

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION



No. QB/2018/0191

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Neutral Citation Number: [2019] EWHC 880 (QB)

Wednesday, 6 February 2019

Before:

MR JUSTICE NICKLIN

B E T W E E N :

EMMET COLVILLE

Appellant

- and -

SEVENTY THIRTY LTD

Respondent

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MS S. CLARKE (instructed by DAS Law) appeared on behalf of the Appellant.

MS K. HOLDERNESS (instructed by Keystone Law) appeared on behalf of the Respondent.

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**J U D G M E N T**

(This transcript has been prepared without the aid of documentation)

MR JUSTICE NICKLIN:

1. This is an appeal against the order of DJ Hugman, sitting at Wandsworth County Court, on 22 January 2018. He was trying the claim and so, for appeal purposes, is treated as exercising the jurisdiction of a Circuit Judge. Permission to appeal was given by Sir Alistair MacDuff on 13 August 2018. The appellant is the Defendant to the claim, Emmet Colville. The Respondent was the original Claimant in the proceedings. I shall refer to the parties as Mr Colville and Seventy Thirty.
2. I am grateful to counsel for their helpful submissions, which have helped significantly in identifying and narrowing the issues on this appeal.
3. Seventy Thirty operates a matchmaking business. Mr Colville was employed as one of its matchmakers. He was the subject of strict contractual obligations of confidence. Seventy Thirty has come to some prominence as a result of a High Court litigation between it and a former customer, Tereza Burki. Ms Burki sued Seventy Thirty for damages for misrepresentation. Essentially, she claimed that Seventy Thirty had falsely misrepresented that it had a substantial number of wealthy male members who matched the claimant's criteria and she had been induced to pay £12,800 to become a member. His Honour Judge Parkes QC, sitting as a High Court Judge, handed down judgment on 15 August 2018 ( [2018] EWHC 2151 (QB)). He held that Ms Burki was entitled to repayment of her membership fee, plus £500 damages for distress, but was required to pay £5000 damages in respect of, effectively, a counterclaim by Seventy Thirty for a libellous review of Seventy Thirty, albeit brought as a separate claim.
4. I can gratefully adopt HHJ Parkes QC recitation of the background to the relationship between Ms Burki and Seventy Thirty. The High Court judgment post-dates the decision under appeal and so has no bearing on it. It is simply a convenient summary that obviates the need for me to explain all the background of the parties in this judgment.
5. The High Court claim was the foundation and basis of the present claim by Seventy Thirty against Mr Colville. For reasons that will become apparent, the two claims are closely linked. In summary, Seventy Thirty claimed that Mr Colville had breached his contractual obligations of confidence by assisting Ms Burki to bring her High Court claim against Seventy Thirty. It claimed as a loss, arising from that breach, the legal costs that it had paid in defending the proceedings. Having heard evidence at trial, DJ Hugman agreed.
6. The Order that he made consequent upon his finding on liability was as follows,

“The defendant shall:

- (a) disclose any confidential business information which he has retained following termination of his employment with the claimant by 4pm on 5 February 2018;
- (b) disclose the names and contact details of any person, companies or other entities to whom the defendant has disclosed any such confidential business information and the extent of such disclosure by 4pm on 5 February 2018;

- (c) deliver to the claimant and/or otherwise destroy any confidential business information he has retained following termination of his employment with the claimant by 4pm on 5 February 2018;
- (d) comply henceforth with the terms of his contract and deed with the claimant to the extent that such terms survive the termination of his employment with the claimant.

The money claim is stayed pending determination of the claim HQ-17X02160” (which is the action number of the High Court action brought by Ms Burki).”

