

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** Dong v Song

**Citation:** [2018] ACTSC 82

**Hearing Date:** 7 February 2018

**Decision Date:** 8 February 2018

**Reasons Date:** 29 March 2018

**Before:** McWilliam AsJ

**Decision:** See [48]-[50]

**Catchwords:** **EVIDENCE** – admissibility of undisclosed video recording of conversation – whether recording and affidavit evidence reliant on the recording was admissible under the *Listening Devices Act 1992* (ACT) – whether the plaintiff who recorded the conversation had objectively reasonable grounds for considering the recording to be necessary for the protection of her then existing lawful interests.

**Legislation Cited:** *Evidence Act 2011* (ACT) ss 81, 138  
*Human Rights Act 2004* (ACT) s 12  
*Crimes (Surveillance Devices) Act 2010* (ACT) s 11  
*Listening Devices Act 1992* (ACT) ss 4, 5, 10, pt 3, Dictionary  
*Listening Devices Act 1984* (NSW) (repealed) ss 5, 13  
*Surveillance Devices Act 2007* (NSW) ss 7, 11

**Cases Cited:** *Chao v Chao* [2008] NSWSC 584  
*Dimech v Tasmania* [2016] TASCCA 3; 257 A Crim R 495  
*DW v R* [2014] NSWCCA 28; 239 A Crim R 192  
*Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72; 261 FLR 211  
*Levy v Bablis* [2013] NSWCA 28  
*R v Le* [2004] NSWCCA 82; 60 NSWLR 108  
*Sepulveda v R* [2006] NSWCCA 379; 167 A Crim R 108  
*Thomas v Nash* [2010] SASC 153; 107 SASR 309  
*Violi v Berrivale Orchards Ltd* [200] FCA 797; 99 FCR 580

**Texts Cited:** Explanatory Memorandum, *Listening Devices Bill 1992* (ACT)

**Parties:** Xin Dong (Plaintiff)  
Shoaqing Song (First Defendant)  
Zheng Zhou (Second Defendant)

**Representation:** **Counsel**  
Mr T Morahan (Plaintiff)  
Mr J Rose (Defendants)

**Solicitors**

Chen Shan Lawyers (Plaintiff)

KWL Lawyers (Defendants)

**File Number:** SC 100 of 2016

1. These proceedings are currently part-heard before the Court and concern a misleading and deceptive conduct claim arising out of the purchase of a restaurant business in Belconnen in the ACT. The plaintiff and the defendants jointly purchased the business through setting up a company vehicle, in which each held a portion of shares. The plaintiff alleges the defendants told her the purchase price for the business was \$550,000 and there were additional costs of \$80,000, including items such as legal fees, payment of a bond to the landlord and advance rent. The plaintiff alleges she then paid sums amounting to almost \$300,000, and further that she subsequently learned, when she obtained a copy of the contract for the sale of the business more than a year after settlement, that the actual purchase price of the business was only \$220,000. The defendants dispute what they initially told the plaintiff, the purpose of the moneys paid by her and the loss alleged to have been suffered.
2. During the hearing, I ruled on a number of objections to evidence, some of which related to a particular issue, namely the admissibility of a video recording made on 5 March 2016 by the plaintiff, through a camera hidden in a handbag. It captured a meeting between the plaintiff and the defendants (and another person whose identity is immaterial to the present issue), during which it is alleged that certain admissions were made by the first defendant. Evidence of an admission is admissible in civil proceedings under s 81 of the *Evidence Act 2011* (ACT) (**Evidence Act**).
3. However, the defendants contended the recording itself and the plaintiff's affidavit evidence setting out parts of the conversation that had been captured by the video recording were inadmissible by virtue of the operation of the *Listening Devices Act 1992* (ACT) (**Act**).
4. The issue was determined on a *voir dire*. I admitted the video recording and the evidence of the plaintiff to the extent that it was reliant upon it, and indicated at the time that I would publish written reasons for the ruling in due course. These are my written reasons.

## Legislation

5. Section 4(1) of the Act creates an offence for using a listening device. It provides:

### Use of listening devices

- (1) A person must not use a listening device with the intention of—
  - (a) listening to or recording a private conversation to which the person is not a party; or
  - (b) recording a private conversation to which the person is a party.

Maximum penalty: 50 penalty units.

6. There was no dispute that a video camera fell within the definition of a listening device in the Dictionary to the Act, and that the plaintiff intended to record her conversation with the defendants.

