COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law Side
2021/CLE/gen/00181

BETWEEN:

ALANA MAJOR

Plaintiff

AND

FAMILY GUARDIAN INSURANCE COMPANY LTD.

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Sharon Wilson, QC for the Plaintiff Roberts Adams, QC, Samuel Brown, for the Defendant
Hearing Dates:	Heard on written submissions (lodged 1st April 2022; authorities 8 April 2022)

RULING

KLEIN, J.

Evidence—Evidence unlawfully or irregularly obtained—Listening device used to secretly record meeting between company executive and President—Whether recording and/or transcript of recording admissible in action against Company—Interception of Communications Act 2018—Meaning of "reasonably necessary to protect the lawful interests of a person" in s. 28 of Act—Meaning of evidence that has "come to the knowledge of a person"—Discretion to exclude evidence on grounds of prejudice and unfairness—Civil proceedings

INTRODUCTION AND BACKGROUND

Introduction

1. The sole issue with which this Ruling is concerned is whether a clandestine recording by the plaintiff of a meeting between herself and the President of the defendant company and the transcription of that recording are admissible and should be received in evidence in the plaintiff's claim against the company for negligence and breach of statutory duty.

2. It emerged during a pre-trial review that, notwithstanding that the defendant had objected to the admissibility of the recording during the discovery phase, the plaintiff had tendered the audio recording and a transcript which was later made as evidence in the bundle of documents for trial. Not surprisingly, the defendant formally objected to the admissibility of the items. No summons or other formal process was filed for this purpose, but the power to decide issues of admissibility, whether before or at trial, is part of the inherent powers of the court. It is also sanctioned by the case management powers given to the court under Ord. 31A, r. 18 (s) to "*take*

any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."

3. I therefore invited the parties to submit brief arguments and authorities on the point with a view to providing a Ruling in advance of the trial date. The trial date was originally set for 8 April 2022, but as matters developed, that date has now been adjourned to 29 April 2022. This was to accommodate an application (which I granted) by the defendant for leave to adduce expert evidence to respond to the expert evidence proposed to be given by the plaintiff, and for discovery of additional documents connected thereto.

4. The litigation context is a claim by an insurance executive against the defendant company which employed her, in which she alleges negligence and breach of statutory duty in the way in which the company responded to her request to work from home during a difficult pregnancy in early 2019. She claims the actions of the defendant contributed to the intrauterine death of the child. The meeting which is the subject of the audio recording in question was one of several meetings and other engagements with senior management to discuss options for accommodating the plaintiff's request to work from home. This was based on medical advice which the plaintiff received from her primary obstetrician after experiencing complications during the pregnancy. The meeting took place on the 31 July 2019. As events turned out, the plaintiff tragically experienced the death of the child later that same evening.

5. Afterwards, there followed a long period of absence from the company, during which various correspondence passed between the plaintiff and the company as to her employment status, and it appears that the plaintiff never actively returned to work. But her employment status is not relevant for present purposes, although it will likely be an issue for trial. On 23 February 2021, the plaintiff filed a specially indorsed writ of summons in which she claimed against the defendant for (i) negligence; (ii) breach of statutory duty; and (iii) constructive and unfair dismissal. The latter claim was subsequently withdrawn, by Notice filed 1 April 2022.

6. According to the evidence, the plaintiff was advised by her husband, Terrell Karson Major, to record the meeting. She contends further, through counsel Mrs. Wilson QC in written submissions, that she recorded the meeting for her personal use because she feared that her state of mind might not have recalled the contents of the meeting, which she thought was "*crucially important to her and her family*". She says that the recording is relevant and has probative value for her claims, in that it demonstrates that at the meeting the defendant demonstrated little or no regard for her health and welfare. The plaintiff had the recording transcribed by a professional court stenographer on 31 March 2021.

Interception of Communications Act 2018 ("ICA")

7. It is useful to make some brief observations about the *Interception of Communications Act 2018* ("the ICA"), which governs the interception of communications and the use of listening devices, and to set out the relevant provisions of the Act on which the parties' arguments have centered.