7. Effectively that was to uphold Seventy Thirty’s claim that Mr Colville had breached his obligations of confidence. He had provided confidential material to Ms Burki, which had caused the loss to Seventy Thirty arising from Ms Burki’s High Court claim.
8. The trial took place before DJ Hugman over two days.
9. It was Seventy Thirty’s case at trial that:
  - 9.1. Mr Colville and Seventy Thirty parted company on less than amicable terms; Seventy Thirty alleged that he had, on departure, made a veiled threat;
  - 9.2. Mr Colville, in breach of his contractual obligations of confidence, provided Ms Burki with (i) contact information for several other Seventy Thirty clients and (ii) information about Seventy Thirty’s business practices and thereby attempted to induce her to cease dealing with Seventy Thirty; and
  - 9.3. as a direct consequence of this breach, Ms Burki commenced her High Court claim. As a result, Seventy Thirty have incurred losses in the form of its legal costs.
10. Seventy Thirty relied upon a number of admissions made by Mr Colville:
  - 10.1. that he had retained emails of dissatisfied clients of Seventy Thirty and their personal contact details following his departure;
  - 10.2. that, following the termination of the employment with Seventy Thirty, Mr Colville contacted Ms Burki in both April and May 2015. Mr Colville knew at that time that Ms Burki had made complaints about Seventy Thirty’s service;
  - 10.3. that there was a meeting in May 2015 between Ms Burki and Mr Colville in a coffee shop at which, according to Ms Burki’s witness statement, she had done most of the talking and Mr Colville had not corrected her;
  - 10.4. that in the autumn of 2015, Mr Colville put Ms Burki in touch with another dissatisfied client, KH;
  - 10.5. that Ms Burki issued a County Court claim against Seventy Thirty in April 2016;
  - 10.6. that Mr Colville provided Ms Burki with the contact details of three or four other clients of Seventy Thirty at some point after the County Court claim had been issued; and

- 10.7. that Mr Colville intended to provide evidence in support of Ms Burki's claim and, to that end, he attended two conferences with Ms Burki and her legal representatives and discussed Seventy Thirty's business with them.
11. Further important parts of the chronology were relied upon by Ms Holderness at the hearing.
- 11.1. Mr Colville provided a witness statement to Ms Burki's solicitors, in May 2017, for use in the claim against Seventy Thirty. Ms Holderness accepts that the only evidence contained in this witness statement that was arguably a breach of the confidentiality restriction was his evidence about having typed the numbers of other clients of Seventy Thirty into Ms Burki's mobile phone at one of their meetings to allow her to make contact with them.
- 11.2. The re-amended Particulars of Claim were served on 14 June 2017. They pleaded an express case of misrepresentations and, as part of that, contended that the representation that Seventy Thirty had a large database of male clients was false.
- 11.3. Ms Burki's Directions Questionnaire was filed on 15 September 2017. In it, in the section seeking details of the parties' witnesses for trial, Ms Burki identified Mr Colville and stated that he would give evidence as to "*truth or falsity of statements about Seventy Thirty's services*".
12. A key dispute, at least on the statements of case, was whether any breach of confidence committed by Mr Colville had caused Ms Burki to pursue her High Court Claim. That was, ultimately, an issue of finding facts as to what Mr Colville had told Ms Burki, and whether that had been a significant cause of her decision to bring her High Court Claim. If, for example, Mr Colville, as a disgruntled former employee, had merely encouraged her to sue Seventy Thirty but disclosed no confidential information, that would not have placed him in breach of his obligation of confidence.
13. In her skeleton for the appeal, Ms Holderness succinctly summarises the issue,
- "The issue of causation was, therefore, firmly in dispute. There can be no doubt that the judge appreciated that part of his task at trial was to determine whether there was a causal connection between Mr Colville's breach of contract and the losses claimed by Seventy Thirty."
14. The Judge reserved his judgment and gave an oral judgment on the afternoon of 22 January 2018. The judge subsequently approved the transcript of his judgment. References in square brackets are to paragraphs of the judgment below.
15. The judge made the following findings:
- 15.1. On his departure from Seventy Thirty, in April 2015, Mr Colville took the details of some 22 clients with him, as well as other confidential information about clients of Seventy Thirty. Mr Colville, "*at some point thereafter ... shared the information ... [with Ms Burki] ... and her lawyers in relation to the High Court claim*" ([5], [46] and [47]).
- 15.2. Mr Colville started having meetings with Ms Burki as early as August 2015, and there had been at least three meetings between Mr Colville and Ms Burki (some of which included her lawyers), and that he had provided substantially more assistance to Ms Burki than Mr Colville had indicated in his witness statement for trial ([31]).