7. The Act then creates a number of exceptions to the offence. The one that is material to the present case is s 4(3)(b)(i) of the Act:
  - (3) Subsection (1) (b) does not apply to the use of a listening device by, or on behalf of, a party to a private conversation if—
    - (a) ...
    - (b) a principal party to the conversation consents to the listening device being so used, and—
      - (i) the recording of the conversation is considered by that principal party, on reasonable grounds, to be necessary for the protection of that principal party's lawful interests; or
8. Section 5 of the Act creates an offence for a party to a private conversation who communicates or publishes a record of a private conversation if the person knows that the record was made using a listening device, whether or not in contravention of s 4. However, one of the exceptions to the offence is where the communication/publication was made in the course of civil proceedings: s 5(2)(c) of the Act.
9. The offences, and the exceptions to them, feed into pt 3 of the Act, headed 'Evidence'. Section 10 of the Act (found in pt 3) governs the admissibility of evidence obtained using listening devices. Again, the structure of the provision makes the use of the evidence inadmissible but then creates exceptions. Section 10(1) of the Act provides (emphasis added):
  - (1) If a private conversation, or a report of a private conversation, **has come to the knowledge of a person as a result (direct or indirect) of the use of a listening device** in contravention of section 4, or as a result (direct or indirect) of the use of a listening device in circumstances referred to in section 4 (2) (b) or 4 (3)—
    - (a) evidence of the conversation; or
    - (b) evidence obtained as a direct consequence of the conversation so coming to the knowledge of that person;

may not be given by that person in any civil or criminal proceedings.
10. Section 10(2) of the Act carves out exceptions to the inadmissibility created by s 10(1). Material to the present case are the following exceptions:
  - (2) Subsection (1) does not apply—
    - ...
    - (c) if the listening device was used in the circumstances referred to in section 4 (3) (b) (i)—so as to render any evidence inadmissible for the purpose of protecting the lawful interests of the principal party to the conversation who consented to the use of the device; or
    - ...
    - (e) if the person referred to in subsection (1) also obtains knowledge of the conversation or report in circumstances other than those referred to in that section.
11. The reference in s 10(2)(e) of the Act to obtaining knowledge otherwise than as set out in sub-s (1) is a reference to the words emphasised above, namely evidence coming to the knowledge of a person as a result of the use of a listening device. Where the person has knowledge of the conversation because he or she was actually a party to it, and not because of the use of the listening device, then the section excluding

admissibility of that evidence does not apply. That is consistent with decisions based on similar wording in s 13(2)(b) of the now repealed *Listening Devices Act 1984* (NSW) (**NSW Act**): see *Chao v Chao* [2008] NSWSC 584 (**Chao**) at [7] per Brereton J; *Violi v Berrivale Orchards Ltd* [200] FCA 797; 99 FCR 580 (**Violi**) per Branson J at [35]; *Sepulveda v R* [2006] NSWCCA 379; 167 A Crim R 108 (**Sepulveda**) at [146]-[147].

12. Of significance for the discussion of the authorities below, s 5(3)(b)(i) of the NSW Act was the statutory equivalent of s 4(3)(b)(i) of the Act, and ss 13(1) and 13(2) of the NSW Act were in similar terms (but not identical) to those in ss 10(1) and 10(2) of the Act respectively. The NSW Act has been replaced by the *Surveillance Devices Act 2007* (NSW), although the exceptions discussed above have been preserved through ss 7(3)(b) and 11(3) of that statute, the terms of which it is unnecessary to consider further here.

#### *Legislative intent of the Act*

13. Due to the nature of the submissions made by the defendants below, consideration has been given to the purpose of these provisions.
14. The general legislative intent of the Act is the protection of unjustified interference with a person's privacy. That is consistent with judicial statements where the NSW Act was under consideration: see *R v Le* [2004] NSWCCA 82; 60 NSWLR 108 (**R v Le**) per Giles JA at [20], in dissent but not in relation to purpose of the NSW Act. Perhaps more generally in *Violi* at [21], Branson J referred first to the mischief which was intended to be addressed by the NSW Act as being the protection of privacy. However, her Honour later specifically addressed the intent lying behind the admissibility provisions in s 13 of the NSW Act at [36]:

...The intent of the legislature would appear to be that where a person would ordinarily be able to give evidence of a conversation otherwise than because of the use of a listening device (for example, from his or her recollection as a party to the conversation) the fact that he or she has obtained knowledge of the conversation as a result of the use of a listening device should not render his or her evidence inadmissible. Moreover, it would appear from the opening words of s 13(2) to be the intent of the legislature that in such a circumstance the best evidence of the conversation, and not merely the [presumably imperfect recollection of the witness], should be available to the court.

