

Neutral Citation Number: [2020] EWHC 1138 (QB)

Case No: QB-2019-001029

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2020

Before :

MASTER DAGNALL

Between :

MEDIA ENTERTAINMENT NV
- and -
(1) SAPAR KARYAGDYEV
(2) ALFONSO GONZALEZ GARCIA

Claimant
Defendants

Paul Burton (instructed by **Blake Morgan LLP**) for the **Claimant**
Jonathan Cohen QC (instructed by **Sherrards LLP**) for the **Defendants**

Hearing dates: 16 April 2020

JUDGMENT

MASTER DAGNALL:

Introduction

1. This Judgement concerns parts of the Defendants' applications made by Application Notice date 2 March 2020, the relevant parts being to strike-out all or part of the Amended Particulars of Claim and/or for (reverse) summary judgment.
2. Essentially, the Defendants contend that the Claimant has failed to state (or, to use the old fashioned terminology and which I will use for convenience throughout, "plead") sufficient facts to give rise to its asserted claim (being a claim for misuse of what was known to be the Claimant's confidential information) in law, although they have an alternative argument that the Claimant's necessary evidence is lacking.
3. The Defendants' primary submission, through their counsel Mr Jonathan Cohen QC, is that where a person in their position has been passed confidential information belonging to the Claimant by an employee of the Claimant, even though they know that the information is confidential in nature, they can only be liable for acts amounting to its "misuse", in the sense of uses for which the employee has not permitted or had no authority from the Claimant to permit, if the Defendants had sufficient knowledge that those acts would be "misuse" (i.e. knowledge that the employee had not permitted or had no authority to permit those acts), and also that this knowledge (or facts said to justify it or its being inferred) must be pleaded, but here there is no pleading of any, let alone sufficient, knowledge.

4. The Claimant, by its counsel Mr Paul Burton, disputes this as a matter of law, but also asserts that there is sufficient pleading in any event both generally and so as to justify the grant of various particular heads of relief. There is also a further distinct pleading point regarding a statement of fact within Paragraph 41 of the Amended Particulars of Claim introduced by the words “so far as the Claimant is aware”.
5. Following circulation of my initial draft judgment, I received some further submissions from Mr Cohen (and to which Mr Burton objected). Although conscious that the court should be careful in permitting this (cf. Bonsor v Bio Collectors 2020 EWHC 918 at paragraphs 5 and 6), it seemed appropriate to me to raise some clarificatory questions (which were answered) of counsel, and have taken those submissions and answers into account in this final judgment.

The Amended Particulars of Claim (“the APC”)

6. The APC in its initial sections sets out a factual situation and a history which can be summarised for the purposes of this Judgment as follows.
7. The Claimant is and was a company incorporated under the laws of Curacao which conducts an online gambling business. Its sole registered shareholder (although the APC are silent as to whether it has directors and if so who they are) is and was Leonid Ponkratenko (“Mr Ponkratenko”) but who holds (or held) some of those shares on trust for Mr Sergei Samsonov (“Mr Samsonov”), Mr Egor Osipov, Mr Georgii Smoliar and Mr Sergei Kanaev (together “the Silent Investors”). The Claimant employed a Mr Dmitry Vereschaka (“Mr Vereschaka”) as a system administrator. Others involved

with Mr Ponkratenko (and on his side) were a Mr Andrew Braitchouk (“Mr Braitchouk”) and a Mr Matt Jellicoe (“Mr Jellicoe”).

8. A Mr Rustam Gilfanov (“Mr Gilfanov”) was interested in acquiring some interest in or control over the Claimant.
9. The Defendants directly or indirectly had had some involvement with the Claimant until 2013 or 2015, and, at least in January 2019, a continuing and present involvement with Mr Gilfanov.
10. The Claimant’s business, being conducted mainly or entirely online, had and has extensive computer systems and which, and the stored information and data, need to be kept secure. Those computer systems included email servers and accounts, and also an account (“the GitHub Account”) with a software development platform known as GitHub and upon which information and data was stored. Each of those system elements had their access protected and controlled by usernames and passwords (together “the Passwords”).
11. The Claimant had and has Confidential Information comprised, amongst other things, matters set out in the sub-paragraphs to paragraph 23 of the APC as follows:
 - "a. The usernames and/or passwords for the Email Accounts.
 - b. The identity of the sender, recipient and any other person copied to the emails sent and/or received by the Email Accounts.
 - c. The content of the emails sent and/or received by the Email Accounts.
 - d. Any attachments to the emails sent and/or received by the Email Accounts.
 - e. The Claimant's usernames and/or passwords for the GitHub Account.

- f. All of the Claimant's information and data stored on the GitHub Account.
 - g. The way in which the Claimant deployed its information and data stored on the GitHub Account.
 - h. The passwords necessary for the Claimant to access services provided to it by third parties."
12. I note that the Claimant asked the Defendants by a solicitors' letter of 4 November 2019 to confirm that all those items of information "were confidential to our client"; and, by response letter of 11 November 2019, the Defendants' solicitors confirmed that "there has never been any dispute that the information was and remains confidential to your client, and our clients... have admitted that".
13. In paragraphs 24 to 27 of the APC it is stated that on 11 January 2019 Mr Braitchouk, Mr Jellicoe and Mr Ponkratenko, believing that Mr Gilfanov was wanting to discuss a purchase of shares in the Claimant, met with Mr Gilfanov in Latvia but that Mr Gilfanov had not revealed that he was seeking the support of the Silent Investors against Mr Ponkratenko.
14. In paragraphs 28 to 31 of the APC it is stated that:
- i) Mr Gilfanov had persuaded Mr Samsonov to join him in instructing Mr Vereschaka to provide the Passwords to the First Defendant so that the Defendants could access the Claimant's computer systems
 - ii) The First Defendant then contacted Mr Vereschaka "for the purposes of obtaining his administrator's usernames and passwords

- iii) By implication (although not expressly) that Mr Vereschaka's username and password enabled the Defendants to take complete control of the Claimant's computer systems.
15. Paragraph 32 of the APC states that "By their actions on 11 January 2019 the Defendants, and each of them, breached the Claimant's right to confidentiality in the Confidential Information."
16. There then follows the words PARTICULARS OF BREACH. However, there does not then follow a set of sub-paragraphs but rather a set of full paragraphs albeit that Paragraph 33 states that these are the best particulars which can be given of breaches prior to disclosure.
17. Paragraphs 33 to 37, 34 and 35 of the APC provide that the Defendants took steps to remove all administrator privileges except for Mr Vereschaka, delete other administrator accounts, create two new email accounts (the "management account" and "the systemp account" and together "the New Accounts"), and to create aliases for certain e-mail accounts. Paragraphs 38 and 39 of the APC state that by this the Defendants took full control of the Claimant's infrastructure, prevented the legitimate users of various e-mail accounts accessing or learning about those e-mail accounts, and controlled passwords to or used by third parties providing services to the Claimant, and also ensured that incoming emails would be copied to the management account.
18. Paragraph 40 of the APC asserts that the Defendants executed a backup script in order to obtain copies of "an unknown quantity of emails" already in or that were subsequently sent to the email accounts, and Paragraph 41 of the APC

states that by doing so “the First Defendant was able to and so far as the Claimant is aware did obtain a “backup copy of emails from one or more of the Claimant’s email accounts...”. Paragraph 43 of the APC states that by so copying the Defendants obtained copies of emails amounting to 5,215,642 bytes of data; and which I note is slightly in excess of 5, but very much less than 6, megabytes of data.

19. Paragraph 44 of the APC states that the First Defendant opened 159 of the emails diverted to the management account; and the Second Defendant opened 51 of the emails diverted to the systemp account.
20. Paragraphs 45 to 47 of the APC state that the Second Defendant accessed and gained control of and then revoked various existing administrators’ access to the GitHubs Account.
21. Paragraph 48 of the APC states that the Second Defendant then changed the Claimant’s passwords so that it could not access various third party suppliers of services.
22. There is then a section of the APC headed **Relief**. Paragraph 49 of the APC states that “In the premises the Claimant is entitled to the following relief.”
23. Paragraph 50 of the APC claims “A declaration that the Confidential Information is confidential to the Claimant.” Paragraph 51 of the APC claims “A declaration that the Defendants, and each of them, were not entitled to use and/or access the Confidential Information in the way that they did and/or generally” I refer to these as “the Declarations”.

24. Paragraph 52 of the APC sets out a list of mandatory injunctions claimed. These mainly amount to injunctions to: disclose to what devices and to whom Passwords and emails were sent or copied and to deliver any such device for destruction; to disclose whether they made backups, or any copies (or notes of contents) of any emails and to deliver them up for destruction, and to disclose whether they provided any information gained by them from the email accounts or the GitHub Account to anyone and in particular Mr Gilfanov and his associates. I refer to these as “the Mandatory Injunctions”.
25. Paragraph 53 of the APC sets out a list of permanent prohibitory injunctions claimed; being against the Defendants: accessing the Claimant’s systems; changing any Passwords; making any further copies; communicating any of the Confidential Information; and making any further use of the Confidential Information. I refer to these as “the Prohibitory Injunctions”.
26. Paragraph 54 of the APC claims “An inquiry as to the loss caused by the Defendants’ actions and/or, at the Claimant’s election, an account of any gain made by the Defendants, or each of them, from their actions and/or the Confidential Information.” and Paragraph 52 of the APC claims interest. However, the Prayer for Relief claims “Damages to be assessed” although, in addition to the Declarations and Injunctions, it also seeks “Such further or other relief or consequential directions as the Court deems just.” I refer to these financial claims as “the Damages Remedy”.