8. The long title of the Act is an "*Act to provide for the interception of Communications and the Provision of Information for Interception in the Bahamas and for Related Matters*". It was enacted to repeal and replace the *Listening Devices Act 1972* ("LDA") following the observations of the Privy Council in *Newbold v. COP et. al.* [2014] UKPC 12. Although stopping short of finding the LDA unconstitutional, their Lordships highlighted the need for reform and modernization of the 1972 Act, to ensure that its provisions were consistent with constitutional guarantees relating to privacy and freedom from interference with communications.

9. The bulk of the ICA contains provisions authorizing the interception of communication for various public purposes, including national security and the investigation of criminal offences, and sets out the procedure for how such authorizations are to be obtained and carried out. This case does not raise any issues relating to orders or warrants issued to state officials to intercept communications for any of those purposes. "Part V" of the Act (ss. 26-34), however, regulates the use of "Listening Devices" generally, and these are the provisions that are relevant to the current application.

10. Section 27 of the Act provides that "*any person who uses a listening device to hear, listen to or record a private conversation to which he is not a party commits an offence against this Act*". This is subject to limited exceptions, such as where the recording is in accordance with an authorization given under s. 29 (i.e., by a court order) or where it involves an unintentional hearing of a private telephone conversation. A private conversation is defined to mean:

> "…any words spoken by one person to another in circumstances indicating that those persons or either of them desire the words to be heard or listened to only by themselves or by themselves and some other person but does not include a conversation made in circumstances under which the parties to the conversation ought reasonably to expect the conversation to be overheard."

11. Sections 27, 28 and 34 are worth setting out in full, as these are the provisions which fall to be construed.

> "S. 27: **Prohibition of the use of listening devices**
>
> (1) Subject to the provisions of subsection (2) of this section, any person who uses a listening device to hear, listen to or record a private conversation, to which he is not a party commits an offence against this Act.
> (2) Subsection (1) of this section shall not apply—
> (a) where the person using the listening device does so in accordance with an authorization given to him under section 29 of this Act; or
> (b) to the unintentional hearing of a private conversation over a telephone.
> (3) The court by which a person is convicted of an offence under this section may order that any listening device used in the commission of an offence shall be forfeited and disposed of as the court may think fit."
>
> "S. 28: **Prohibition of communications of private conversations recorded by listening devices**.

(1) Subject to the provisions of subsection (3) of this section, any person who communicates or publishes to any other person a private conversation or report of or the substance, meaning or purport of a private conversation that has come to his knowledge as a result of the use of listening device used in contravention of section 27 of this Act commits an offence against this Act.

(2) Subject to the provisions of subsection (3) of this section, any person who, having been a party to a private conversation and having used a listening device to hear, listen to or record that conversation, subsequently communicates or publishes to any other person any record of the conversation made directly or indirectly by the use of a listening device commits an offence against this Act.

(3) Subsection (1) or (2) of this section shall not apply where the communication or publication—

(a) is made to a party to the private conversation or with the consent, express or implied, of such a party; or

(b) is not more than is reasonably necessary—

(i) in the public interest;

(ii) in the performance of a duty of the person making the communication or publication; or

(iii) for the protection of the lawful interests of that person; or

(c) is made to a person who has, or is believed on reasonable grounds by the person making the communication or publication to have, such an interest in the private conversation as to justify the making of the communication or publication under the circumstances under which it is made; or

(d) is made in accordance with an authorization referred to in paragraph (a) of subsection (2) of section 3 of this Act by a person who used the listening device to hear, listen to or record the private conversation pursuant to the authorisation."

"s.34 **Evidence of private conversations unlawfully obtained inadmissible**

(1) Where a private conversation has come to the knowledge of [a] person as a result, direct or indirect, of the use of a listening device used in contravention of section 27 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings.

(2) Subsection (1) of this section shall not render inadmissible the evidence of a private conversation—

(a) that has come to the knowledge of the person giving evidence if a party to the conversation consents to that evidence being given; or

(b) in any prosecution for an offence against this Act."