15. Although the analysis is *obiter* because her Honour later concluded that the NSW Act was not binding on a Federal Court, there is no reason why the intention of the ACT legislature in enacting the Act should be construed differently. The explanatory memorandum of the *Listening Devices Bill 1992* (ACT) describes the intent of what became s 10 of the Act as being to render evidence inadmissible in civil or criminal proceedings if it was obtained by a person by the unlawful use of a listening device.
16. Further, the specific limited exceptions to the offence created, and to the subsequent admissibility of evidence prescribed by the Act, are plainly not an arbitrary interference with the individual right to privacy such as to give rise to any concern under s 12 of the *Human Rights Act 2004* (ACT).

#### **Issues for determination**

17. Applying the above provisions to the evidence under consideration:

- (a) If the video recording was made in the circumstances described in s 4(3)(b)(i) of the Act, then it will be admissible through the exception in s 10(2)(c) of the Act.
  - (b) If the video recording was not made in those circumstances (and thus contravened s 4 of the Act), it would still be admissible under s 10(2)(e) of the Act, because it was nevertheless evidence of a conversation that the plaintiff had obtained knowledge of in lawful circumstances, namely because she was there and could remember it. However, s 138 of the *Evidence Act* would operate, which permits the Court to exercise discretion to exclude improperly obtained evidence.
  - (c) Similarly, with regard to the plaintiff's affidavit evidence, if the video recording did not contravene s 4 of the Act, then the plaintiff's use of it to revive her memory and then prepare her affidavit evidence is admissible under s 10(2)(c) of the Act. Conversely, if the video recording contravened s 4 of the Act, then the issue of illegality or impropriety again arises for consideration pursuant to s 138 of the *Evidence Act*. see, by analogy, *Sepulveda* at [147]-[148] and the authority there-cited.
18. The overarching question on admissibility then, is whether the recording falls within the s 4(3)(b)(i) exception under the Act. That may be broken down into a number of elements. In order for the evidence in the present case to be admissible under the Act:
- (a) The person must be a principal party to a conversation;
  - (b) The person must consent to using a listening device;
  - (c) The reason for the recording must be because the person considers it necessary to protect his or her lawful interests;
  - (d) There must be reasonable grounds for that belief; and
  - (e) The evidence must be led for the purpose of protecting those lawful interests (picking up the purpose referred to in s 10(2)(c) of the Act).
19. The matters listed in (a), (b) and (e) of the preceding paragraph are uncontroversial here. First, the plaintiff was a principal party to the conversation. Second, as seen from the extract of her evidence set out below, she put the camera in her handbag, knew that it was recording and intended to record the conversation. She therefore consented to the use of the listening device. Third, the 'interests' causing the listening device to be used are the very subject matter of the allegations in the statement of claim. This is not a case where the recording was made for an entirely different or unrelated purpose.
20. That leaves two matters in issue:
- (a) Whether the plaintiff considered that the recording of the conversation was necessary for the protection of her lawful interests; and
  - (b) Whether such belief was held 'on reasonable grounds'.

## Evidence and submissions on the voir dire

21. The plaintiff was cross-examined (through an interpreter), by Mr Rose for the defendants, on her belief or reasons at the time for making the recording. The critical evidence is:

Mr Rose: You decided to record the conversation because you wanted to set a trap for Ms Song, didn't you?

[Plaintiff]: I decided to record the meeting because firstly, I kept asking for the contract and she didn't give me the contract. Also she changed my shareholding and up and down several times without my knowledge. Also she put in this person called Ming to manage the business also without my knowledge, and also because of many other reasons. ...I decided to record the meeting not because I want to set up a trap, but because I want to protect my interest.

Mr Rose: And that was by trying to gather some evidence that you didn't previously have.

[Plaintiff]: The figure of 550,000 that was mentioned during the interview and that was also added up as a sum in Song's notebook or diary, and for many other reasons that I just mentioned, that made me [at] unease, I decided to protect my interests so that to record the meeting. Also before I did the recording I consulted my barrister at the time and solicitor at the time. ...They both gave me legal advice and they suggest to me that I should make the recording.