The History of the Claim

27. The Claimant (by one or more of Mr Ponkratenko, Mr Braitchouk and Mr Jellicoe) soon learnt what had happened and took steps to regain control of its systems.
28. Prior to issue of the Claim Form, the Claimant applied on notice to Mrs Justice Farbey who on 11 March 2019 accepted agreed undertakings from the Defendants that, amongst other things, (i) they would not until the return date or further order (a) attempt to further access the Claimant's systems, or (b) copy, disclose or use or allow or permit to be used, copied or disclosed any information or data they had obtained; but (ii) they would destroy all copies, electronic or paper, of all information and data they had obtained; and further ordered the Defendants to each serve a sworn affidavit (affirmations were in fact provided) stating whether they had obtained any information or data for anyone else, the purposes for which they had used any information or data, and to whom they had communicated or copied any information or data. Mr Cohen QC points out that the destruction undertaking was not on the (perhaps usual) basis that a copy would be preserved for the purposes of the litigation. A cross-undertaking as to damages was given by the Claimant in case the order was to result in recoverable loss to the Defendants. Costs were reserved.
29. The Defendants provided their affirmations dated 13 and 15 March 2019 respectively ("the Affirmations"). Each affirmation rather challenged the assumptions (of the Claimant, and possibly also the Court) underlying the order for the Affirmations. My impression, although I do not find the affirmations very clear as to this, but which I think Mr Cohen QC confirmed

to me during the hearing, is that each Defendant was seeking to say that: (i) they had merely changed passwords and diverted emails to another (new) address within the Claimant's systems and (ii) had not made any copies and (iii) had not looked at the content of any material beyond passwords and (iv) had not communicated any material to anyone else and so that (v) all they had done was to lock out others (and in particular Mr Braitchouk, Mr Jellicoe and Mr Ponkratenko) from the Claimant's systems rather than directly (or indirectly by copying) having let anyone else "in" to the Claimant's systems. Mr Cohen QC says that the Claimant was able shortly after 11 January 2019 to reverse this "lock-out" and regain sole control of and access to its systems and including to the New Accounts, with any emails received in the meantime being located in the New Accounts, and that that was (or should have been) the end of it.

30. The Claim Form was issued on 22 March 2019, claiming slightly different declarations, injunctions and damages. However, in the "Value" section, the Claim Form was completed to state, "I expect to recover between £5,000 and £10,000." and which figure has remained unaltered.
31. The matter came back, with further applications, before His Honour Judge Parkes QC (sitting as a judge of the High Court) on 21 June 2019 who accepted undertakings from the Defendants until trial or further order that they would not (a) attempt to further access the Claimant's systems, or (b) copy, disclose or use or allow or permit to be used, copied or disclosed any information or data they had obtained. A cross-undertaking as to damages was again given. Costs were again reserved.

32. These interim hearings, although both were effectively comprised by the proffering and accepting of agreed undertakings pending trial or further order, had generated other substantial witness evidence, being witness statements from Mr Braitchouk, Mr Jellicoe and Mr Vereschaka, and witness statements from both of the Defendants.
33. In the First Defendant's witness statement of 29 March 2019: in paragraphs 20 and 27, he stated that he did not consider that what he had done with the assistance of the Claimant's own administrator, Mr Vereschaka, had been unauthorised, data had not been removed or copied "whether unlawfully or otherwise" and actions had not been taken to disrupt the operational management of the business but rather to safeguard it in the event of an anticipated (but which never occurred, of course) removal from it of Mr Ponkratenko, Mr Braitchouk and Mr Jellicoe; and in paragraph 39 he stated that the Defendants had only changed passwords and created New Accounts under the control of Mr Vereschaka. The Second Defendant stated in his witness statement of 29 March 2019 that he had assumed that someone with the requisite authority had authorised the work to be done, although also at paragraph 38 he denied that he had downloaded or accessed or held any personal or business information, and at paragraph 39 stating that he had acted on the First Defendant's instructions.
34. The Claimant responded with the second witness statements of Mr Braitchouk and Mr Jellicoe of 18 April 2019. They dispute that all that the Defendants had done was to change passwords, and in particular by reference to the asserted taking of 5MB of data and opening of 159 emails on the management

account and the opening of 51 emails on the systemp account. Mr Braitchouk in his paragraph 20 refuses to accept the Defendants' statements as to their conduct, and in his paragraphs 40 and 41 refers to expert evidence (to which I refer below) which he says suggest that the Defendants could have stored and retained backup copies of the Claimant's material, and that further investigations of the Defendants' devices would be required in order to be sure that they had not copied or communicated material further. Mr Braitchouk in his paragraphs 21 to 35 also challenges both the Defendants' assertion that they acted under legitimate authority (of Mr Gilfanov and/or Mr Vereschaka) and what he sees as being their assertion that the Defendants did not know of any lack of authority (see, for example, his paragraph 22 and the final sentence of his paragraph 35) giving various reasons for both challenges. They also mention various matters which they say suggest that the First Defendant (at least) was much more involved in and knowledgeable of a scheme by Mr Gilfanov to effect an hostile takeover that the Defendants would accept (see, for example, paragraph 5 of Mr Jellicoe's second witness statement).

35. There had also been conducted investigations of at least some of the Claimant's computer systems by its expert, Mr Coyne (and to whose evidence Mr Braitchouk refers in his witness statement above), and of the Defendants' computers, devices and internet systems by their expert Mr Heighway. I have not been shown their reports, although Mr Burton asserts that the Claimant and Mr Coyne have not been permitted access to the Defendants' computers, devices and internet systems. Mr Cohen asserts that the Claimant has not asked for such access, but it does not seem to me that I am able to resolve that dispute at this hearing.

36. At some point the Claimant served Particulars of Claim (which are not in the Bundle) but the contents of which can be seen by examination of the APC. In its paragraphs 41 and 43 statements were made that the Defendants had copied 1200 Email Accounts amounting to 5,214,642 kilobytes of data and resulting in the copying or obtaining of over 12515 emails. In Paragraph 44 it was stated that 159 emails which had been diverted to the management account had been opened and 51 emails which had been diverted to the systemp account had been opened.
37. The Defendants served a Defence, which in paragraph 1.10 stated that their case had been set out in their affirmations and witness statements, and that access to the Claimant's computer systems had been consensual and limited, had caused no damages and that they had not misused any information. In Paragraph 40 the making of a backup was admitted but it was stated that it did not include any copy emails. Paragraph 42 denied that any emails had been downloaded. Paragraph 44 denied that the Defendants had opened either the 159 emails or the 51 emails referred to in paragraph 44 of the Particulars of Claim; but admitted that they had opened an estimated 20 emails in order to effect password resets. Apart from this, the Defence mainly contained extensive non-admissions, the Defendants saying that they lacked knowledge of the doings of others, and they disputed the extent and effect of the steps taken by them.
38. The Defendants answered a CPR Part 18 Request from the Claimant on 7 October 2019. In response 1(a) they confirmed that their case as to their access to the Claimant's computer systems was that it was consensual and

authorised, and that the First Defendant had been authorised by Mr Gilfanov, the Silent Investors and Mr Vereschaka, and the Second Defendant had been authorised by the First Defendant. As appears below, it seems to me that, while not expressly stated, that all took this as impliedly asserting that the Claimant was bound by such authorisation. In Response 19 it was admitted that the Second Defendant had created a back-up script. In Response 20 it was admitted that some emails had been opened but stated that this was only to enable certain passwords to be reset. In Request 20b it was asserted that Mr Heighway had found evidence of downloaded emails on the Second Defendant's computer, to which the Response was to dispute that Mr Heighway's report said that.

39. In Request 20c it was asserted that the Second Defendant had admitted to Mr Heighway that he had made a backup of 5MB, contrary to his witness statement, and could make the back-up available; and the Response was that the Second Defendant had forgotten when making his witness statement that he had made this "technical back-up" which was only of email settings and without substantive emails or source code.
40. As far as this Response 20c is concerned, Mr Cohen submits that it does not amount to an admission of the obtaining, or retaining, of anything significant let alone of emails, and that if the Claimant wished to challenge it then the Claimant should have done so in a statement of case. Mr Burton submits (and has confirmed in his recent emailed answers to my clarificatory questions following the initial draft judgment) that the download did involve the obtaining of emails and important data and as alleged in both paragraphs 41

and 43 of the APC. It seems to me that Request 20c amounts to an admission of obtaining 5MB of data, and that I cannot resolve at this hearing what seems to me to be a real issue of what was contained within it. I do find the suggestion that this Part 18 Response should have been countered within a statement of case (whether the APC or otherwise) somewhat unreal in the circumstances of what is set out specifically in paragraph 43 of the APC which gives substantial particulars even if more might be available after disclosure and following inspection of the relevant device and the data.

41. The Claimant answered a CPR Part 18 Request from the Defendant on 16 November 2019. Request 32 sought full particulars of each loss or gain (for which an inquiry or account was sought) and the Response was that “The Claimant is entitled to plead the relief that it has in relation to quantum.” and reference was made to the Defendants’ denial of a right to such relief.
42. Each side challenged the sufficiency of the other side’s Part 18 Response but either no applications were made or they were not pursued. No applications were made to cross-examine any of the relevant makers upon their affidavits or witness statements.
43. By the exchange of letters on 4 and 11 November 2019, the Defendants accepted and admitted that what was (and still is) in Paragraph 23 of what is now the APC (“the Confidential Information”) was and still is information confidential to the Claimant.
44. The Claimant then obtained the Defendants’ consent, under CPR17.1(2)(a), to making amendments to the Particulars of Claim so as to give rise to the APC.

Those amendments included (showing the struck-out and new underlined wording):

"41. By executing the script referred to in paragraph 40 above the First Defendant was able to obtain, and so far as the Claimant is aware did obtain, a 'backup' copy of ~~the entire content of approximately~~ emails from one or more of the Claimant's 1200 of the Claimant's Email Accounts including:

- a. The identity of the sender, recipient and any other person copied to the those emails sent and/or received by the Email Accounts.
- b. The content of those emails in the Email Accounts."

"43. By making copies of emails from ~~copying 1200 of~~ the Email Accounts the Defendants obtained approximately 5,215,642 ~~kilobytes~~ bytes of data, including but not limited to:

- a. At least 15 ~~15~~ Emails from the accounts listed in paragraph 37 above.
- b. At least 2500 ~~2500~~ Emails from the Email Accounts to an IP address under the Second Defendant's control at the material time.
- c. ~~In total in excess of 10,000~~ An as yet unknown quantity of emails from the Email Accounts."