DISCUSSION AND ANALYSIS

12. Before analyzing the arguments, it is important to set out a few basic propositions. Firstly, there is no dispute between the parties that the meeting was recorded without the knowledge of the President of the defendant company, and therefore without his consent. It was not disclosed to the court what device was used to make the recording. But it may be assumed that a digital recording device such as a mobile phone, laptop, or mini tape recorder was used. Any of these would come within the definition of a "listening device" under s. 26(1) of the ICA. The ICA defines a listening device as "*any instrument, apparatus, equipment or device capable*

of being used to hear, listen to or record a private conversation which is taking place". There also does not seem to be any dispute that the conversation was intended to be a private conversation within the meaning of the ICA.

The parties' arguments

Plaintiff

[13] The plaintiff relies on several provisions of the ICA which it is argued creates exceptions to the general prohibition against disclosure and non-admissibility of a covert recording made without authorization. Mrs. Wilson QC's submissions are premised on the proposition that s. 27 does not forbid the recording of a private conversation by a party thereto.

[14] There are two main strands to the plaintiff's argument. Firstly, it is submitted that communication of the recording to another person is not in breach of the ICA, as it could conceivably come within the exceptions stated at section 28(3)(a) [communication with the *consent* of a party to the conversation] and 28(3)(c) [communication to a person with an *interest* in the conversation]. Secondly, the plaintiff contends that the plain and ordinary meaning of s. 34(2)(a) is to render admissible evidence of a private conversation "*that has come to the knowledge of the person giving evidence if a party to the conversation consents to that evidence being given*". Therefore, it is argued that a mental health psychologist whom the plaintiff attended in the aftermath of the incident and to whom she disclosed either the recording or the substance of the conversation should be able to give evidence of it.

[15] Apparently in support of the general contention that the recording should be admitted, she commended the approach of the English Court of Appeal in the case of *Jones v. University of Warwick* [2003] EWCA Civ. 151. I say in support of the general contention because the discussion in *Jones* revolves around the discretion of a judge to admit evidence irregularly obtained pursuant to 32.1 of the UK Civil Procedure Rules ("CPR") and at common law. It does not assist with any of the issues arising under the ICA.

[16] In *Jones*, the defendant's agent had gained entrance to the plaintiff's home by deception and covertly videotaped the plaintiff, who had made a claim for substantial damages against her employer for an accident that occurred at work which injured her hand. The employer admitted liability but rejected the claim for continuing disability as it was suspected the plaintiff was exaggerating the injury and had regained full use of her hand, which the videotape revealed. On an application for directions as to the admissibility of the videotapes, the District Judge ruled that the evidence was admissible, which was later upheld by the Court of Appeal. Essentially, the district judge concluded, after weighing all the competing interests, that the public interest favoured admissibility, as explained in the following excerpt from his ruling [15]:

> "In these circumstances, I do not believe that the courts should be too astute to prevent effective investigation by the defendants of the claimant's case against them. Clearly, there is a public interest that unfair, tortious and illegal methods should not be used in general and where they are

> unnecessary, but the conflicting considerations are on the one side to the claimant's privacy and on the other the legitimate need and the public interest that defendants or their insurers should be able to prevent and uncover unjustified, dishonest and fraudulent claims. In the instant case, I have no doubt that the latter considerations do and should outweigh the former."

[17] Even though upholding the ruling, the court of appeal indicated its disapproval of the methods used to obtain the evidence by awarding costs of the admissibility proceedings against the defendants to "*deter the improper conduct of a party while conducting litigation*."

[18] In support of the admissibility argument under s. 34(2), Mrs. Wilson QC referred the court to *Regina v Pleasant Bridgewater & Tarino Lightbourne* [2009] 2 BHS J. No. 5, which interpreted what was s. 10 of the LDA. That section is indistinguishable from s. 34(2) of ICA. Reliance was also placed on the more recent decision of Hanna-Adderley J. in *Marvin Dames et. al. v. First Caribbean International Bank (Bahamas) Ltd. and Insurance Management (Bahamas) Ltd.* (2019/CLE/gen/FP/000244 (unrept'd.).