...

Mr Rose: You weren't recording this conversation so that you had something about what you said to stop somebody misrepresenting you later, were you?

[Plaintiff]: I did the recording because I felt cheated and I decided to do the record to protect my interests.

Mr Rose: You didn't know why you felt cheated, did you?

[Plaintiff]: I knew why I felt cheated for a couple of reasons. Firstly, the ASIC records – in the ASIC records my shareholding was changed up and down a couple of times, and secondly I kept asking for the contract and it was never provided to me, and thirdly this person called Ming was put in to manage the business and I didn't know about it. Fourthly, the weekly reports were not provided to me in a timely manner. Also, in the beginning it was mentioned to me as the business I can get the investment back in the business after two years or after one year and a half, but actually in half-a-year the business started to make no profit. For all these reasons I felt my interest was hurt.

22. The argument against admissibility was that the plaintiff was attempting to set a trap for the defendants. She was not concerned to 'protect' then existing 'lawful interests'. Instead, she was creating evidence to support a case in order to commence proceedings. The defendants argued that such conduct did not fall within the words of the Act, either because it was not a 'lawful interest', or because it was not conduct 'necessary' to 'protect' that lawful interest, on objectively reasonable grounds.
23. Alternatively, the defendants submitted that the motivation behind the recording was directed to protecting the plaintiff's credibility generally, or to supporting her credibility if she had to give evidence in a court proceeding about the matter. That too was said to be insufficient to bring the conduct within the exception of s 4(3)(b)(i) of the Act, relying on *R v Le* at [47] per Giles JA (who was in dissent on this point).

## Applicable legal principles

24. A number of authorities in other jurisdictions have given consideration to the meaning of 'necessary', 'reasonable grounds', and 'protection' of 'lawful interests' in the same or similar statutory contexts.

### *Necessary*

25. In this statutory context, 'necessary' has been held to mean appropriate, but not essential: *Sepulveda* at [117].

### *Reasonable grounds*

26. The reasonableness of such necessity is to be judged objectively, and upon bases or grounds that exist at the time of the recording: *Sepulveda* at [118], in relation to the terminology used in the NSW Act, being 'reasonable necessity'.

### *Protection*

27. The ordinary meaning of 'protection' as shelter, defence or preservation from harm, danger, or evil has been said to be apt in this statutory context: *Sepulveda* at [120]; *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72; 261 FLR 211 (**Georgiou**) at [16].

### *Lawful interests*

28. The words 'lawful interests' are not defined and the scope of those words has not been comprehensively identified in the authorities: *DW v R* [2014] NSWCCA 28; 239 A Crim R 192 (**DW v R**) at [27]. It is an expression best left to be applied case by case, subject to some general guidelines: *Thomas v Nash* [2010] SASC 153; 107 SASR 309 (**Nash**) per Doyle CJ at [47].
29. In *Violi* at [28], it was said that 'lawful interests' means simply interests which are not unlawful. The words are to be distinguished from legal interests, and convey notions of 'legitimate interests' or 'interests conforming to law'. *Violi* was a case involving a claim for breach of contract or alternatively for misleading or deceptive conduct. The conversations that had been recorded had taken place after the date upon which the alleged contract was entered into and the representations relied upon by the applicants to base their claims in misleading or deceptive conduct had already occurred. It thus has some resonance with the present case.
30. *Violi* was followed in *Georgiou* per Allanson J at [16], and in *Dimech v Tasmania* [2016] TASCCA 3; 257 A Crim R 495 at [8]. In *Sepulveda*, Johnson J (with whom McClellan CJ at CL and Hislop J agreed) suggested at [126] that the meaning of a lawful interest may not be as broad as that stated in *Violi*, although his Honour expressly declined to consider the issue as the parties had not submitted that what was stated in *Violi* was wrong.
31. The parties here have similarly not expressly submitted that *Violi* was wrong, but it arises for consideration here because the defendants have argued that 'lawful interests' does not encompass the interests of the plaintiff here and they rely in part on the reasoning in *Sepulveda* to support that submission.
32. *Sepulveda* was a criminal proceeding. Johnson J construed the structure of the equivalent exception in the NSW Act as follows at [115]:

...It is necessary to bear in mind that s 5(3)(b)(i) constitutes an exception to the general statutory prohibition on the use of a listening device, where the primary exception permits recording of conversations under warrant. There is a strong argument that the words of s 5(3)(b)(i) ought be closely confined to avoid undermining the primary purpose of the [NSW Act]. An undue willingness to include a multitude of differing circumstances within this statutory exception may serve to encourage persons to make a covert recording of a conversation rather than (in the present context), comply with the primary object of the Act by bringing the matter to the attention of the relevant law enforcement authorities so that application may be made for a warrant to lawfully record a conversation.