45. The Defendants then served an Amended Defence ("the AD"). In Paragraph 40 it was stated that the execution of the backup script was in order to ensure that the Claimant's systems could be restored when convenient.

46. The matter then came before Master Gidden on 16 January 2020. I have not seen any transcript of the hearing or of the parties' Case Summaries for it, and do not regard it as safe or appropriate to place any weight on what might (or might not) have been said in them. However, it is common ground that:

- i) The parties and Master Gidden proceeded on the basis that the Claimant was asserting that the Defendants had not been authorised in any way which was binding upon the Claimant to act as the Defendants had done, and that the Defendants were asserting that they had been so authorised. I think that that was and is in any event correct as the Defendants had stated that they were authorised in paragraph 1.10 of the AD and by not filing a reply the Claimants at least required that matter to be proved (CPR16.7)
- ii) Master Gidden directed a trial of a preliminary issue ("the Authorisation Preliminary Issue") as to whether the Claimant had authorised the Defendants to act as set out in their Defence, affirmations and witness statements, and gave directions.

47. On 2 March 2020, the Defendants issued their Notice of Application, and which:

- i) Seeks to have the Claim struck out under all three limbs of CPR3.4(2) being that the statement of case discloses no reasonable grounds for bringing the claim, is an abuse of process or otherwise likely to obstruct the just disposal of proceedings, or there has been a failure to comply with a rule or practice direction

- ii) Alternatively seeks reverse summary judgment under CPR24 on the basis that the Defendants believe that on the evidence the Claimant has no real prospect of succeeding and there is no other compelling reason why the claim should be disposed of at trial
- iii) Otherwise and alternatively, seeks permission to amend [more correctly to re-amend] the Defence and to vary the order for the Authorisation Preliminary Issue. It is common-ground that these matters are very dependent upon what happens regarding the first two limbs of the Applications, and so consideration of them has been postponed until after this judgment and I do not deal with them further in it.

48. The Application goes on to provide details stating that it is based on (1) the Particulars of Claim containing no allegation of equitable fraud or unconscionability or knowledge of misuse of Confidential Information or knowledge of their having been given to them Confidential Information in breach of confidence as against the Defendants (2) the Passwords were given to the Defendants by Mr Vereschaka voluntarily knowing of the purpose for which they were to be used and so there is no reasonable prospect of the Defendants being found to have acted in breach of equitable duty and (3) if the Particulars of Claim advance a claim for equitable breach of confidence going beyond use of the Passwords then there is a breach of CPR16 PD 8.2 and (4) the plea in Paragraph 41 of the APC that things were done “so far as the Claimant is aware” is abusive.

49. No further evidence has been served by either side. I have, however, had full written and oral submissions from counsel. I have considered all the material carefully in preparing and giving this judgment. If I do not mention all matters specifically, I have still borne them in mind and any omission is due to considerations of time and the constraints due to the present COVID-19 circumstances.

The CPR

50. CPR3.4(2) provides that: “The court may strike out a statement of case if it appears to the court- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court’s process or otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or order.”
51. In principle, on the wording of the rule, the question of whether there is jurisdiction to strike-out under sub-paragraph (a) in circumstances of the nature of those before me involves simply a determination as to whether the wording of the statement of case, assuming the facts stated to be proved, discloses a cause of action in law, being a genuine and serious dispute, which could justify the relief sought – see White Book 3.4.2. Mr Burton has also drawn my attention to a passage in Altimo Holdings v Kyrgyz Mobil 2012 1 WLR 1804 where at paragraph 84 Lord Collins stated that “it is not normally appropriate to strike out (or grant summary judgment) so as to decide a controversial question of law in a developing area, particularly because it is

desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts...”

52. CPR3.4(2) is, however, itself discretionary, being introduced by the word “may”, and which brings into play the overriding objective in CPR1.1. Thus, for example, if a statement of case does not disclose reasonable grounds, the court may often allow an opportunity for amendment, and the court will consider what is the proportionate response in relation to all aspects once one of the jurisdictional conditionals in the three sub-paragraphs of CPR3.4(2) is established.
53. CPR16.4(a) provides that Particulars of Claim must include “a concise statement of the facts on which the claimant relies”.
54. The Practice Direction to CPR Part 16 (“PD16”) in paragraph 8.2 provides that “a claimant must specifically set out the following matters in his particulars of claim where he wishes to rely upon them in support of his claim: (1) any allegation of fraud... (5) notice or knowledge of a fact.”
55. CPR24.2 provides that “The court may give summary judgment against a claimant... on the whole of a claim or on a particular issue if- (a) it considers that- (i) the claimant has no real prospect of succeeding on the claim or issue... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
56. It is common ground that in approaching the CPR24.2(i) test of “no real prospect” the court applies the principles summarised in NCC Skills Ltd v Ascentis [2016] EWHC 206 at paragraphs 5-8 being

"The Test

5. Applications for summary judgment are governed by [CPR 24](#) . [CPR 24.2](#) provides that:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue;

or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

6. There is no dispute between the parties as to the principles to be applied on an application for summary judgment. As was pointed out by Mr. Andrew Latimer, those principles were conveniently summarised by Simon J (as he then was) in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 at paragraph 15.

“The principles which apply have been set out in many cases, are summarised in the editorial comment in the White Book [Part 1](#) at 24.2.3 and have been stated by Lewison J in [*Easyair Limited v. Opal Telecom Limited* \[2009\] EWHC 339 \(Ch\)](#) at [15], approved subsequently (among others) by Etherton LJ in [*A C Ward & Son v. Caitlin \(Five\) limited* \[2009\] EWCA Civ 1098](#) at [24]. For the purposes of the present application it is sufficient to enumerate 10 points.

(1) The Court must consider whether the defendant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success, see *Swain v Hillman* [2001] 2 All ER 91 , 92. A claim is ‘fanciful’ if it is entirely without substance, see Lord Hope in [*Three Rivers District Council v Bank of England* \[2001\] UKHL 16](#) at [95].

(2) A ‘realistic’ prospect of success is one that carries some degree of conviction and not one that is merely arguable, see [*ED & F Man Liquid Products v. Patel* \[2003\] EWCA Civ 472](#) .

(3) The court must avoid conducting a ‘mini-trial’ without disclosure and oral evidence: *Swain v Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers* case, the object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see [*Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* \[2006\] EWCA Civ 661](#) , Mummery LJ at [17].

(6) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary

judgment, but the evidence that can reasonably be expected to be available at trial: [*Royal Brompton Hospital NHS Trust v Hammond \(No. 5\) \[2001\] EWCA Civ 550*](#) , [19].

(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly be drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example *JD Wetherspoon v Harris* [2013] EWHC 1088 , Sir Terence Etherton Ch at [14].

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in [*AK Investment CJSC v Kyrgyz Mobil Tel Ltd \[2012\] 1 WLR 1804*](#) at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(9) The overall burden of proof remains on the claimant, ...to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial, see Henderson J in [*Apovodedo v Collins \[2008\] EWHC 775 \(Ch\)*](#) , at [32].

(10) So far as [Part 24,2\(b\)](#) is concerned, there will be a compelling reason for trial where ‘there are circumstances that ought to be investigated’,

see [Miles v Bull \[1969\] 1 QB 258](#) at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a legitimate transaction; see also [Global Marine Drillships Limited v Landmark Solicitors LLP \[2011\] EWHC 2685 \(Ch\)](#) , Henderson J at [55]-[56].”

7. Mr. Latimer lays particular stress on principles (8) and (9) in Simon J's list. As he correctly points out the claimant has sought summary judgment in the present case before an acknowledgement of service or the defence has been filed and before standard disclosure has been completed. As he observed “ *the claimant has chosen to make an exceptionally early ... application based on its particulars of claim. If the hearing shows that the claimant cannot establish at this stage that the defence has no real prospect of success then the claimant fails and the application is dismissed .*” I agree.

8. I also agree with Mr. Latimer in his observations about what this summary judgment application *is not* . It is not a rectification claim; it is not open to the claimant to re-word the Agreement between the parties as a means of advancing its claim. It is not a trial of a preliminary issue; instead the strict limits imposed by [Part 24 CPR](#) apply. And it is not a judicial review hearing; accordingly public law concepts of legitimate expectation or procedural fairness have no application. This application turns essentially on the proper construction of the contract."

The Parties' Main Submissions

57. Mr Cohen's primary reliance is upon CPR3.4(2)(a) in that he submits that while paragraph 32 of the APC states that the Defendants breached the Claimant's right to confidentiality in its Confidential Information:

- i) He submits that there is no allegation that the Defendants owed to the Claimant any duty of confidentiality or that it was unconscionable or a matter of equitable fraud for the Defendants to act as they so acted, and therefore that the allegation of breach lacks a foundational substance so as to give rise to cause of action
- ii) He further submits that for any such duty to exist or unconscionability or equitable fraud to have been the case, it would be necessary for the Defendants to have known not merely that the information was Confidential Information but also that the Claimant was not authorising its use for the purposes to which the Defendants were putting it (or, alternatively, and which comes to the same thing, that the Claimant was only authorising its use for other purposes)
- iii) He accepts, but for the purposes of these Applications only, that knowledge would extend beyond actual knowledge to "Nelsonian" (deliberately and subjectively turning a blind eye to what would have been seen) knowledge, and, possibly, to constructive knowledge (in terms of objective knowledge which a reasonable person in the position of the Defendants would have gained had they made reasonable inquiries). However, he submits that there is no allegation of such knowledge or of any facts upon which such knowledge would be inferred (if it is subjective) or based (if it is objective).

58. Mr Cohen's reliance on CPR3.4(2)(c) and non-compliance with rules and practice directions, is based on submissions by him that:

- i) The allegations made by the Claimant are effectively of "equitable fraud" and that requires an express pleading of both "fraud" itself (PD6 paragraph 8.2(1)) and of the facts from which "fraud" should be inferred (or, possibly, following Ivey v Genting 2018 AC 391), both of subjective knowledge of facts and facts from which such subjective knowledge should be inferred, which would amount to objective dishonesty), and which are not present in the APC
- ii) Allegations of notice or knowledge of any fact should be pleaded in particulars of claim as required by PD6 paragraph 8,2(5), and which are not present in the APC.