- 15.3. Ms Burki discussed her dissatisfaction with Seventy Thirty with Mr Colville. Mr Colville described Seventy Thirty to Ms Burki as the most corrupt and immoral matchmaking outfit (or words to that effect) ([31]).
- 15.4. A year or more after leaving his employment with Seventy Thirty, in May 2016, Mr Colville provided information to Ms Burki to enable her to contact other clients who had made complaints and also discussed how Seventy Thirty “*dealt with things*” ([31] and [34]).
- 15.5. Mr Colville was not a reluctant, innocent participant in the High Court proceedings. In the judge’s words,

“If Mr Colville was even half as unwilling and as reluctant as he suggests, he would not have done it; he would not have been happy with those meetings with Ms Burki; he would not have gone to talk to her lawyers and provided them with information” ([47]).

16. At the end of what was clearly a careful judgment, Ms Clarke, for Mr Colville, submitted that the Judge had not dealt specifically with the issue of causation in his judgment. That was entirely the proper course for Ms Clarke to adopt. Counsel should always raise a point as to alleged inadequacy of reasons with the Judge rather than to leave the point for appeal.
17. The Judge, therefore, added one further, but important, paragraph to his judgment. It was in these terms ([57]):

“Miss Burki’s claim has been amended to include the allegation of misrepresentation. Mr Colville is stated in Miss Burki’s directions questionnaire to be a witness in relation to the business practices in particular of the claimant in this case. Whether Miss Burki would have actually commenced the proceedings without the information from Mr Colville is not clear to me. She certainly appears to have discussed matters with him before she actually commenced proceedings. She might have gone to talk to her friend, Mr Tooth, who wrote the first letter. Mr Tooth is not a practitioner in this type of law I do not think, so she then went to another firm. At that stage she possibly had not obtained anything from Mr Colville, but at the time she commenced the proceedings, I think she had at least had the first of those discussions with him. He could have scotched the whole thing there by saying, ‘I am sorry, Miss Burki; I am sorry that you and I did not have the opportunity of ensuring that you got from that arrangement, but at the end of the day I am bound by a contract. I cannot help you.’ He did not. That was not the evidence.

I have to say, given that he was prepared to go on meeting her to discuss this, I do not believe that he genuinely was that reluctant. He has, at the very least, encouraged her in that activity and, as her claim is currently pleaded, any losses that the claimant stands to accrue flow from his breach. That is the causal relationship ... The one motive that seems to me to be loud and clear is what is properly termed malice. He is a disgruntled former employee.”

18. Ms Holderness, for Seventy Thirty, submits that, although the Judge may not have made these findings in terms, his findings point to what she submits are his “*inferred conclusions*”:

- 18.1. Mr Colville's intention in contacting Ms Burki was to encourage or assist her in bringing claims against Seventy Thirty.
  - 18.2. Had it not been for the information provided to Ms Burki by Mr Colville, Ms Burki would not have brought the misrepresentation claim she did (as formulated in her re-amended Particulars of Claim) against Seventy Thirty. Ms Holderness submits that Ms Burki's original complaint, sent in February 2016, was about Seventy Thirty's failure to provide the requisite number of introductions under her contract and was entirely different from her eventual misrepresentation claim which concerned the size and composition of Seventy Thirty's database.
19. The Appellant's Notice identified five Grounds of Appeal. Referred to by the headings used in the skeleton argument they were:
- 19.1. the Judge applied the incorrect legal test for causation;
  - 19.2. the Judge erred in law in failing to take into account relevant factors;
  - 19.3. the Judge erred in law in taking into account an irrelevant factor, namely that Ms Burki had amended her claim and/or erred in fact in concluding that (i) Ms Burki's claim had been amended at all and/or (ii) the amendment was connected with Mr Colville's breaches;
  - 19.4. a finding of fact that Mr Colville's breaches caused the losses claimed was perverse; and
  - 19.5. the Judge's conclusion that Mr Colville is liable for the entirety of the shortfall of the Respondent's legal expenses is against the weight of the evidence and/or perverse.
20. The Appellant's arguments before me in relation to those first four grounds have not strayed outside the parameters as set out in the Appellant's Notice and in the skeleton argument, but they could perhaps more accurately and succinctly be described as follows:
- 20.1. the Judge did not make critical findings of fact in relation to what Mr Colville told Ms Burki and when;
  - 20.2. consequently, he did not make findings as to whether the disclosure of that information was a breach of confidence; and
  - 20.3. in further consequence, the Judge did not have the necessary factual findings to enable him to conclude that the disclosures made in breach of contract had caused Ms Burki to "*commence legal proceedings against the Claimant*," as was the pleaded claim in paragraph 12 of the Particulars of Claim.
21. There does not appear to be much dispute between counsel as to the fundamental legal test of causation:
- 21.1. If a breach of contract by a defendant is to be held to entitle the claimant to damages, it must be first be held to have been an "effective" or "dominant" cause of his loss: *Galoo Ltd -v- Bright Grahame Murray* [1994] 1 WLR 1360, 1374G-H, the judgment of Glidewell LJ (with whom Evans and Waite LLJ agreed);
  - 21.2. The breach need not be the *sole* cause; it need only be *an* effective cause. Ms Holderness relies on a passage from Beldam LJ's judgment in *County Ltd -v- Girozentrale Securities*