33. Johnson J (again with McClellan CJ at CL and Hislop J agreeing) went on to state at [142] (emphasis added):

Section 5(3)(b)(i) of the [NSW] Act should not be interpreted in such a way as to render otiose the primary purpose of the Act, which is to protect privacy by prohibiting covert recording of a conversation other than (usually) by way of a warrant under the Act. Section 5(3)(b)(i) operates as an exception. **The construction of the learned trial Judge would leave open the covert recording of a conversation by any person who alleges that he or she is a victim of crime, and who speaks to the alleged offender for the purpose of obtaining admissions of offences.** The 'lawful interests' identified by the trial judge in the present case are of a somewhat nebulous kind. They do not appear to satisfy the requirement that the recording be undertaken for the protection of then existing lawful interests. It is important that a construction not be attached to this statutory exception which would serve to undermine, in a significant respect, a primary purpose of the [NSW] Act.

34. That passage was relied upon by the defendants as applying to the present case. They sought to draw an analogy between a victim of a crime and the present case, where the conduct that is the concern of these proceedings (past representations made to the plaintiff) has already occurred, and the plaintiff seeks to meet with the defendant to obtain admissions as to what was said previously.
35. It is difficult to see how the above reasoning as to the proper construction of the exception is applicable in a civil context. Respectfully, I do not accept the Act ought be construed so that the obtaining of a warrant is seen as the 'primary exception', by which other exceptions that directly follow it (in this case, s 4(3)(b)(i) of the Act) 'ought be closely confined'. The context of the section does not require such a construction, and it does not sit well with the fact that the particular exception provided for by the Act is equally apt to the use of listening devices to protect a person's interests in a civil context. A person who seeks to protect their private interests in a civil context cannot entreat the relevant law enforcement authorities to use their resources to apply for a warrant: see *Crimes (Surveillance Devices) Act 2010* (ACT) s 11. The exception in s 4(3)(b)(i) of the Act is necessarily unrelated to the exception covering warrants in s 4(2)(a) of the Act.
36. In my view, neither a broad nor a confined construction attaches to the exception created by s 4(3)(b)(i) of the Act. Rather, in line with Doyle CJ's comment in *Nash* (referred to in 28] of these reasons), it is preferable to simply consider the expression 'lawful interests' in the context of the circumstances of each case, focussing on the words not in isolation, but in the context of the section being an exception to a criminal offence, and with the purpose of the Act in mind. It may be that the more tenuous the lawful interest, the less likely that it will be objectively necessary to protect it through the means of a listening device.
37. Further, even in the case of victims of crime, the reasoning at [142] of *Sepulveda* has been distinguished where the facts of the case make it impracticable for someone to ask the police to apply for a warrant. In *DW v R*, one of the grounds of the appeal

involved a recording made by a 14 year old child complainant of conversations with her father which had been admitted into evidence by the primary judge in a trial involving criminal charges of, among other things, aggravated indecent assault and use of a child for pornographic purposes.

38. In *DW v R*, Ward JA (as her Honour then was) at [45]-[46] referred to the appellant's reliance on the above reasoning in *Sepulveda* at [142] in support of a submission that it was open to the complainant to have complained to the police. Her Honour found that the child could not be expected to have understood the legal avenues that she could take in order to have her complaints investigated (at [47]), going on to state at [48]-[49]:

[48]...Nor did she, as was the case in *Sepulveda*, seek to obtain money in exchange for the recording. Given the relatively short period of time between the making of the recording and the occasion on which the complaint was made to the police (about a month), there is no reason to infer that the recording was not made for the purpose of the complainant having some evidence which she could use to convince others to believe her or to corroborate her word (as was the context in which it was suggested that she make the recording in the first place) or to protect herself from further assaults. ...

[49] In my opinion, it was open to the trial judge to infer that the recording was made for the purpose of the protection of the complainant's lawful interest in protecting herself from continuing abuse and exploitation.

