowledged AM's assurance but pointed out that his website continued to encourage third parties to breach confidence and proposed a form of undertaking to cover the 2017 and future 11+ exams. AM replied by email requesting copies of undertakings given by 11+EPE. KH responded asking for an express reply to the proposal that undertakings be given in a proposed form and set a 48 hour deadline for reply. There was no reply.
- 27 WCC commenced these proceedings on 22.8.17. AM served his defence on 29.8.17. HHJ Cooke granted an interim injunction on 31.8.17.
- 28 On 5.10.17, WCC again viewed AM's warwickshire11plus website. So far as material, the content was unchanged from 2.8.17.

- 29 It was a feature of AM's case that the 'Brotherhood' email to Amy Taylor in June 2017 had, or may have, been fabricated by WCC and that it could not be proven that the content of AM's warwickshire11plus website on 22.6.17 was as alleged by WCC, the implication being that this too may have been fabricated by WCC. WCC's witnesses, KH and Collette Naven-Jones, WCC's lead officer for pupil and student services, were cross-examined with a view to undermining, or at least casting doubt as to the authenticity of, the email and WCC's evidence as to the warwickshire11plus website content as at 22.6.17. AM was also cross-examined on his assertions challenging the authenticity of the email and website content. In the light of the evidence before me, and not disregarding inherent probabilities, I reject AM's propositions as not credible. My view of the evidence given by KH and Ms Naven-Jones is that it was frank and I regard them as reliable witnesses.
- 30 I do not have the same view of AM as a witness. This is not as a mere corollary. AM is plainly a very intelligent and articulate man. However, he left me with the very firm impression that he is so committed to the cause of challenging the integrity of 11+ exams, at least those set by CEM and used in Warwickshire, that both his objectivity and his regard for the truth have been overborne. AM's fixation permeated his evidence and undermined its reliability.
- 31 AM called a further witness, Mr Edward Webster, who is a director of a tutoring business in central London. Mr Webster was under the impression, derived from the nature of AM's request that he be a witness, that he would be giving expert evidence. There was no direction for expert evidence. Mainly for that reason, but also for its content, Mr Webster's evidence was of no value. As an example of content, Mr Webster's surmises as to the reasons for an increase in the number of candidates sitting the 2017 11+ exams after the first sitting day were explained and contradicted on a factual basis by Ms Naven-Jones in her evidence; somewhat bafflingly, in his oral evidence, Mr Webster refused to accept that he might have been wrong in his speculation. To the extent that it purported to be factual, rather than opinion, evidence, Mr Webster's evidence added nothing of relevance.
- 32 The issues raised at trial have been agreed between Mr Watkin, who appears for WCC, and Mr Hyams, who appears for AM (and who appeared for AM at the trial before Newey J but not on the appeal), and are : (1) Is WCC entitled to seek an injunction, i.e. does it have standing to do so? (2) Has AM threatened to breach a duty of confidence which is enforceable by WCC? (3) Is it unlawful to encourage a breach of a duty of confidence? (4) If so, has AM threatened to encourage, or actually encouraged, one or more persons to breach a duty of confidence which is enforceable by WCC? And, (5) In the circumstances as found

by the Court at the end of the trial, should the Court's discretion to order an injunction be exercised in favour of WCC?

- 33 The above facts are those material to the decision to be made in this case on the substantive claim for breach of confidence.

(1) Is WCC entitled to seek an injunction, i.e. does it have standing to do so?

- 34 Newey J, the Court of Appeal, and the Supreme Court have all stated that WCC has standing to litigate to protect the confidentiality in the 11+ exams set in Warwickshire. Undeterred by or oblivious to this settling of the position in law, AM asserted again, and more than once, in his defence to the present action that only CEM can sue and that WCC lacks standing. The basis for this contention was that the contractual position is now different, specifically the 11+ exams are no longer unique to WCC, rather WCC and KEVI are co-licensees. In his opening submissions, Mr Hyams contended that the fact that there is another licensee with a right to enforce but which does not intend so to do is a material difference distinguishing the present situation from the facts as they were before the Court of Appeal. This is obviously misconceived. There is no principle applicable to this area of the law which requires that where more than one person has an enforceable right either they must all agree to exercise that right or the right must remain unexercised. That is implicit in the judgment of Richards LJ, which was effectively the judgment of the Court of Appeal. Raising the point as an issue in this action was an abuse of the process. I do not consider that the fact that KEVI, for Birmingham schools, and WCC, for Warwickshire schools, are in a tri-partite contract with CEM has any material impact on the legal position and standing of WCC when compared to its position and standing under the agreement the subject of the earlier litigation.

- 35 During the course of the trial, Mr Hyams set a new course for, and sought to redefine, the lack of standing issue. In his closing submissions, he contended that the claim was made without proper authority. As a basis for this contention Mr Hyams submitted that this point was raised by AM by inference. As to the premisses from which to draw such an inference, Mr Hyams referred to AM's allegation at the conclusion of his defence that :

"The claim is without merit and is filed as a personal vendetta against [AM], using local tax payers' funds and constitutes both harassment and misconduct in public office".