[1996] 3 All ER 834, 848H-849D, and in the judgment of Hobhouse LJ at 857F-G. However, this appears to be dealing with a situation where it is contended that events that occur subsequently to the breach of contract do not prevent the original breach still being an effective cause of the loss. That is a rather different point. It was not Mr Colville's case at trial that the subsequent events had 'overtaken' his breach to such an extent that he could no longer be said to have 'caused' the loss. His submission was rather more fundamental. Seventy Thirty could not prove that the alleged breach of confidence had caused the loss at all. Put simply, if Ms Burki was determined to sue Seventy Thirty, Mr Colville's assistance to her had come after she had made the decision to sue, then even if a breach could be established, it had not caused the loss.

- 21.3. It is sufficient if the breach of contract is one of two causes, both cooperating in causing the loss to the claimant, *Heskell -v- Continental Express Ltd* [1950] 1 All ER 1033, 1048A in the judgment of Devlin J.
22. Both counsel have referred me to several further authorities on the proper approach to the assessment of causation. In my judgment, however, the real issue on this appeal is not with the legal test that the Judge adopted in relation to causation, but whether the Judge made sufficient factual findings to support his conclusion on causation.
23. Ms Holderness accepts that the task of a first instance judge is to find facts, identify the crucial legal points and to give reasons for deciding them in a particular way. The Judge should give reasons in sufficient detail to show the parties and, if need be, an appeal court, the principles on which he has acted and the reasons that have led him to the decision and the facts upon which they are based: *Fage UK Ltd -v- Chobani UK Ltd* [2014] FSR 29 [115].
24. In my judgment, the principal complaint of Mr Colville on this appeal is not that the Judge made findings against the weight of the evidence, but that he did not make critical findings at all. Therefore, this is not a case of the category that Ms Holderness has referred me to where the appeal court is being asked to disturb findings of fact made by a judge at trial after hearing evidence.
25. Ms Holderness contends that the Judge's factual findings were sufficient to support his conclusion. In particular, she submits that the judge found as a fact:
  - 25.1. Mr Colville started having meetings with Ms Burki as early as August 2015, (approximately eight months before Ms Burki's claim was issued). Mr Colville had provided substantially more assistance to Ms Burki in relation to her claim than his and her written statements had suggested ([31]). He also found that Ms Burki had discussed matters with Mr Colville before she had commenced her claim ([57]).
  - 25.2. In particular, having heard Mr Colville give evidence, the Judge determined that Mr Colville's suggestion that he was reluctant or unwilling to be involved in Ms Burki's claim was untrue ([47]).
  - 25.3. In any event, Ms Burki's claim was initially framed as one for breach of contract, not misrepresentation. The allegations of misrepresentation were only incorporated into her claim once Mr Colville became "available", i.e. indicated his willingness to give witness evidence as to Seventy Thirty's business practices ([47]).
26. She further submits that the Judge's factual findings were made on the basis of evidence that he heard during trial, not all of which was expressly referred to in the judgment.

27. Finally, she submits that the focus of Mr Colville on the issue of whether an alleged breach of contract by him had caused Ms Burki to commence proceedings in her High Court Claim is, she says, misconceived. She argues that the claim that Ms Burki originally had intended to pursue against Seventy Thirty was a simple breach of contract claim based on a failure to deliver. Subsequently, and after she submits Mr Colville had a further meeting with Ms Burki's legal team that led, in June 2017, to Ms Burki adopting her claim for misrepresentation relying on Mr Colville's evidence. It was this evidence, she submits, that enabled – and therefore caused – the misrepresentation claim to be adopted. As she put it in her skeleton,

“Mr Colville knew that his breach of confidence would embolden Ms Burki in pursuing a claim against Seventy Thirty.”