[19] The *Bridgewater* case concerned the admissibility of conversations recorded by the police with the consent of a party to the conversation, in the investigation of a case involving fraud. Allen Snr. J held that s. 10 did not prevent the admissibility of the recordings in the defendant's criminal trial. The essence of the learned Judge's conclusion is set out at paragraphs 9 and 10, in which she stated:

> "9. Having considered the provisions of the Listening Devices Act and given the evidence proposed to be led that Allyson Gibson and Michael McDermott gave consent to the police to hear, listen to and record the conversation between them and the Accused, the police, in my view became a party to those private conversations and are not in breach of the provisions of section 3 (above). Further, no authorization as required by section 5 is necessary.
> 10. It follows that the evidence of the private conversation to which objection is made, were not unlawfully obtained in breach of section 3 as contended and are not therefore inadmissible in these proceedings by virtue of the provisions of section 10."

[20] In *Dames v First Caribbean*, there was an application to strike out affidavit evidence derived from transcripts of a recording of a conversation made by one of the plaintiffs with an officer of the defendant bank. The affidavit was submitted in the plaintiffs' claim for negligence and breach of contract relating to the insurance on a residential properly which had been damaged in Hurricane Dorian in September of 2019, and in which it was alleged the first defendant was negligent in paying the premiums, causing the insurance to lapse. The defendants argued that the recordings (and the resultant transcript) were made in breach of s. 10 of the LDA, and inadmissible as having been obtained in contravention of s. 4 of the LDA. Hanna-Adderley J. refused the application to strike-out, reasoning as follows:

> "56. According to section 10 of the Listening Devices Act, for the private conversation to be deemed inadmissible in civil and criminal proceedings, the recording of such by way of a listening device must be in contravention of s. 3 of the said Act. Section 3 of the said Act makes it an offense to use a listening device to hear or record a private conversation to which a person is not a party. In the instant case, one of the Plaintiffs was a party to both private conversations and as such I do not find that the Plaintiffs are in contravention of Section 3 of the Act.

> 57. As it relates to the transcripts of the recordings I am persuaded by Mr. Duncanson that the inclusion of the transcripts in an Affidavit used in court proceedings does not amount to communicating or publishing the same to another person as required by section 4 of the Act, but in any event a contravention of Section 4 of the Act does not result in the material being inadmissible."

The defendant's contention

[21] As mentioned, strong objection has been taken to the admissibility and the reception into evidence of the recording and transcript. The defendant contends, through counsel Mr. Adams QC, that the only possible relevant exception for communicating the recording to the court and any other third party is that contained at (s. 28 (3)(b)(iii))—whether or not the recording was reasonably necessary for "*the protection of the lawful interest of the plaintiff*". Mr. Adams QC roundly rejects the suggestion that the plaintiff can come within this exception and invites me to exclude the evidence based on the ICA and general principles of evidence law.

[22] I should say at the outset that I doubt very much that the expression communicates or publishes *"to any other person*" in s. 28, which prohibits publication of a private conversation except in limited circumstances, refers to publication to the court (see *Miller v Miller* (1978) 141 CLR 269 (per Barwick, CJ), *Canadian Pacific Tobacco Co. Ltd. v Stapleton* (1952) 86 CLR 1 (at p.6) and *Dames*, *supra*, para. 57). Indeed, in many instances the court may have to review material said to be confidential or evidence whose admissibility is disputed to determine its confidentiality or admissibility. But in any event, there is no dispute that the conversation was published to third parties, including the plaintiff's doctor and the stenographer, prior to submission to the court.

[23] Mr. Adams QC referred the court to several Australian decisions which considered the question of what amounts to lawful interests in the context of admissibility of covert recordings, the most important being the decision of the Supreme Court of South Australia in *Thomas & Another v Nash* [2010] SASC 153. There, Doyle, CJ had to consider whether private recordings made by a son of conversations with his mother were admissible in proceedings contesting the validity of her will. Section 7(3) of the relevant Australian legislation (*Listening and Surveillance Devices Act, 1972* (SA)) contains a similar exception to the creation of an offence in respect of communication or publication where the communication is "*reasonably required for the protection of a person's lawful interests*". In rejecting the contention that the recordings were necessary for protecting the plaintiff's lawful interest, Doyle CJ said as follows:

> "45. Mr. Nash made the recordings in case it might later turn out that in some way he could use them to his advantage. There was no litigation in contemplation at the time. Even if there was, my conclusion would be the same. I do not consider that a person makes a recording to protect his lawful interests simply because he has a hope that in contemplated litigation the recording might be used to his advantage. This is not a case in which the recording was made to uncover a crime, or to resist an allegation of crime.