59. Mr Cohen accepts that the information set out in paragraph 23 of and referred to elsewhere within the APC is information which in its nature is confidential to the Claimant, and, it seems to me, he is bound to do so in view of the Defendants' admissions in their solicitors' letter of 11 November 2019. I think that he also accepts that the Defendants knew (or at least that it is sufficiently alleged that they knew) that this Confidential Information was generally confidential to the Claimant, in that the Claimant had a right to control the purposes for which it was used, his point being rather that he asserts that the Claimants would also have to allege and show that the Defendants knew that their use was for an unauthorised purpose i.e. a misuse. Even if Mr Cohen does not accept that, I think that it, or at least the facts upon which such knowledge is based, is both clearly implicit as a matter of

common-sense from the pleading and has always been appreciated by the Defendants as being alleged. The Confidential Information in its very nature of Passwords to an entity's computer systems (as well as emails to and from third parties to the entity) is obviously both confidential in nature and not to be used without authorisation from that entity to access those systems and emails. While it might be desirable (and in the light of the remainder of my judgment) for an amendment to be made to expressly state this, it seems to me that it would be instantly admitted, that it would be wholly unreasonable for there to be any objection or costs consequence, and I would regard it as wholly disproportionate for any consequence (including as to costs) to flow from that or its earlier admission. However, that leaves Mr Cohen's actual point regarding his submission of a need for knowledge of misuse.

60. Mr Cohen accepts also that the APC impliedly plead that Mr Vereschaka acted without authorisation from the Claimant in providing the Passwords to the Defendants and (he says) for the purposes of taking the steps which they did (and Mr Burton has confirmed in his answers to my clarificatory questions following the initial draft judgment that this is the Claimant's case). I think that he is correct to accept this, as both the Defendants (in the AD) and, more importantly, the Court, in ordering the Authorisation Preliminary Issue, have proceeded on this basis. I do, for myself, feel that it would be much better if the APC did formally state that Mr Vereschaka lacked authorisation and why, and that this would assist in further case managing the Authorisation Preliminary Issue, but in the light of what I have said above, that does not matter in relation to this judgment; and the Authorisation Preliminary Issue may require reconsideration (and especially as Mr Cohen in his submissions

and answers to my clarificatory questions has indicated that the Defendants' (at least primary) position is that this question is irrelevant, at least following this judgment).

61. Mr Cohen does, however, submit that the reality of the Claim is that the Defendants are being sued on the basis that they have assisted in Mr Vereschaka's breach of his obligations of confidence owed to his employer in relation to the Confidential Information (although, again, I think that Mr Cohen accepts that such obligations are obvious and implicit in the APC, and that he is right to do so). He submits that for the Defendants to be liable on that basis then they require actual or Nelsonian knowledge, or, perhaps, constructive knowledge sufficient to render their conduct unconscionable, and, again, none of this or the facts on which such knowledge is to be inferred (subjective) or based (objective) is pleaded.
62. Mr Cohen's summary judgment application is again based on his assertion that, for a claim to succeed, the Defendants must have had sufficient knowledge not merely that the information was Confidential Information but also that they did not have the Claimant's authority to use it as they did, and that would require knowledge that Mr Vereschaka was not authorised by the Claimant to engage them to act as they did. He submits that where an information technology employee of the Claimant (Mr Cohen says the senior IT operative, although that is disputed by the Claimant and is not a matter which I think I can determine on the paper evidence) authorises such steps with the apparent support of those who have significant (and Mr Cohen says the majority) beneficial interests in the shareholding of the Claimant, then the

Defendants will not have the necessary knowledge of absence of authority, and thus of misuse, and the claim has no real prospect of success.

63. Mr Cohen submits that the case is even weaker against the Second Defendant who, he says, was simply acting on the First Defendant's instructions.
64. In relation to Paragraph 41 of the APC, Mr Cohen submits that it is not a proper pleading. He submits that particulars of claim should plead facts (supported by a statement of truth) and an allegation that "so far as the Claimant is aware" the Defendants did something is not a statement of fact (capable of giving rise to a cause of action) at all, but rather a mere statement as to the Claimant's present awareness.
65. Mr Burton takes issue with Mr Cohen's approach both to pleading and to the constituent elements of a claim regarding misuse of Confidential Information. He reserves his position as to seeking any permissions to amend until after this judgement, but otherwise submits in general as follow.
66. Mr Burton submits that the APC should, and should legitimately, be seen and construed in all the circumstances, including the witness statements (and expert evidence) adduced by the Claimant. In saying this, he also refers to the fact that paragraph 1.10 of the AD expressly refers to and seeks to incorporate the witness statements (and expert evidence) adduced by the Defendants. Mr Cohen says that this approach is illegitimate.
67. Mr Burton submits that, while the law requires the Defendants to have sufficient knowledge that the information is Confidential Information i.e. information whose nature is that it is confidential to the Claimant and not to be

used except as permitted by the Claimant, the only other element of the cause of action is that the Defendants then use the information in a way or for a purpose which the Claimant has not permitted (either by itself or its actually or ostensibly authorised agent) and which thus amounts to a misuse. He submits that it is the misuse of what is known to be the Claimant's Confidential Information which is actionable; and, if, as (at least to an extent) here, the Defendants say that such authority did exist from Mr Vereschaka and Mr Samsonov (and the other Silent Investors), and if not actually then ostensibly, then it is for the Defendants to allege that they had such authority and the Claimant can then challenge that authority on various grounds including that the Defendants had knowledge of misuse. He submits that it is for the Defendants to have properly ensured that they had the Claimant's authorisation to use its known Confidential Information, and they are liable if, for whatever reason, it turns out that they did not even if they believed (with reasonable grounds) that they had. Therefore, it is neither necessary in law or in point of pleading for the Claimant to allege any form of knowledge of misuse or lack of authority. Mr Cohen says that this is not the right way to look at this cause of action.

68. Mr Burton submits that the expression "unconscionability" has to be seen in the above context. If the information is known to be Confidential Information then it is unconscionable to use it for purposes which have not been authorised (in a way to as to bind the Claimant, and thus including by way of ostensible authority) by the Claimant. Again, he says that it is for the Defendants to have properly satisfied themselves that they had authority to do what they did. Mr Cohen says that this is not the right way to look at this cause of action.

69. Mr Burton further submits that the expression “equitable fraud” has a special meaning, referring here to what is unconscionable (in the above sense) rather than fraud in one its various senses of deliberate or reckless (both being subjective) wrongdoing. Mr Cohen responds to say, in effect, that “fraud” means “fraud” and attracts, and has always attracted, special rules owing to its nature.
70. It seems to me that Mr Burton might also as a variant of the above points be submitting that, even if, which he would dispute as his primary case, absence of knowledge (of whatever nature) on the part of the Defendants of their actions being unauthorised misuse could be an answer to the Claim, it is something which the Defendants would have to allege and prove by way of defence, rather than, as Mr Cohen contends, the Claimant having to allege and prove sufficient knowledge on the part of the Defendants of their actions being unauthorised misuse as part of its cause of action.
71. Mr Burton’s second line of submission is that if some form of knowledge of unauthorised misuse is required then the contents of the APC contain sufficient statements of particular facts from which the necessary inferences of such knowledge can be drawn. He submits that it is clear from the APC (especially when taken with the witness statements) that it is being said that the Defendants had actual, or at least Nelsonian, and, if not then, constructive knowledge, and that the facts pleaded would justify such inferences or objective conclusions. Mr Cohen responds that the relevant inferences are not pleaded, and that it is wholly unclear what pleaded facts are supposed to justify what inferences and how.

72. Mr Burton's third line of submission is that the Defendants in taking the various steps pleaded in paragraphs 33 to 48 of the APC have clearly gone beyond what they were purportedly authorised to do by Mr Vereschaka and accordingly must have had knowledge that they had (at least to that extent) misused the Confidential Information. Mr Cohen's primary answer is that this is not pleaded, although he also disputes it in whole as well as (even on Mr Burton's case) in part.
73. Mr Burton's alternative and secondary approach is to contend that even if (which he disputes) knowledge of misuse is required to give rise to a financial liability, or that this is a case of accessory conduct and that that requires knowledge (although he does not accept that that is the case), and so that the Claimant is not entitled to damages; the Claimant is still entitled to: (1) the Declarations, as it is important to declare that what happened to the Confidential Information was without the Claimant's authority (as this might affect customers, regulators etc.) and (2) the Injunctions, as being appropriate to preserve the Confidential Information and the rights in it, and where the Defendants are not purchasers, and so cannot be bona fide purchasers for value so as to take free from the Claimant's rights in the Confidential Information even if that was an answer to a claim for Injunctions in law.
74. Mr Cohen says that such entitlements would still require knowledge of misuse, but that in any event those remedies would not be granted without good reason, and that there is clearly none as the Claimant has all the Confidential Information, the Defendants have destroyed what they had, the Defendants have not retained any Confidential Information themselves (and nothing was

ever taken from the Claimant's systems, rather everything was left "in" the Claimant's systems, all that really changed was, for a short period, those who could gain access to them) and the Defendants had never passed any information to anyone. Mr Cohen also points out that the Claimant has not sought to make any application for cross-examination on affirmations or witness statements or for early disclosure or early inspection of devices (which jurisdiction exists, but is an exceptional order – see Hollander on Disclosure at 7-46). Mr Cohen further submits that the case against the Defendants is pleaded simply based upon and limited to events on 11 January 2019 and not on any acquiring of knowledge or events thereafter. Mr Cohen further submits that the Court will, or should, not allow a Claim to go to a full and very expensive trial (or trials) in such circumstances.