39. Her Honour went on to state at [51]:

The Crown submitted, and I accept, that it was not practicable in the circumstances of this case for the complainant to contact police in order to seek to arrange a warrant to record conversations with her father.

40. Similarly, the desire of a witness to protect her credibility generally; to support her credibility if she had to give evidence in court proceedings about the matter; and to protect herself against exposure to being charged with making false allegations against other people about matters of considerable seriousness, have been held to be lawful interests in *R v Le* at [83] per Adams J (with whom RS Hulme J agreed).
41. As stated at [23] of these reasons, the defendants relied on a passage in *R v Le* to the contrary, per Giles JA at [47]. However, his Honour was in dissent on that issue and the applicable reasoning to this case is that of the majority.
42. Such interests may be contrasted with a mere desire to have a reliable record of a conversation, or a desire to gain an advantage in civil proceedings, which would not ordinarily amount to a relevant lawful interest: *Nash* at [48] per Doyle CJ, noting again that each case has to be considered on its facts.
43. In *Chao* at [8] a recording made where a serious dispute had erupted, and it was anticipated there would be a dispute as to different versions of an arrangement, was held by Brereton J to give rise to a lawful interest (see also *DW v R* at [34]).

### **The circumstances of this case**

44. The evidence set out above establishes that at the time the plaintiff made the recording, she felt cheated in her business deal with the defendants. There were things occurring that might be described as causing her trust in the defendants to be eroded. One of the things that caused the plaintiff to mistrust the defendants in their dealings with her was that she kept asking for the contract for sale (which recorded the purchase price) and it was not being provided to her.

45. By the time the plaintiff decided to record her conversation with the defendants the plaintiff had taken legal advice, and the Statement of Claim was filed in these proceedings on 29 March 2016, within a month of the conversation being recorded. The facts are thus aligned with those in *Chao* in that a serious dispute had erupted and it was anticipated there would be a dispute as to what was represented to the plaintiff. That is sufficient to give rise to a lawful interest.
46. As was the case in *Violi*, and contrary to the submission of the defendants, it does not matter here that the alleged representations constituting the misleading or deceptive conduct were made more than a year before the meeting on 5 March 2016 between the parties that the plaintiff recorded. The very nature of a claim for misleading and deceptive conduct is that the plaintiff does not realise he or she is being misled at the time the business transaction occurs. Indeed, on the *voir dire* the plaintiff said that in the beginning she trusted the defendants 'very much'.
47. This is not a case where a trap was being set. The plaintiff was not seeking to blackmail the defendants, as was the case in *Sepulveda*. She was also not seeking to use the recording to induce the defendants into further conduct, which she could then threaten to disclose, in order to persuade the defendants to meet asserted obligations, as in the case of *Levy v Bablis* [2013] NSWCA 28 (**Levy**). Indeed, in *Levy*, Meagher JA distinguished the conduct described, which his Honour characterised as a 'trap' at [109], from a circumstance where a conversation was recorded for the purpose of obtaining admissions as to the transactions which had been undertaken and in respect of which a person had legal rights. Beazley JA (as her Honour then was, the decision being published days before her Honour's appointment as President) and Macfarlan JA both agreed with the reasoning of Meagher JA: *Levy* at [1] and [2]. In my view, the plaintiff's conduct in the present case falls squarely within that latter scenario.
48. As at 5 March 2016, the plaintiff had then existing legal rights in relation to the past conduct of the defendants. She was not in the position of a victim of crime who might invoke the assistance of police. She was in the position of a person who had an interest in confirming the previous representations that had actually been made to her and in having a reliable record of what the defendants said to corroborate her position, not in the abstract or in the hope that it might be used to her advantage (*c.f. Nash* at [45], [48]), but in circumstances where the plaintiff now had real doubts about the honesty of the defendants and where legal proceedings were not only in contemplation but imminent, and would turn on oral conversations between those parties.
49. I was therefore satisfied that the interests the plaintiff sought to protect were 'lawful interests' on the authorities above, and that the recording of the conversation was 'necessary' in the sense of being appropriate, on objectively reasonable grounds.

## Conclusion

50. For those reasons, the video recording made 5 March 2016 was not made in contravention of the Act. Accordingly, the video recording and the affidavit evidence that relied upon it was admitted.

I certify that the preceding fifty [50] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam

Associate:

Date: 29 March 2018