[24] Then, continuing at para. 47 and 48 after reviewing a number of Australian authorities dealing with the relevant provisions of the Act, he added:

> "47. In none of those decisions is there an attempt to define "lawful interests". That is not surprising. It is an expression which is best left to be applied case by case, subject to some general guidelines. 48. Each decision is an application of the expression to its particular facts. In most of those reported decisions it was accepted that a mere desire to have a reliable record of a conversation is not enough. I agree. Most of the decisions proceed on the basis that a desire to gain an advantage in civil proceedings would not ordinarily amount to a relevant interest, although of course each case has to be considered on its facts. Several of the cases proceed on the basis that where the conversation relates to a serious crime, or an allegation of a serious crime, or to resisting such an allegation, a court is more likely to find that the recording of a conversation relating to the crime can be made in the protection of the person's "lawful interest".

[25] The defendant's position on the s. 34 argument is that this provision is only concerned with the admissibility of a private conversation that has been recorded with the use of a listening device by a person who is *not* a party to the conversation, i.e., an interloper. As put in supplemental written submissions:

> "The provisions of section 10(2)(a) of the Listening Devices Act (LDA) are identical to section 34(a) of the Interception of Communications Act (ICA). These sub-sections, however, cannot be properly construed in a vacuum. These sub-sections find their roots in sections of the applicable statutes that govern the admissibility of recordings of private conversations made by an interloper using a listening device. Neither subsections 10(2)(a) of the LDA nor subsections 34(2)(a) of the ICA relate to circumstances where a private conversation has been recorded by a person who was a party to such conversation. Hence, they do not apply to circumstances where, such as in this case, the Plaintiff has covertly recorded the private conversation with her former employer. The Plaintiff was not an interloper. Section 34(2)(a) is of no assistance to the Plaintiff on the question of the admissibility of the covert recording."

[26] Further, it is submitted that to construe s. 34 (2)(a) in the manner contended for by the plaintiff would render s. 28 meaningless. The defendant also distinguishes the *Bridgewater* case on the grounds that two of the parties to the conversation had given consent to the police to listen to and record the private conversations. Therefore, the police had become a party thereto with the result that the conversations were not unlawfully obtained.

Court's analysis

[27] I start with the observation that Mrs. Wilson QC is right to point out that s. 27 does not prohibit the mere recording of a private conversation by a party. The justification for this may partly lie in the inter-relationship of ss. 27 and 28. Section 27 simply prohibits the recording of a private conversation, subject to very narrow exceptions. Section 28, on the other hand, prohibits the *communication* or *publicizing* of a private conversation by any person to whose knowledge it might come, or even by a party to the conversation, unless it can be brought within one or more of the exceptions at s. 28(3). In other words, the expectation of privacy is not necessarily breached by a party recording a private conversation which is not disclosed, or only disclosed to another party; it is only breached when the recording is made by an unauthorized third party or communicated to any other person in circumstances which do not fall into any of the exceptions.

[28] The other point to note is that neither s. 27 nor s. 28 deals with admissibility. They make certain conduct under the ICA unlawful and subject to significant fines and penalties. Admissibility of evidence obtained by a listening device is dealt with under s. 34.

[29] These provisions must also be construed having regard to the principle in many common law jurisdictions that the fact that evidence may have been irregularly or unlawfully obtained does not render otherwise relevant and probative evidence inadmissible: see *Reg. v. Sang* [1980] A.C. 402, *Reg. v Khan (Sultan)* [1996] 3 W.L.R. 162, *Regina v Pleasant Bridgewater & Tarino Lightbourne* [2009] 2 BHS J. No. 5; and for an operation of the principle in the civil context, *Jones v. University of Warwick* [2003] EWCA Civ. 151; *Mustard v Flowers* [2019] EWHC 2623 (QB).

[30] For relevant and material evidence to be rendered inadmissible requires a clear statutory statement to that effect. In the UK Court of Appeal case of *Reg. v Effick* (1992) 95 Cr. App. R. 427, Steyn LJ, giving the judgment of the court said [pp. 431]:

> "The starting point is the principle that all logically probative evidence is admissible. Any legislative inroad on this principle requires clear expression. Language to the effect that any evidence obtained as a result of an interception will be inadmissible could achieve such a purpose."