75. Mr Burton responds to the summary judgment application on similar lines, but also says that the question of Mr Vereschaka's actual or ostensible authority is a very live issue for the Authorisation Preliminary Issue, including because there was no apparent objective justification for his authorising the directing minds of the Claimant to be locked out of the Claimant's systems.
76. Mr Burton submits that the introduction of the "as far as the Claimant may be aware" wording in paragraph 41 of the APC is proper as reflecting the Claimant's actual belief where there had to be a statement of truth (in the form of "The Claimant believes the facts stated in this statement of truth to be true" under CPR 22 and its Practice Direction), and the Claimant could not be sure that it had full information as to what happened, particularly prior to disclosure and its expert having inspected the Defendants' devices. He did

confirm that paragraph 41 ran onto paragraph 43 which quantified the backup data at 5,215,642 bytes; and eventually confirmed that the Claimant was actually intending to allege that this backup data had actually been obtained notwithstanding the words used.

The Authorities

77. The parties have taken me to a number of authorities in this area, relevant elements of which I review as follows (and while I have considered their entirety, I have only cited limited elements below due to considerations of time and technology). I deal first with authorities regarding the substantive questions relating to the court's protection of confidentiality and then authorities dealing with pleading.
78. Mr Cohen referred me to passages in Section 2 within Part 9 of Snell on Equity: 24th Edn. In sub-section 9-013 it is said that the doctrine arises from the Claimant's "reasonable expectation" of confidentiality.
79. In sub-section 9-014 it is stated that, in the absence of a contractual promise (as is absent here), the underlying question in each case "is one of unconscionability... is the [Defendants'] state of mind such as to render it unconscionable to make a particular use of the information?"; and the sub-section goes on to discuss what type of knowledge of the "reasonable expectation of confidence" is sufficient to give rise to the "duty of confidence"; and finishes with stating that there is no defence of bona fide purchaser for value and that a person's "innocent receipt of information, in return for payment, may be taken into account when deciding what relief is available, but it does not give [the person] any absolute immunity and so [the

person]’s later acquisition of the necessary knowledge can still give rise to a duty of confidence”. Mr Cohen submitted that it can only be “unconscionable” to make a particular use of the information if it is known that there is a general reasonable expectation of confidence both generally (i.e. in the information itself) and such that the particular use is not permitted.

80. Sub-section 9-015 deals further with the situation of when B imparts information to C in breach of a duty of confidence owed by B to A (said by Mr Cohen to be the Claimant’s case in relation to Mr Vereschaka’s transmitting of the Passwords to the First Defendant) It states that C may be primarily liable to B if C does misuse with sufficient knowledge that the information is confidential (e.g. picking up a stranger’s diary); but that if C makes no use of the information then liability can only be on the basis of accessory liability by way of “knowing assistance”, being actual or Nelsonian of there being misuse or possibly (the work seems not to consider Ivey v Genting) dishonesty.

81. In his Reply, Mr Cohen also referred me to passages in Toulson and Phipps on confidentiality in Chapter 3. In its statements of general principle at 3-001, the authors make clear that “(1) the duty... may arise... as an equitable obligation (2) Key facts in establishing an equitable obligation are the nature of the information, the circumstances in which it was obtained and notice of its confidentiality (3) The circumstances must have been such as to import an obligation of confidentiality (4) the recipient must have notice that the information is confidential... (6) It is an essential ingredient of the action for breach of confidence that confidential information has been, or is threatened to

be misused. What constitutes misuse will depend on the circumstances of the case and the scope of the duty owed...”

82. At sub-section 3-053 the authors say that a third party recipient from someone who has breached their duty of confidence will owe a duty of confidence on the basis of it being equitable fraud to knowingly assist in such a breach. In paragraph 3-054 it is said that a lack of knowledge on receipt may not prevent a duty arising once knowledge is gained by “discovering the true position” except possibly if money or other detriment had been paid or incurred by the recipient in the meantime, although subsequent paragraphs query the existence or extent of such a defence.
83. I do not find these various sections to be of much assistance on the critical question on these applications as to whether there has to be knowledge of lack of authorisation for the relevant purpose, even though they regard knowledge as a key element of the arising of a relevant duty, unconscionability or equitable fraud. They do, however, make clear that a gaining of knowledge can give rise to a duty etc. even where such did not exist at the time of the original acquisition of the confidential information.
84. Mr Cohen took me to various cases. The first of these is Re: Smith Kline 1991 FCA 150 a decision of the Federal Court of Australia, and where at paragraph 20 it was said the substantial question there was as to the nature and extent of the confidentiality, and which seems to me to have been mainly directed as to what uses were actually authorised by the person whose confidential information it was.
85. Later in that judgment at paragraphs 48 to 52 it was said

"48. Megarry J. has suggested a broad test to determine whether an obligation of confidence exists. In *Coco v. A.N. Clark (Engineers) Ltd.* [\(1969\) RPC 41](#), Megarry J. said:

"It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence". (48)

49. However, this test does not give guidance as to the scope of an obligation of confidentiality, where one exists. Sometimes the obligation imposes no restriction on use of the information, as long as the confidEE does not reveal it to third parties. In other circumstances, the confidEE may not be entitled to use it except for some limited purpose. In considering these problems, and indeed the whole question, it is necessary not to lose sight of the basis of the obligation to respect confidences:

"It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained".

This is quoted from *Moorgate Tobacco Co. Ltd. v. Phillip Morris Ltd.* (No. 2) [\[1984\] HCA 73](#); [\(1984\) 156 CLR 414](#) at 438 per Deane J., with whom the other members of the Court agreed. A similar broad view has been taken in the United States: *E.I. Dupont de Nemours Powder Company v. Masland* [\(1917\) 244 US 102](#):

"Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations".

50. Similar expressions recur in other cases: *Seager v. Copydex Limited* ([1967](#)) *RPC 349* at 368:

"The law on this subject ... depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it".

51. To avoid taking unfair advantage of information does not necessarily mean that the confidEE must not use it except for the confider's limited purpose. Whether one adopts the "reasonable man" test suggested by Megarry J. or some other, there can be no breach of the equitable obligation unless the Court concludes that a confidence reposed has been abused, that unconscientious use has been made of the information.

52. Here, SKandF supplied, in pursuit of its commercial interests, a mass of information, part of which was confidential. It did not trouble to

identify that part when furnishing the information. Nor did it, until very late in the piece, make the assertion that was so much pressed upon us in this Court, namely that the Department could not make purely internal use of the information other than for SKandF's purposes, not even when public health and safety made that necessary. In those circumstances, it appears to us that the primary Judge was correct in concluding as he did that no equitable obligation was breached, except as to the use of the sample for the government of Papua New Guinea. "

86. This does emphasise something of a “reasonable person” approach to the duty of the confidee and that the duty is not to abuse or make unconscientious use, and which might suggest that there needs to be “knowledge of unauthorised purpose”, especially by reference to the words “fraudulently abuse the trust reposed in him” (which use of the word “fraudulently” may suggest a need for knowledge of misuse) as cited in paragraph 49, but the judgement is not directly concerned with the point before me. Instead it seems to have depended upon the confidee not having sufficient knowledge that the information was confidential combined with a failure to limit the purpose for which it was provided as set out in paragraph 52.

87. Mr Cohen then cited R v Department of Health ex p Source 2001 QB 424 where at paragraphs 24-25 it was said that²⁴. I have already cited one passage from Megarry J's judgment in *Coco* . In turning to the other main authorities I propose to be highly selective in citation. I start with the *Federal Court of Australia* in [*Smith Kline & French Laboratories \(Australia\) Limited v Department of Community Services and Health \(1991\) 99 ALR 679*](#) at 691:

“Megarry J has suggested a broad test to determine whether an obligation of confidence exists. In [Coco v A.N. Clarke \(Engineers\) Limited \[1969\] RPC 41](#) , Megarry J said (at 48):

‘It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.’

However, this test does not give guidance as to the scope of an obligation of confidentiality, where one exists. Sometimes the obligation imposes no restriction on use of the use [*sic*] of the information, as long as the confidant does not reveal it to third parties. In other circumstances, the confidant may not be entitled to use it except for some limited purpose. In considering these problems, and indeed the whole question, it is necessary not to lose sight of the basis of the obligation to respect confidences: ‘it lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.’ This is quoted from *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (1984) 156 CLR 414* at 438; *56 ALR 193* at 203 per Deane J, with whom the other members of the court agreed. A similar broad view has been taken in the United States: *E.I. Dupont de Nemours Powder Co v Masland (1917) 244 US 102* ...

Similar expressions recur in other cases: [Seager v Copydex Ltd \[1967\] RPC 349](#) at 368: ‘The law on this subject ... depends on the broad

principle of equity that he who has received information in confidence shall not take unfair advantage of it.’

To avoid taking unfair advantage of information does not necessarily mean that the confidEE must not use it except for the confider's limited purpose. Whether one adopts the ‘reasonable man’ test suggested by Megarry J or *13 some other, there can be no breach of the equitable obligation unless the court concludes that a confidence reposed has been abused, that unconscientious use has been made of the information.

...

We would add that in our opinion courts exercising equitable jurisdiction should not be too ready to import an equitable obligation of confidence in a marginal case. There is the distinction between use of confidential information in a way of which many people might disapprove, on the one hand, and illegal use on the other. Not only the administration of business and government, but ordinary communication between people, might be unduly obstructed by use of too narrow a test, such as that which the appellants put forward here.”

25. Many of those same citations had found their way into Bingham LJ's judgment in the *Court of Appeal* in the [Spycatcher case — Attorney General v Guardian Newspapers \(No. 2\) \[1990\] 1 AC 109](#) — in a passage setting out the relevant principles of law, later approved by the House of Lords. As to the duty of confidence generally, Bingham LJ at page 216 said this:

“The cases show that the duty of confidence does not depend on any contract, express or implied, between the parties. If it did, it would follow

on ordinary principles that strangers to the contract would not be bound. But the duty ‘depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.’ [Seager v Copydex Ltd. \[1967\] 1 WLR 923](#) , 931, per Lord Denning MR. ‘The jurisdiction is based not so much on property or on contract as on the duty to be of good faith’: [Fraser v Evans \[1969\] 1 QB 349](#) , 361, per Lord Denning MR. It accordingly ‘affects the conscience of the person who receives the information with knowledge that it has originally been communicated in confidence’: per Sir Nicolas Browne-Wilkinson V-C at the interlocutory stage of this case [\[1987\] 1 WLR 1248](#) , 1265. So it is appropriate that the enforceability of rights of confidence against third parties should be analysed in the traditional terms of equitable rights over property, as Sir Nicolas Browne-Wilkinson V-C did [\[1987\] 1 WLR 1248](#) ,1264D, and Nourse LJ did at an even earlier stage of this case *Attorney-General v Observer Ltd., The Times, 26 July 1986; Court of Appeal (Civil Division) Transcript No. 696 of 1986* .