The Judge's findings about Mr Colville's conduct, applying a common-sense approach, supported his conclusion that his breach of confidence was more than an incidental or ineffective part of *“the history of Ms Burki's claim against Seventy Thirty.”*

28. In my judgment, the Judge's factual findings were insufficient to support his conclusion on causation. I reject Ms Holderness's submission that there is room for “inferred conclusions”. In order to make a decision on causation, the Judge needed to make clear findings about what was disclosed by Mr Colville, when, and whether that was a breach of his contractual obligations. Without those findings, the decision on causation cannot be supported on the facts.

29. The Judge did not make findings as to what Mr Colville had told Ms Burki and, more critically, when. For its pleaded claim to succeed, Seventy Thirty had to demonstrate (a) that Mr Colville had disclosed confidential information in breach of contract to Ms Burki; and (b) that this disclosure was an effective cause of her bringing the High Court claim. It was impossible, without finding clear facts as to what Mr Colville had told Ms Burki, to embark on the assessment of whether that caused her to bring the claim. As I identified earlier, Mr Colville could have cajoled, encouraged, persuaded, even pressurised Ms Burki to bring her claim against Seventy Thirty, but if he had not disclosed any confidential information to her, that was not a breach of contract. Equally, no amount of malice or disgruntled bad faith by Mr Colville could prove a breach of contract. This shows how important the factual findings are.

30. The chronology is also important. It is clear that Ms Burki had instructed her solicitors to send the letter of claim to Seventy Thirty on 9 February 2016. Both counsel have made submissions as to its contents. I note particularly the following:

30.1. the letter threatened a claim against Seventy Thirty; the heading of which was “Breach of Contract”; however

30.2. it made repeated references to Ms Burki having been told herself repeatedly that Seventy Thirty held a large database of eligible men; and

30.3. at this stage, Ms Burki could advance her claim only on the basis that she had been provided with only a limited number of “matches” and that she “has seen no evidence to suggest that such a database exists.”

What also appears from this letter is that Ms Burki had entertained doubts, as early as 2015, as to whether there was such a large number of eligible men available on the database.



31. Ms Burki's claim was issued in April 2016. I am told that she issued the claim acting in person and she drafted the Particulars of Claim herself. Given the importance it was subsequently to be given, it is surprising that the actual Particulars of Claim issued by Ms Burki was not before the court below. It is submitted that the pleaded case at that stage was limited to a breach of contract claim, based on the basis of Seventy Thirty's alleged failure to perform its side of the bargain in producing sufficient potential "matches" for her, and not cast as a misrepresentation claim. Because the Particulars of Claim are not available, it is impossible to assess this submission. Certainly, on the basis of the letter of 9 February 2016, the claim advanced there was for a breach of contract based on an alleged failure to deliver "the quality of service she is reasonably entitled to expect from a 'world-class' matchmaking service". But the letter of claim certainly also included complaints as to alleged misrepresentations made to Ms Burki.
32. Seventy Thirty's action against Mr Colville was not commenced until 6 December 2016. Particulars of Claim served with it were dated 28 November 2016. The breach of contract alleged against Mr Colville was that "as a consequence of the breaches [of contract], Ms Burki has commenced legal proceedings against [Seventy Thirty]" which was a reference to her High Court claim against Seventy Thirty. For good measure, the claim was reiterated in the Reply served on 27 February 2017,
- "It is averred that Ms Burki only commenced her claim ... against [Seventy Thirty] due to the advice and encouragement provided by [Mr Colville], which advice and encouragement were only possible by the defendant contacting Ms Burki through the use of confidential business information (as defined) in violation of his [obligations of confidence]."
33. The chronology is therefore very important. On the pleaded case, to be causative of the pleaded basis of loss, the breach of contract had to happen *prior* to the commencement of the claim. But the only finding of the Judge as to an occasion on which Mr Colville had disclosed confidential information to Ms Burki was at the meeting with Ms Burki and her lawyers in May 2016 ([31], [34] and [47]) and (if it was a different occasion) the further meeting at which Ms Burki and Mr Colville had discussed Seventy Thirty's "*business*" and how it "*dealt with things*" in May 2016.
34. The Judge correctly noted that "the minute [Mr Colville] shared that information [the confidential information that he had taken with him on leaving Seventy Thirty's employment] with Ms Burki, he definitely was in breach of [contract]" ([46]). But that post-dated the commencement of Ms Burki's claim. She was already set on the course of suing Seventy Thirty by the time of this alleged breach of confidentiality by Mr Colville. The Judge's findings that Mr Colville's actions prior to the commencement of the High Court Claim were limited to those in [31]:
- 34.1. the fact that Mr Colville had begun meeting Ms Burki as early as August 2015, and that they had had at least three meetings;
- 34.2. when Mr Colville provided telephone numbers of other Seventy Thirty clients to Ms Burki, that was at a meeting in a coffee shop "a year afterwards or more"; and
- 34.3. Mr Colville had described Seventy Thirty as the most corrupt moral matchmaking outfit, or words to that effect.
35. In my judgment, those findings are insufficient to support the judge's conclusion on causation. The first finding does not include any finding about what, if any, information was disclosed by Mr Colville to Ms Burki in breach of contract. The second finding does not make a finding as to