[31] Of course this is subject to the rule of evidence, codified at s. 178 of the *Evidence Act* in respect of criminal proceedings, that the court has a discretion to exclude even admissible evidence if it considers that the prejudicial effect of the evidence may outweigh its probative value. This rule equally applies to civil proceedings, although a less formalistic approach and one embracing wider public policy and justice considerations might be in play (see *Jones*, *Mustard supra*). However, the fact that evidence has been obtained in contravention of the ICA is a significant factor in it being declared statutorily inadmissible (see s. 34(1)), and would also loom large in the exercise of the court's discretion in deciding whether to exclude such evidence.

[32] Mr. Adams QC in his arguments did not seek to deal with all of the exceptions contained at 28(3)(a)-(d), obviously because the defendant takes the view that they are not engaged. In fact, as mentioned, the plaintiff only sought to rely specifically on sub-paragraphs (a) and (c). I will, however, treat briefly with each of them for completeness.

[33] Sub-section 3(a) creates an exception against disclosure of a conversation where it is made to a party to the conversation or with the consent "*express or implied*" of such a party. The first limb of this subsection (disclosure to a party) is obviously not engaged by the facts of this case. In my view the second limb of 3(a), the exception based on consent, can only have been intended to apply to disclosure by a *third party* who has obtained knowledge of a private conversation by the use of a listening device in contravention of s. 27. It cannot apply where the disclosure is by a party to the conversation. It would be illogical and tautologous for the draftsman to have prescribed that the communication or publication should be with the consent, "*express or implied*", of a party to the conversation if it were intended to apply to a situation

where the party, himself or herself, knowingly and intentionally discloses the conversation or its substance to another person.

[34] I am also not of the view that the communication was reasonably necessary under (b)(i) [in the public interest], as this case involves the private rights of the plaintiff. No public interest considerations are engaged. This may be contrasted, for example, with the situation in *Jones,* where there was a public interest in preventing or uncovering a fraudulent claim being foisted on the insurance company. It also clearly does not come within (b)(ii), as being in the performance of any duty.

[35] I also accept the submissions of Mr. Adams QC that disclosure was not in furtherance of the plaintiff's lawful interests. In fact, the defendant did not have to look so far afield for judicial support of this proposition. In *Maritek Bahamas Ltd. v Peter Robert Hall* [2008] 1 BHS J. No. 5, Albury J. held that transcripts of telephone conversations made by the defendant in connection with a purported agreement for the sale of land did not fall within s. 4(3)(b)(iii) of the LDA [s. 28(3)(b)(iii) of the ICA] and were not reasonably necessary for the protection of the defendant's lawful interest. As she said [16]:

> "…I find that the recordings were not necessary for the protection of the defendant's lawful interest. Moreover, the pleadings in this matter show that the dispute between the parties has its genesis in a purported contract for the sale of land. Therefore, any claims of suspected crime or the prevention of fraud as relied on by the defendant are indisputably beyond the compass of this dispute."

[36] This was followed in *Rolle v Nassau Flight Services Ltd.* (COM/lab/47 of 2009), where Bain J. held that a recording of a meeting between the plaintiff and representatives of NSF and the Airport Airline and Allied Workers Union, which the plaintiff secretly recorded, was contrary to the LDA and not reasonably necessary to protect the plaintiff's lawful interest. It was therefore held inadmissible in a claim for wrongful dismissal and breach of statutory duty.

[37] I also reject the notion that the psychologist to whom evidence of the conversation was communicated had any interest in the private conversation to justify divulging it to him. In fact, apart from asserting this exception, the plaintiff did not advance any arguments as to why the expert witness is said to have any interest in the private conversation. In my view, an example of an interest that might justify divulging a private conversation recorded by a listening device by a party or another person would be where information is revealed that a crime might be committed (i.e., a bank might be robbed) and the person immediately notifies the police. The police would obviously have an interest in preventing crime. Interest cannot be conferred by the act of disclosing the conversation; it must reside in the person receiving the communication.

[38] Lastly, subsection (3)(d) is clearly not applicable, as this is not an intercept or warrant case.