***14**

The English law on this subject could not, I think, be more clearly or accurately stated than it was by the *High Court of Australia* in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No. 2) (1984) 156 CLR 414* , 437–438:

“It is unnecessary for the purposes of the present appeal, to attempt to define the precise scope of the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision,

some wider fiduciary duty or some copyright or trade mark right. A general equitable jurisdiction to grant such relief has long been asserted and should, in my view, now be accepted: see *Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39*, 50–52. Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.””

88. Paragraph 24 essentially adopts the Smith Kline paragraphs which I have already cited. Paragraph 25 cites an element of the Spycatcher 1990 1 AC 109 decision in the Court of Appeal and which stresses the not taking of unfair advantage of what is known to be confidential information. This, however, does not deal with the question of whether it is simply unfair to use it for an unauthorised purpose or whether there needs to be knowledge that such purpose was unauthorised. However, the concluding sentence does stress the importance of the circumstances of obtaining the information in considering the obligation of conscience.

89. Paragraph 31, however, reads

"To my mind the one clear and consistent theme emerging from all these authorities is this: the confidant is placed under a duty of good faith to the confider and the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more and no less. One asks, therefore, on the facts of this case: would a reasonable

pharmacist's conscience be troubled by the proposed use to be made of patients' prescriptions? Would he think that by entering Source's scheme he was breaking his customers' confidence, making unconscientious use of the information they provide?"

90. This Paragraph is somewhat more helpful to Mr Cohen as it stresses that the scope of the duty is to be judged is the conscience of the confidee, and whether a reasonable person in the position of the confidee would have been troubled by the proposed use and consider that unconscientious use was being made. That would seem to have potential to bring in consideration of what was known of the purpose or authorisation of the confidor or person entitled. However, the actual decision depended upon what the confidee would have considered was the legitimate rights of the person entitled in the relevant information rather than any question as to their purpose.
91. Mr Cohen then cited Vestergaard v Bestnet 2013 1 WLR 1556 and which concerned a claim for damages against a defendant who had formed a company with an ex-employee of the claimant to exploit what turned out to be the confidential information of the claimant, but where this defendant only learnt of the fact that it was confidential at a very late stage and possibly at the time of the first instance judgment. The improper exploitation was, of course, by the company and there was no suggestion that the corporate veil could simply be pierced and so some other way had to be sought to render the defendant liable financially.
92. The main reasoning of the Supreme Court is contained in Paragraphs 20 – 28

"Breach of confidence: preliminary observations

20. Vestergaard's contention that Mrs Sig is liable for breach of confidence is, as I understand it, put on three different bases. First, she is said to be liable under her employment contract, either pursuant to the express terms of clause 8 or pursuant to an implied term. Secondly, she is said to be liable on the basis that she was party to a common design, namely the design, manufacture and marketing of Netprotect, which involved Vestergaard's trade secrets being misused. Thirdly, she is said to be liable for being party to the breach of confidence, as she had worked for Vestergaard, and then formed and worked for the companies which were responsible for the design, manufacture and marketing of Netprotect.

21. In my opinion, each of these three arguments must fail because of the combination of two crucial facts. The first is that Mrs Sig did not herself ever acquire the confidential information in question, whether during the time of her employment with Vestergaard or afterwards. The second crucial fact is that, until some point during the currency of these proceedings (possibly not until Arnold J gave his first judgment), Mrs Sig was unaware that the Netprotect product had been developed using Vestergaard's trade secrets.

22. It would seem surprising if Mrs Sig could be liable for breaching Vestergaard's rights of confidence through the misuse of its trade secrets, given that she did not know (i) the identity of those secrets, and (ii) that they were being, or had been, used, let alone misused. The absence of such knowledge would appear to preclude liability, at least without the

existence of special facts. After all, an action in breach of confidence is based ultimately on conscience. As Megarry J said in [Coco v A N Clark \(Engineers\) Ltd \[1969\] RPC 41](#), 46, “[t]he equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust”.

23. The classic case of breach of confidence involves the claimant's confidential information, such as a trade secret, being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential – see eg per Lord Goff in [Attorney-General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109](#), 281. Thus, in order for the conscience of the recipient to be affected, she must have agreed, or must know, that the information is confidential.

24. The decision in [Seager v Copydex Ltd \[1967\] 1 WLR 923](#), on which Arnold J relied, was an entirely orthodox application of this approach. The plaintiff passed on to the defendants a trade secret about his new design of carpet-grip, and although the defendants realised that the secret was imparted in confidence, they went on to use that information to design a new form of carpet-grip, which they marketed. What rendered the case unusual was that the defendants (i) did not realise that they had used the information, as they had done so unconsciously, and (ii) believed that the law solely precluded them from infringing the plaintiff's patent. However, neither of those facts enabled them to avoid liability, as, once it was found that they had received the information in confidence, their state of mind

when using the information was irrelevant to the question of whether they had abused the confidence.

25. Liability for breach of confidence is not, of course, limited to such classic cases. Thus, depending on the other facts of the case, a defendant who learns of a trade secret in circumstances where she reasonably does not appreciate that it is confidential, may nonetheless be liable to respect its confidentiality from the moment she is told, or otherwise appreciates, that it is in fact confidential. From that moment, it can be said that her conscience is affected in a way which should be recognised by equity.

26. Further, while a recipient of confidential information may be said to be primarily liable in a case of its misuse, a person who assists her in the misuse can be liable, in a secondary sense. However, as I see it, consistently with the approach of equity in this area, she would normally have to know that the recipient was abusing confidential information. Knowledge in this context would of course not be limited to her actual knowledge, and it would include what is sometimes called “blind-eye knowledge”. The best analysis of what that involves is to be found in [*Royal Brunei Airlines Sdn Bhd v Tan \[1995\] 2 AC 378*](#), especially at pp 390F-391D, where Lord Nicholls approved the notion of “commercially unacceptable conduct in the particular context involved”, and suggested that “[a]cting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty”.

27. Further, even a person who did not know that the information which is being abused is confidential could nonetheless be liable if there were relevant additional facts. Thus, if a person who directly misuses a claimant's trade secret does so in the course of her employment by a third party, then the third party could (at least arguably) be liable to the claimant for the breach of confidence. However, that would simply involve the application of one well established legal principle, vicarious liability, to another, misuse of confidential information.

28. In this case, subject to considering Vestergaard's arguments in a little more detail, the position would seem to me to be as follows. First, unless her employment contract with Vestergaard imposed such a liability, Mrs Sig could not be primarily liable for misuse of confidential information, because she received no confidential information, or at least no relevant confidential information. Secondly, subject to the same qualification, she could not be secondarily liable for such misuse, as she did not know that Dr Skovmand was using, or had used, Vestergaard's confidential information in order to develop the Netprotect product. Thirdly, it was not contended that Mrs Sig could be vicariously liable for any misuse of Vestergaard's confidential information by Dr Skovmand (perhaps unsurprisingly, as it would seem that Dr Skovmand worked for Intection and then Bestnet, as did Mrs Sig, either as director, or through 3T)."

93. However, it is also relevant what was said in relation to the "common design" argument in Paragraphs 32-39

"32. I turn, then, to the second, and most strongly advanced, ground upon which Vestergaard's case rests, namely that Mrs Sig was liable for breach of confidence on the basis of common design. This argument proceeds on the basis that Dr Skovmand, Mr Larsen and Mrs Sig all worked together to design, manufacture and market Netprotect products, and as these products were designed by Dr Skovmand in a way which involved his wrongfully misusing Vestergaard's trade secrets so as to render him liable for breach of confidence, Mrs Sig and Mr Larsen are liable together with him.

33. I accept that common design can, in principle, be invoked against a defendant in a claim based on misuse of confidential information; I am also prepared to assume that, in the light of the findings made by the Judge, Mr Larsen was liable on that ground (as he knew that Dr Skovmand was misusing, and had used, Vestergaard's trade secrets when designing Netprotect). However, I cannot see how Mrs Sig could be so liable, in the light of her state of mind as summarised in para 22 above.

34. As Lord Sumption pointed out in argument, in order for a defendant to be party to a common design, she must share with the other party, or parties, to the design, each of the features of the design which make it wrongful. If, and only if, all those features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some other relevant acts, will not stop them all from being jointly liable. In this case, Mrs Sig neither had the trade secrets nor knew that they were being misused, and therefore she did not share one of the features of the design which rendered it wrongful, namely the necessary

state of knowledge or state of mind. Accordingly, although she was party to the activities which may have rendered other parties liable for misuse of confidential information, she cannot be liable under common design.

35. A driver of the motor car who transports a person to and from a bank to enable him to rob it, would be liable in tort for the robbery under common design or some similar principle, but only if she knew that her passenger intended to rob, or had robbed, the bank. So, in this case, given the ingredients of the wrong of misuse of confidential information, and given that she never had any relevant confidential information, Mrs Sig cannot be held liable in common design for exploiting with others, on behalf of Intection and then Bestnet, a product which, unknown to her, was being and had been developed through the wrongful use of Vestergaard's trade secrets.

36. We were taken to two decisions, which, it was suggested, are inconsistent with that conclusion. The first is [*Unilever Plc v Gillette \(UK\) Ltd \[1989\] RPC 583*](#), 609, where Mustill LJ said that, in order to show that a defendant was secondarily liable for infringement of a patent, “there [was no] need for a common design to infringe”, as it was “enough if the parties combine to secure the doing of acts which in the event prove to be infringements”. I do not doubt the correctness of that statement, but it has no application here.