the date of the meeting, but the chronology and Mr Colville's admissions relied upon by Seventy Thirty suggested that this meeting post-dated the commencement of the claim. In any event – and this shows the importance of clear factual findings, the provision of contact numbers of other clients of Seventy Thirty, although no doubt confidential information, arguably did not cause Ms Burki to launch her claim. Nor did it enable her to adopt the misrepresentation claim at some later point. Evidence to support the misrepresentation claim (to prove that the representations were false) came, on Seventy Thirty's case, from Mr Colville alone. It could not come from other clients of Seventy Thirty.

36. The third finding, although plainly something the Judge was entitled to rely upon to conclude that Mr Colville's assistance to Ms Burki was driven by his having fallen out with Seventy Thirty and that he was a malicious, disgruntled former employee ([57]), is not relevant to the issue of what information he had in fact disclosed and when.
37. Thus far, I have (perhaps unsurprisingly) approached this on the basis of the pleaded case. However, Ms Holderness has submitted that at trial Seventy Thirty's case was that Mr Colville's breach of contract consisted of him giving information to Ms Burki after she had issued her claim, which enabled her to adopt her misrepresentation claim which first appeared expressly in the Re-Amended Particulars of Claim on 14 June 2017. This is troubling for two main reasons.
  - 37.1. First, this was a significant departure from the pleaded case. It is clear from Ms Clarke's written opening submissions for trial that she had come expecting to deal with the pleaded case.
  - 37.2. Second, the striking feature was this new case had emerged **after** the original claim against Mr Colville had been issued. The focus of Ms Holderness' submissions was on the assistance that Mr Colville was alleged to have given to Ms Burki's solicitors (in breach of contract) prior to the service of the Re-Amended Particulars of Claim in the period from May to June 2017.
38. Ms Holderness has shown me enquiries that were made by Seventy Thirty's solicitors after the Re-Amended Particulars of Claim were served in Ms Burki's claim probing the evidential basis for the express allegation that the representations about the size of Seventy Thirty's database were false. In a letter, dated 24 November 2017 and which post-dated Ms Burki's statement in her Directions Questionnaire that she intended to rely upon the evidence of Mr Colville, Ms Burki's solicitors stated:

“In response to your concern that parts of our client's case appear to be based on supposition only, you are aware from the Directions Questionnaire that our client intends to rely upon the witness evidence of Emmet Colville regarding ‘truth or falsity of statements about Seventy Thirty's services’. The Court has given directions concerning evidence of fact and we do not consider that our client is or should be required at an earlier stage to set out any further factual basis- that is the evidence on - which she will rely ...”
39. Ms Burki's solicitors were clearly treading carefully. None of the documents filed or any statement made by the solicitors indicated expressly that Mr Colville had breached the terms of his confidentiality agreement. Ultimately – although not relevant for this appeal – he was made the subject of a witness summons to give evidence for Ms Burki at the trial of the High Court claim. The importance of that was that Mr Colville could not be sued for breach of contract if he was required to disclose confidential information by a Court.