[39] In all the circumstances, I do not find that any of the other exceptions under subsection 3 of 28 are made out. Specifically, I do not find that the plaintiff's desire to have an aide memoire of the conversation was a sufficient reason to bring it within the "*protection of the lawful interest of that person*" as defined under 28(3)(iii). But as indicated, even if the communication of the

conversation does not come within any of the exceptions, that does not *ipso facto* make the recording and transcript inadmissible. I must now consider the s. 34 argument.

The admissibility argument (s. 34)

[40] I accept the contention of Mr. Adams QC that on a wholistic construction, s. 34(2)(a) was not intended to provide for the admissibility of evidence obtained in contravention of s. 27 in circumstances where a party to the conversation is seeking to adduce evidence through a third party based on consent. I think this is the only sensible linguistic and logical interpretation that can be given to this section. As already noted with respect to the exception at 28(3)(a), the draftsman would hardly have used the third person—"*if a party to the conversation consents*"—to refer to a situation where the party himself or herself was the one disclosing it to the person giving evidence. Were it otherwise, the protections sought to be erected at ss. 27(1) and 28(1)(2) would be rendered otiose, and a party could always orchestrate the use of evidence derived from a listening device obtained or disclosed in direct contravention of the ICA by simply purporting to give consent to a third party. This would drive a horse-and-carriage through the very mischief which the ICA intends to address—the unjustified invasion of privacy that could be occasioned by the unauthorized use of surveillance and listening devices and prohibiting or restricting the use of any evidence obtained as a result of such conduct.

[41] I am also fortified in this view by the observations in several of the cases cited to the court and, in particular, the case of *Laing v Commissioner of Police* (Appeal No. 87 of 1993), which the parties did not lay over but which was referenced in the *Bridgewater* case. In that case, the appellant appealed his conviction by the magistrate for, *inter alia*, conspiracy to possess dangerous drugs with intent to supply. One of the grounds of objection was that the magistrate ought not to have allowed into evidence telephone conversations between one Wadie Crawford, who was an agent of the US Drug Enforcement Agent and also an agent of the Commissioner of Police, engaged to obtain evidence of the commission of the crime. Counsel for the plaintiff had pointed out that there had been no written authorization for the use of a listening device as then required by s. 5(2) of the LDA. After setting out the provisions of s. 10 of the LDA, which as has been explained is the *ipsissima verba* of s. 34, Sawyer J. said:

> "As noted above, the recordings in this case were made by a "party" to the call—<u>not a third person, so that section 10 would not apply to the situation which arose in this case because the person who adduced the tape recordings was a party to the conversations which were taped</u>." [Emphasis supplied.]

[42] As already explained, the reliance in *Bridgewater* does not help the plaintiff because the case was actually decided on the basis (as was *Laing*) that the person seeking to rely on the evidence was a party to the call, and therefore s. 10 was not engaged. Neither does *Dames* specifically address the position where the evidence is being sourced through a third party, as again the plaintiffs (or one of them) was a party to the conversation. In any event, the learned Judge in *Dames* actually decided the issue by exercising her discretion to admit the evidence even if it were communicated in contravention of s. 4 of the LDA [s. 28 of ICA]. As she rightly pointed

out, a violation of s. 4 does not "*result in the material being inadmissible*", as opposed, say, to a violation of s. 3 of the LDA [s. 27 of the ICA].

[43] Before leaving this point, however, I would observe that s. 34(2)(a) is not a model of clarity, and in fact there is somewhat of a textual inconsistency between sub-section (1) and (2)(a). This is because, while subsection (1) renders statutorily inadmissible in criminal or civil proceedings any private conversation which has come to the knowledge of a person as a result of a device used in violation of s. 27 (i.e., unlawfully), sub-section (2)(a) of the same section purports to make such evidence admissible by the consent of *one* party to the conversation. This anomaly, and the possible unfairness created by it, has been addressed in other jurisdictions with similar legislation. For example, the comparative provision in the New South Wales Act *Listening Devices Act 1984*, provides that the prohibition against the use of evidence of a private conversation obtained in breach of the Act is rendered admissible, *inter alia*, only:

> "(a) <u>if all of the principal parties to the private conversation concerned consent</u> to the evidence being given,
> (b) <u>if the private conversation comes to the knowledge of the person called to give evidence otherwise than in the manner referred to in that subsection</u> [otherwise than by the use of a device in contravention of the Act], notwithstanding that the person also obtained knowledge of the conversation in such a manner." [Emphasis supplied.]