37. Patent infringement is a wrong of strict liability: it requires no knowledge or intention on the part of the alleged infringer, whose state of mind is wholly irrelevant to the issue of whether she infringes the patent. Thus, the fact that the alleged infringer did not know of the existence,

contents or effect of the patent is completely irrelevant to the question of infringement, even if she had thought the invention up for herself. Accordingly, it is entirely logical that a person who, while wholly innocent of the existence, contents or effect of the patent, is nonetheless secondarily liable if she assists the primary infringer in her patent-infringing acts. It cannot possibly follow that the same approach is appropriate in a case for a person who assists the primary misuser of trade secrets, given that it is necessary to establish the latter's knowledge and/or state of mind (as explained in paras 22-25 above) before she can be liable for the misuse.

38. The second case relied on by Vestergaard is [*Lancashire Fires Ltd v S A Lyons & Co Ltd \[1996\] FSR 629*](#). In that case, an injunction to restrain the misuse of the plaintiff's confidential information was granted against a Ms Magnall on the ground she had had “a common design with [another] to manufacture [certain products] and the process used was found to be confidential to the plaintiff” – p 677. It appears that, while she had been aware of the nature of the process, Ms Magnall had not been aware of the fact that the manufacture of those products involved a process which had been wrongly developed with the benefit of the plaintiff's trade secrets. Sir Thomas Bingham MR said at p 677, that it was “just that Susan Magnall should be precluded from disclosing the information to others” and therefore granted an injunction against her.

39. As already explained in para 25 above, I have no difficulty with the idea that a person who receives and uses confidential information, but does not appreciate that it is confidential, can be liable for using that

information once she appreciates that it is indeed confidential. Accordingly, in this case, the grant of an injunction against Mrs Sig, if she was threatening to use or pass on Vestergaard's trade secrets, might well be justified, once it could be shown that she appreciated, or, perhaps, ought to have appreciated, that they were confidential to Vestergaard. However, I do not see how that can entitle Vestergaard to damages from Mrs Sig in respect of losses suffered from misuse of their trade secrets at a time when Mrs Sig was honestly unaware of the fact that there had been any misuse of their trade secrets. I note that in *Lancashire*, immediately after the short passage I have just quoted, Sir Thomas Bingham MR added that “[i]f the plaintiff seeks financial relief against Susan Magnall, we shall need to hear further argument before deciding the point.” (I should add that it appears that *Lancashire* may not have been as fully argued as it might have been in one respect, in that, at least at first instance, it was apparently conceded that the principle in *Unilever*, as discussed above, applied to confidential information cases, whereas, for the reason I have given in para 37 above, this is wrong.)”

94. Accessory liability was dealt with in Paragraphs 40-43

"40. In so far as I understand the third way of putting Vestergaard's case, (i) it involves saying that Mrs Sig had “blind-eye knowledge” of the fact that Dr Skovmand was using Vestergaard's trade secrets, or (ii) it amounts to contending that Mrs Sig should be liable for misuse of confidential information, as she must have appreciated that she was, to use a well worn

metaphor, playing with fire, when she started up the new business with Mr Larsen, employing Dr Skovmand, in 2004.

41. These two alternative ways of presenting Vestergaard's third ground are quite close in their import, and in a sense they can both be said to involve an attempt to conflate the first and second grounds, albeit in a somewhat incoherent way. In the end they each must fail, essentially because of findings of fact made (or, in many respects, understandably not made) by the Judge.

42. So far as argument (i) is concerned, it cannot succeed without a finding against Mrs Sig of dishonesty of the sort characterised by Lord Nicholls in *Royal Brunei*, as discussed in para 26 above. There is no such finding, and it seems to me clear from the conclusions which the Judge did reach, as summarised in para 15 above, that there was no basis for his making any finding of relevant dishonesty on the part of Mrs Sig.

43. As to argument (ii), it is not enough to render a defendant secondarily liable for misuse of trade secrets by another to establish that she took a risk in acting as she did. The fact that she took a risk might often render it easier to hold that she was dishonest, but, by definition, it is not enough on its own. To revert to the metaphor, if one plays with fire, one is more likely to be burnt, but it does not of itself mean that one is burnt."

95. Mr Cohen points to various elements of these citations in support of his submission that knowledge of lack of authorisation is required, and Mr Burton to others, including:

- i) The reference in paragraph 22 to judicial surprise if there could be liability when there was no knowledge of misuse, and which seems there to be distinct, at least to some extent, from knowledge of confidentiality, and which Lord Neuberger seems to be saying is crucial to an action based on conscience
- ii) The references in paragraph 23 to the classic case of whether a confidEE knows or ought to have appreciated that the information is confidential. However, this passage seems to relate more to the nature of the information than to purpose
- iii) Paragraph 24 and the decision in Seager v Copydex where it was held that once there is knowledge of confidentiality then a belief that use is legitimate in law is irrelevant. That may suggest that knowledge that the information is confidential is sufficient but does not really deal with the question of whether it is necessary that there be knowledge that the use is unauthorised in fact
- iv) Paragraph 25 makes clear that circumstances may change so that a person who originally received information without knowledge of confidentiality becomes bound once they do gain or ought to have such knowledge as their conscience is then affected. Paragraph 39 makes clear that an injunction can then be granted but not damages
- v) Paragraph 26 and Paragraph 34 state that the concept of “common design” cannot assist where a person “neither had the trade secrets nor knew that they were being misused” and so lacked necessary knowledge. However, here the Defendants had the Passwords and so,

while emphasising the importance of knowledge, these passages do not seem be determinative

- vi) Paragraphs 26 and 40-43 make clear that accessory liability depends upon actual or Nelsonian knowledge of wrongdoing by the principal being assisted.

96. Mr Cohen (and Mr Burton) then took me to Valeo Vision v Flexible Lamps 1995 RPC 205 where the defendant had been given the claimant's confidential information by an entity which had obtained it from the claimant for use only for specific purposes, and utilised it for purposes not authorised by the claimant but without knowledge (even on a constructive knowledge "ought to have known") that it was even the claimant's confidential information. At page 227 line 42 to page 228 line 20 it was said that

"At the heart of the plaintiffs' submission is their allegation that the defendant has benefited from the use of the plaintiffs' confidential information without the plaintiffs' consent and it would not be appropriate for them to retain that benefit. It was submitted that they are not entitled to keep the profit from the use of confidential information. That submission is not supported by the judgment of Sir John Donaldson M.R. in the case of Attorney-General v. Guardian Newspapers (No. 2) [1990] 1 A.C. 109 .

At page 177 he said:

"Since the right to have confidentiality maintained is an equitable right, it will (in legal theory and practical effect if the aid of the court is invoked) 'bind the conscience' of third parties, unless they are *bona fide* purchasers for value without notice (*per* Nourse L.J., on the 25 of July 1986 in

the *228 interlocutory proceedings *Attorney-General v. Observer Limited*,
Court of Appeal (Civil Division) Transcript No. 696 of 1986).”

It is clear from that quotation that there are circumstances in which the right to have confidentiality maintained cannot be asserted against third parties. The Master of the Rolls there refers to one case, namely, that of the *bôna fide* purchaser for value without notice. In the present case, the defendant was not a *bôna fide* purchaser without notice as they obtained the information from M.A.N. However, they did not know of the plaintiffs' right to the information. In my view, using the words of the Master of the Rolls, it did not bind their conscience. Thus, although the court may step in to grant injunctive relief, I do not believe that it would be right to grant an inquiry as to damages. I believe that only in cases where the conscience of the defendant is bound would it be appropriate to grant relief by way of damages. Thus for an inquiry to be ordered, it is necessary to establish knowledge or for there to be circumstances in which the defendant ought to have known or there were reasonable grounds for the defendant to know that the use was wrongful. I therefore come to the conclusion that I shall not accede to the plaintiffs' request for an inquiry as to damages in respect of the plaintiffs' confidential information."

97. I note in particular that:

- i) Aldous J at page 227 held that an injunctive remedy to prevent dissemination of confidential information would exist where a person obtained confidential information in circumstances that the provider

was not authorised to give it to them. An injunction was not there sought (or granted) as a matter of discretion (the reason is not given although the obvious probability is because the defendant had acted to its detriment in ignorance)

- ii) Aldous J then reviewed Seager v Copydex and distinguished it on the basis that the information was obtained and used when the defendant believed that they had the right to use it. However, here and later, Aldous J did refer to the defendant not even knowing that the information was the claimant's confidential information
- iii) However, on page 228 Aldous J made clear that even though in his circumstances "... the court may step in to grant injunctive relief, I do not believe that it would be right to grant an inquiry as to damages. I believe that it is only in cases where the conscience of the defendant is bound would it be appropriate to grant relief by way of damages. Thus for an inquiry to be ordered, it is necessary to establish knowledge or for there to be circumstances in which the defendant ought to have known or there were reasonable grounds for the defendant to know that the use was wrongful..." I note that at page 227 Aldous J also seems to have been considering a remedy (presumably an account) for disgorgement of profits made. He rejected such a financial remedy, and his words seem to base that conclusion upon lack of knowledge of wrongfulness and not merely use of known confidential information for a purpose which was actually (even if not known to be) unauthorised.

98. Mr Cohen took me to Campbell v MGN 2003 QB 633 and paragraphs 66-69

"66. Where a third party receives information that has been disclosed by his informant in breach of confidence owed to the confider, the third party will come under a duty of confidence to the confider if he knows that the information has been obtained in breach of confidence. This principle is derived from the doctrine that it is equitable fraud in a third party knowingly to assist in a breach of trust, confidence or contract by another — see *Toulson & Phipps on Confidentiality* at 7–02 and the cases there cited.

67. The mental element necessary to render a defendant liable as an accessory to a breach of trust has been refined by the decisions of the [*House of Lords in Royal Brunei Airlines v Tan \[1995\] 2 AC 378*](#) and [*Twinsectra v Yardley \[2002\] 2 WLR 802*](#). On this jurisprudence Mr Browne constructed an ambitious submission that, in a case such as this, a defendant will only be liable for breach of confidence if (a) he knows that the information that he publishes is confidential and (b) he knows that publication cannot be justified on the ground that it is in the public interest. Thus, so he submitted, an editor who publishes material that he knows is confidential in the mistaken belief that this is in the public interest will not be guilty of breach of confidence. He will only be liable if he has acted dishonestly.