40. There was, perhaps, an inferential case to be made that Mr Colville **must** have disclosed information in breach of contract about the falsity of the claimed numbers of the Seventy Thirty database, but that does not appear to be the case that was advanced by Seventy Thirty or the basis on which the Judge decided the matter.
41. Ms Holderness attempted to support the Judge's conclusion on causation by arguing that Mr Colville's disclosures before the filing of Ms Burki's Re-Amended Particulars of Claim were in breach of contract, as the Judge found, and that that was causative of Ms Burki adopting a misrepresentation claim in her High Court action. She relies on the Judge's findings in this respect in [47] and [57] to support that argument. In particular, Ms Holderness relies upon the following passage in [57]:
- “[Mr Colville] has, at the very least, encouraged her in that activity [i.e. pursuing her claim against Seventy Thirty] and, as the claim is currently pleaded, any losses that the claimant stands to accrue flow from his breach. That is the causal relationship.”
42. Leaving to one side for the moment that this was not Seventy Thirty's pleaded case, the only factual finding capable of supporting the case that Mr Colville's breach of contract caused Ms Burki to adopt a misrepresentation claim was the finding that, at the meeting in May 2016, Ms Burki and Mr Colville had discussed Seventy Thirty's “*business*” and how it “*dealt with things*” in May 2016. But that finding lacks the detail that would be required to demonstrate any causation. Whilst it is legitimate for a judge to reach factual findings by the drawing of inferences, for example, as I have said, that Mr Colville must have told Ms Burki and/or her lawyers this information at some point, this is no answer on this appeal. First, the Judge did not make these findings (even on an inferential basis). Second, to be causative of the claimed losses, Seventy Thirty had to show that this disclosure by Mr Colville had been made prior to the adopting by her of the misrepresentation claim.
43. I return to [57] which, in my judgment, contains two very important findings by the Judge, specifically dealing with the issue of causation that had been raised on the pleadings.
- 43.1. First, the Judge found that it was not clear to him whether Ms Burki would have actually commenced the High Court proceedings without the information from Mr Colville.
- 43.2. Second, the Judge referred only to Mr Colville and Ms Burki having “*discussed matters*” before she actually commenced the proceedings. But the balance of the paragraph strongly suggests that the judge considered that the confidential information (i.e. the phone numbers and information on Seventy Thirty's business practices) was provided *after* the commencement of the claim.
44. Put shortly, to find for Seventy Thirty on the basis of its pleaded case, the Judge did have to be satisfied that an effective cause of Ms Burki commencing the High Court proceedings **was** the provision of confidential information by Mr Colville. Even on the revised un-pleaded case that, I am told, Seventy Thirty ran at trial - that Mr Colville's breach of contract was an effective cause of Ms Burki adopting and continuing her misrepresentation claim - that still required supporting findings of fact to be made.
45. Ms Holderness has taken me to parts of the transcript of the cross-examination of Mr Colville in support of her submission that Mr Colville admitted that he had provided the information about the falsity of the information on the database prior to June 2017. I expressed at the hearing that it was not really the job of an appeal court to have to descend into an analysis of the evidence given

at the trial in a search for evidence upon which a judge could have relied. But, on analysis, Mr Colville's evidence was that he had agreed to be a witness at Ms Burki's trial and then Ms Holderness, unfortunately due to an interruption, did not get a clear answer to the question whether he had *already* provided the information to Ms Burki's solicitors.

46. This case perhaps serves as a valuable example of what can happen if the issues at the trial are allowed to range outside (and here, well outside) the originally pleaded case. Ms Holderness submits that there was no complaint by Ms Clarke at the trial. That may be so, but I think it is fair to say that the full extent to which this new case was being advanced really only presented itself during the trial, and possibly only in closing submissions. It is a matter now of speculation as to whether Seventy Thirty would have been permitted to amend its statement of case on the first day of trial to set out this new case. There are substantial grounds for believing that it would not. The shift of causation away from Ms Burki's commencement of the proceedings to their continuation or amendment seem to me to raise very tricky issues of causation themselves. The claim was already, by that stage, on foot and legal costs had been incurred before the alleged breach.
47. In the event, it is not necessary for me to resolve those points. For the reasons I have given, I am satisfied that the Judge failed to make sufficient findings of fact to support his decision on causation. The appeal will be allowed and the order of DJ Hugman of 22 January 2018 will be set aside. Grounds 1 to 4 seem to me to have been embraced in the decision I have made. I have not dealt with a separate Ground 5 as I do not need to determine that in light of my decision.
48. As the basis of my decision is the insufficiency of factual findings and, as an appeal court, I am not in a position to make findings of fact myself, my provisional view is that I should remit the claim to be retried but I will hear submissions on the order I should make consequent upon allowing the appeal.

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**CERTIFICATE**

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