- 36 There is no counterclaim in this action.

- 37 Mr Hyams cross-examined Ms Naven-Jones and, more particularly, KH about the authorisation process for this litigation. Ms Naven-Jones and KH confirmed that none of the six Warwickshire schools had asked that proceedings be taken. KH explained that the

decision to commence proceedings had been cleared through notification and acceptance or lack of objection from WCC's Head of Law and Governance, and after consultation with WCC's admissions section responsible for administration of the 11+ exams.

- 38 Mr Hyams submitted that one of the most interesting aspects of WCC's evidence was "the revelation that the claim was made in effect on the authority only of [WCC's] legal services team". Referring to McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC [1992] 2AC 48, Mr Hyams likened this to a power ancillary to an ancillary power or incidental to the incidental and not incidental to the discharge of WCC's functions. Perhaps recognising that a challenge to authorisation of the action, and therefore whether WCC was intentionally, and therefore in fact, the claimant, had not in fact been made, Mr Hyams did not develop the point but characterised the point as "something of a side issue" and "a more important question is whether there was a proper purpose for making the claim". The suggestion underlying that more important question was to be understood as a reference to the alleged personal vendetta, particularly on the part of KH, against AM. Drawing together the diffused strands of the submissions on this aspect of AM's case to a close, Mr Hyams submitted that the pleading was sufficient, at least by implication, to raise a public law defence of at least a claim that the action was brought for an improper purpose and was, therefore, ultra vires WCC's powers.
- 39 Not unreasonably, Mr Watkin sought to interrupt Mr Hyams, as he embarked on this new course, to point out that the defence does not raise want of authority or ultra vires in any intelligible way.
- 40 Mr Watkin dealt briefly with this issue. First, as actually raised in AM's defence, Mr Watkin submitted that there was no material difference between the facts of the earlier litigation and this action, and in particular that the existence of a co-licensee was expressly addressed by the Court of Appeal. Secondly, as to the want of authority or ultra vires argument, Mr Watkin submitted that WCC acknowledges that if the Court finds that the proceedings have been brought in bad faith or as a personal vendetta this will affect the outcome, in particular the exercise of the court's powers in equity.
- 41 Having read and heard the evidence, my unequivocal conclusion is that the fact that there is or may be no love lost between AM and KH, or anyone else at WCC referred to in the evidence, has not affected the conduct of KH and WCC in the events leading to the commencement of or in the conduct of the present action. The same cannot be said of AM. Further, WCC had cause to and has standing to commence this action and to seek an injunction against AM.

(2) Has AM threatened to breach a duty of confidence which is enforceable by WCC?

- 42 In Coco v A N Clark (Engineers) Ltd, Megarry J summarised the criteria for establishing a breach of confidence as :

*"First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be unauthorised use of that information to the detriment of the party communicating it".*

- 43 As to the first element, it is beyond argument that the content of 11+ exams in Warwickshire is confidential information.

- 44 As to the second element, it is also beyond argument that deriving information about 11+ exams from the children who have been candidates does not destroy confidentiality in the content of the 11+ exams.

- 45 As to the third element, detriment, in Attorney-General v Guardian Newspapers (No.2) [1990] 1AC 109, Lord Goff (whose speech was characterised by Lord Walker in OBG Ltd v Allan [2008] 1AC 1 as *"the most important single step forward in the law's [of privacy and confidence] recent development"*) said :

*"I would also, Like Megarry J in Coco v A N Clark (Engineers) Ltd [1969] RPC 41,48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case but this may not always be necessary."*

However, for present purposes, if the first two elements are satisfied, threatened unauthorised use would constitute a threat to the integrity of the 11+ exams and thereby be detrimental.

- 46 A breach of confidence occurs when unauthorised use is made of confidential information. Seeking to obtain and obtaining confidential information without authority is no less a breach than disseminating or publishing that information without authority and, to the extent necessary, detriment will be readily inferred. In this context, Mr Watkin referred to Imerman v Tchenguiz and others [2010] EWCA Civ 908 and the judgment of the Court of Appeal, Lord Neuberger MR sitting with Moses and Munby LJJ, at [68]-[69] :

*"68 If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation takes steps to obtain such information. ...*

*69 In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of a document, whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the*

*claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document".*

- 47 In my view, it follows that indirect collection or collation of recollections of exam content, by utilising parents as a medium to debrief children who have recently taken 11+ exams, falls squarely within the scope of threatened breach of confidence.
- 48 In both the original (22.6.17 and 17.7.17) and the revised (2.8.17) website publications that was the express and intentional objective of the exhortation to parents of children who had recently taken 11+ exams for Warwickshire grammar schools.
- 49 The question arising is whether AM had a defence on the particular facts.
- 50 His first line of defence was that he had no intention of uploading information he collected while any particular 11+ exams were current. This is nothing to the point because breach is not confined to publication, it extends in principle to any and all unauthorised use.
- 51 Next, AM contended that he did not appreciate that it was or might be a breach of confidence to solicit and collect or collate information as he had done. No reasonable person could hold that view. Moreover, I do not accept that that was AM's view at the time. AM was and is fixated by the notion that 11+ exams which may be taken at more than one sitting are unfair and, therefore, flawed. He is so intent upon pursuit of this cause that he is prepared to disregard WCC's legitimate right to maintain confidentiality in 11+ exams licensed by CEM.
- 52 Thirdly, Mr Hyams, submitted that the information sought, and any gathered, by AM was not confidential because it was already in the public domain. In Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1AC 109 at p.282C-F, Lord Goff identified three principles limiting the broad general principle as to when a duty of confidence arises. The first, which he characterised as an expression of the scope of the duty, is that "*confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it*". Access to information via the internet

now is a far cry from what it was in 1990, however this explanation of the meaning of public domain remains valid.

- 53 As to entry of information into the public domain, Mr Hyams relied on the evidence as to the content of 11+EPE's website forum and as to refusals to confirm or deny whether specified information was 11+ exam content. The argument in essence was that if the information under discussion on a website forum is 11+ exam content it is in the public domain; alternatively, if it is not exam content it cannot be confidential information.
- 54 The public domain argument emanated from correspondence between WCC (KH) and AM in December 2016 and January 2017 about a document sent by AM to Stratford Girls Grammar School, said by WCC to appear to be a breach of the injunction, to which AM responded that the content was taken from the 11+EPE website and was in the public domain. However, that is not the subject matter of this litigation. The present action is about the organised collection and collation of information derived from debriefed 11+ candidates which is quite different and as to which there is no evidence that it is in the public domain, in other words so generally accessible that, in all the circumstances, it cannot be regarded as confidential.
- 55 Returning to the issue, by his website exhortations during June, July and August 2017 AM threatened a breach of confidence, through misuse of confidential information, which is actionable by WCC.

(3) Is it unlawful to encourage a breach of a duty of confidence?

- 56 In closing submissions for AM, Mr Hyams submitted that the first reference to a complaint by WCC that AM was encouraging parents to provide him with 11+ exam content and, in so doing, had demonstrated an intention to compromise the 11+ exams was in an email on 18.7.17. AM's response was that he had no intention of uploading any 11+ exam content while it was still being used. By letter dated 4.8.17, WCC complained that AM's "website continues to encourage third parties to commit breaches of confidence".
- 57 Mr Hyams also submitted that it is not necessary to determine whether encouragement to others to breach confidence is unlawful.
- 58 I regard AM's approach as disingenuous and Mr Hyams' submission as misconceived.
- 59 AM cannot realistically have held the view that encouraging third parties to breach confidence was not itself a breach of confidence. The injunction granted by Newey J expressly prohibited encouragement and that injunction was not varied by the Court of

Appeal. AM was represented by experienced counsel at trial (Mr Hyams) and on appeal (Mr Bragiel). AM is an intelligent and articulate person. If notwithstanding what his counsel are likely to have advised as to the order in place against him and his own reading of that order, AM had failed to appreciate that encouragement of breach of confidence was prohibited and unlawful, it can only have been because of wilful blindness to the constraints imposed upon him. My firm view is that AM paid close attention to the injunction ordered against him as demonstrated by his email references to the absence of an injunction covering 2017 11+ exams and the issue (whether a child can report on an 11+ exam) he sought to explore.

60 As to Mr Hyams' submission, it is well settled law that a defendant who procures an unlawful act by encouragement acts unlawfully. For authority it suffices to refer to CBS Songs Ltd v Amstrad Consumer Electronics PLC [1988] 1AC 1013, and the speech of Lord Templeman at p.1058D-E, with which Lord Keith, Lord Griffiths, Lord Oliver and Lord Jauncey agreed :  
“ ... a defendant who procures a breach of copyright is jointly and severally liable with the infringer ... A defendant may procure an infringement by inducement, incitement or persuasion”.  
There is no relevant difference between the tort of infringement of copyright and the breach of a duty of confidence. In CBS Songs the distinction drawn was between procurement (unlawful) and facilitation (lawful).

61 It is unlawful to encourage a breach of a duty of confidence.

(4) If so, has AM threatened to encourage, or actually encouraged, one or more persons to breach a duty of confidence which is enforceable by WCC?

62 The express content of AM's website postings in June, July and August 2017 referred to above contains unequivocal encouragement to third parties (parents) to breach a duty of confidence which is enforceable by WCC.

(5) In the circumstances as found by the Court at the end of the trial, should the Court's discretion to order an injunction be exercised in favour of WCC?

63 Based on the findings in this judgment, WCC is, in principle, entitled to an injunction to restrain AM from threatened breach of a duty of confidence in current 11+ exams. In principle this should extend to future 11+ exams. The precise form of such an injunction should be dealt with after the parties have had a brief opportunity to consider this judgment.