[44] In this connection, it should also be noted that the 1984 NSW Act imposed strict restrictions on the ability that existed in an earlier 1976 Act for one party to a conversation to record it unbeknownst to the other person, as this was thought to allow excessive interference in private conversations. In fact, quite a few common law and other jurisdictions have gone even further and do not permit what is called "one-party consent" recordings, instead requiring "all-party consent" or at least the consent of the principal parties to be able to record a conversation. For completeness, it should be stated that the NSW 1984 Act has now been repealed and replaced by the NSW *Surveillance Devices Act 2007*, but the provisions retain the safeguards enacted in the 1984 Act.

[45] I do not find that the circumstances in which the recording and transcript have been communicated to third parties are covered by any of the exceptions at s. 28(3), and it would therefore be contrary to the ICA. As pointed out, that finding alone does not make the material inadmissible. However, in the exercise of my discretion, I would exclude the material on grounds of unfairness and the possible prejudicial effect. In this regard, a number of cases warn about the inherent danger and unfairness that can result from reliance on evidence obtained where one party is unaware that a recording is being made (see for example, *Sing v Singh* [2016] 1432 Ch; and *Maritek, supra.*) In the latter case, Albury J. made the point with admirable clarity and force [16]:

> "The decision whether the transcripts should be admitted into evidence, in my view, also turns on a consideration of their probative versus prejudicial value in these proceedings. In the instant circumstances, the covert recording by the defendant of telephone conversations to which he is a party is reprehensive, and contrary to the principles of fairness. The apparent objective in so doing was to give the defendant an unfair advantage. The defendant, being the only person aware that the conversations were being recorded could direct and orchestrate the course of the conversations. He

> was also able to self monitor his input into the discussion, while simultaneously the other, unsuspecting party, unaware that he was being recorded, would be inclined to speak with more candour. The deck would be stacked, so to speak, against that party. In such circumstances, the probative value of the recordings, or any purported admissions therein must be suspect. Of limited value, and highly prejudicial to the other party to those telephone conversations which were recorded by the defendant without his knowledge."

[46] I wish to add nothing to that analysis. Not only are undisclosed recordings susceptible to manipulation by the recording party, but the court cannot be assured that what is adduced represents accurately the full conversation, or just the portion or snippets prejudicial to the other party. In fact, I listened to the recording (which is just over 21 minutes long) and reviewed the transcript, and it is apparent that it abruptly trails off in mid-sentence. I also do not consider that there is any overriding interest of fairness or justice that would require the Court to exercise its discretion to admit the evidence. It is not material evidence on which the plaintiff's case might be said to rise or fall, or which contradicts an essential aspect of the defendant's case. The essential details of the meeting of 31 July 2019 and the outcome are spoken to in the witness statement of the plaintiff, and the witness statement of the company's President, Mr. Ritchie. The plaintiff will also have a full opportunity to cross-examine Mr. Ritchie on that meeting.

[47] I also reiterate that to permit reliance on the recording would be tantamount to the Court condoning covert recordings and the disclosure of private conversations at the manipulation of a party to the conversation, thereby giving its *imprimatur* to such conduct. Although the ICA reflects the "one-party consent" approach to recording a private conversation, it attempts to strike a balance by imposing strict controls on when such recordings may be disclosed or relied on as evidence. The misuse of these provisions can create great unfairness and prejudice to the unknowing party and may even raise constitutional issues going to possible violations of privacy. It is not a practice to which the court should grant its indulgence.

CONCLUSION AND DISPOSITION

[48] For the foregoing reasons, I rule that the audio recording of the meeting of 31 July 2019 and the transcription should not be admitted into evidence. I will hear the parties as to costs.

Postscript

[49] Having heard the parties on the issue of costs at the handing down of this Ruling, I award the costs of the proceedings to determine admissibility to the defendant, to be taxed if not agreed.

Klein J.

25 April 2022