68. We consider that these submissions are misconceived. As *Toulson & Phipps* remark at 7–03, while dishonesty is a natural word to use in relation to misappropriation of trust property or misuse of confidential information of a commercially valuable kind, it is not an appropriate word to use in relation to the publication of information about someone's private

life in circumstances which would make the publication offensive to any fair-minded person. We consider that the media can fairly be expected to identify confidential information about an individual's private life which, absent good reason, it will be offensive to publish. We also believe that the media must accept responsibility for the decision that, in the particular circumstances, publication of the material in question is justifiable in the public interest.

69. The suggestion that complex tests of the mental state of the publisher have to be satisfied before breach of confidence can be made out in respect of publication of information which violates the right of enjoyment of private or family life is not acceptable. Mr Browne has only been able to advance such a suggestion because of the shoe-horning into the tort of breach of confidence publication of information that would, more happily, be described as breach of privacy."

99. Paragraphs 68-69 make clear that this decision is of limited application to the case before me. It is some obiter authority for the general proposition that a confidant only comes under a duty "if he knows that the information has been obtained in breach of confidence", but no distinction is drawn between the situation where the confidant does not know that the information is confidential, and the situation before me where it is common ground that the confidant knew that the information was confidential and the real question is whether they need to know that their use is unauthorised. Nevertheless, there is some force in Mr Cohen's argument that the dicta say that for accessory liability there has to be knowing assistance in the sense of there being

knowledge that what is being done (albeit by the confider) is actually wrongful.

100. Mr Cohen in reply took me to Thomas v Pearce 2000 FSR 718 which involved an ex-employee taking confidential information to her new employer who then sent out a circular based upon it. A claim against the new employer for knowing assistance failed on the basis that the employer (through other employees) had not acted dishonestly, that having been alleged on the basis of subjective actual or Nelsonian knowledge of the ex-employee having acted in breach of duties owed to the old employer. The decision can be said to support Mr Cohen both in its terms and on its facts which have some similarity to the Claimant's case before me. However, as set out at pages 719 and 720 that claim seems to have proceeded on the basis that it was common ground that the old employer needed to show that the new employer had knowledge that the ex-employee was passing on the information in breach of duty of confidence. An argument, as in this case from the Claimant, that it was sufficient for the new employer to have received what it knew to be confidential information, and where such receipt was on an unauthorised basis, does not seem to have been advanced.

101. Mr Burton responded to these authorities in particular by taking me to the Court of Appeal decision in Tchenguz v Imerman 2010 EWCA Civ 908 and its review of the judicial history of the development of the law of protection of confidential information, and the principles for awarding of injunctive relief, at Paragraphs 54-74:

"The nature of a claim in confidence

54. The law of confidence was developed by the Courts of Chancery over the eighteenth and nineteenth centuries. Typically, a claim for breach of confidence arose in the commercial context, and in circumstances where there was no question but that the defendant was entitled to have obtained the information concerned initially. Thus, in perhaps the most familiar and frequent category of case, involving trade secrets and the like, the claimant himself will have provided the defendant with the information, as, at the relevant time, the defendant will have been an employee or agent of the claimant. In such cases, the claimant cannot allege that the defendant is not entitled to have the information, let alone complain that he did anything legally wrong or morally culpable to obtain the information in the first place. What the claimant could do was to complain if the defendant made illicit copies of confidential papers or misused the information for his own, rather than his principal's, purposes.

55. The earliest cases on the topic pre-date even the days of Lord Eldon LC. However, the jurisprudence really starts with a number of his decisions and then continues throughout the nineteenth century. There are many reported cases but it is convenient to start with the celebrated case of [*Prince Albert v Strange \(1849\) 1 Mac & G 25*](#), the facts of which are too well known to require repetition. It suffices to say that the claim was brought against various defendants who were involved in the copying and proposed publication of etchings of the Royal family made by Prince Albert which, as Lord Cottenham LC put it (page 41), had been “surreptitiously and improperly obtained.”

56. Lord Cottenham LC stated the general principle as follows (page 44):

“a breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction. The Plaintiff’s affidavits state the private character of the work or composition, and negative any licence or authority for publication ... To this case no answer is made, the Defendant saying only that, he did not, at the time, believe that the etchings had been improperly obtained, but not suggesting any mode by which they could have been properly obtained ... If, then, these compositions were kept private, ... the possession of the Defendant, or of his intended partner Judge, must have originated in a breach of trust, confidence or contract ...; and ... in the absence of any explanation on the part of the Defendant, I am bound to assume that the possession of the etchings by the Defendant and Judge has its foundation in a breach of trust, confidence or contract ...; and upon this ground ... I think the Plaintiff’s title to the injunction sought to be discharged, fully established.”

57. He added (page 46):

“The cases referred to ... have no application to cases in which the Court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what this Court considers and treats as a wrong ... arising from a ... breach of ... confidence, as in the present case and the case of Mr Abernethy’s lectures; ... In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend upon any legal right, and to be effectual, it must be immediate.”

58. The relief sought against the defendants included the delivery up of all copies of the plaintiff's etchings. At trial this part of the order was resisted. Knight Bruce VC made the order sought. He said this ((1849) 2 De G & Sm 652, page 716):

“It is ... said that neither the copies of the catalogue, nor the impressions that have been taken, can be delivered, or be directed to be delivered up, inasmuch as the Defendant contends that he is entitled to the property in the materials on which they are printed. With regard to catalogues, no such question, I think, arises. They must be either cancelled or destroyed; and without destruction they can hardly be cancelled. With regard to the impressions, it might possibly be right to attend to the Defendant's claim, had the impressions been upon a material of intrinsic value – upon a material not substantially worthless, except for the impressions which, by the wrongful act of the Defendants, had been placed there. That case, however, does not arise. The material here is substantially worthless, except for that in which the Defendant has no property. There can consequently be no reason why the effectual destruction of subject should not be directed by the court.”

59. It is convenient to go next to [*Morison v Moat \(1851\) 9 Hare 241*](#), a decision of Sir George Turner VC, affirmed on appeal to the Lords Justices, which has been frequently cited with approval. It concerned a servant, Moat, who had sought to use a secret formula of his employer's. The relief sought was an injunction to restrain use of the formula. In a much quoted passage (page 255) which there is no need for us to set out,

the Vice Chancellor reiterated the principles, as to which he said there was “no doubt.” He added (page 263):

“The Defendant admits that the secret was communicated to him by Thomas Moat ... The question then is whether there was an equity against him; and I am of opinion that there was. It was clearly a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The Defendant derives under that breach of faith and of contract, and I think he can gain no title by it ... the cases of *Tipping v Clarke* and *Prince Albert v Strange* shew that the equity prevails against parties deriving under the breach of contract or duty.

It might indeed be different if the Defendant was a purchaser for value of the secret without notice of any obligation affecting it; and the Defendant's case was attempted to be put upon this ground ... but I do not think that this view of the case can avail him ... So far as the secret is concerned he is a mere volunteer deriving under a breach of trust or of contract.”

60. [*Prince Albert v Strange \(1849\) 1 Mac & G 25*](#) and [*Morison v Moat \(1851\) 9 Hare 241*](#) were cited with approval by Kay LJ in [*Lamb v Evans \[1893\] 1 Ch 218*](#) . Referring (page 235) to cases where an employee has “surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence”, Kay LJ said that the employee “has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it.” In [*Robb v Green \[1895\] 2 QB 1*](#) (another employee case) the relief granted included an order for delivery

up to the plaintiff of all copies or extracts from the plaintiff's papers in the defendant's possession or under his control. The judgment and order were upheld by the Court of Appeal: [Robb v Green \[1895\] 2 QB 315](#) , per Kay LJ (page 319):

“On whatever ground it is put, it is clear in this case that an injunction ought to be granted ... The other items of relief granted are the delivery up of the list made and the damages. With regard to the first, it seems to me clear that such a document surreptitiously made in breach of the trust reposed in the servant clearly ought to be given up to be destroyed.”

61. Many of the cases on the use of confidential information are confused by the fact that the documents concerned not only contain confidential information but were privileged. That was the position in one of the best known cases on the topic, [Lord Ashburton v Pape \[1913\] 2 Ch 469](#) . In that case a third party who had received the confidential and privileged document from the plaintiff's clerk was restrained from using it and required to hand it back to the plaintiff. The court approached the claim on the basis that it was based on confidence, presumably on the somewhat archaic basis that privilege had been lost: see [Calcraft v Guest \[1898\] 1 QB 759](#) . Although there appears to have been no claim for return of copies, Swinfen Eady LJ plainly thought (page 477) that an order could be made for delivery up of both originals and copies, a conclusion entirely consistent with the earlier authorities to which we have referred.

62. In [Duchess of Argyll v Duke of Argyll \[1967\] Ch 302](#) , Ungood-Thomas J granted the plaintiff an injunction to restrain the defendant, her former husband, from publishing “secrets of the plaintiff relating to her

private life, personal affairs or private conduct, communicated to the first defendant in confidence during the subsistence of his marriage to the plaintiff and not hitherto made public property.” He said (page 322) that: “the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.”

Later (page 333) he added:

“an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come.”

63. [*ITC Film Distributors Ltd v Video Exchange Ltd \[1982\] Ch 431*](#) was a case where a defendant had got possession of his opponent's papers, including certain privileged material, by a trick. Having referred to [*Lord Ashburton v Pape \[1913\] 2 Ch. 469*](#), Warner J (page 438) said this:

“that was not an isolated decision but is illustrative of a general rule that, where A has improperly obtained possession of a document belonging to B, the court will, at the suit of B, order A to return the document to B and to deliver up any copies of it that A has made, and will restrain A from making any use of any such copies or of the information contained in the document.”

He added (page 440) that, had the plaintiff applied in time for relief against the defendant on the lines of that granted in [*Lord Ashburton v Pape \[1913\] 2 Ch. 469*](#), “I have little doubt that ... they would have been held entitled to it.”

64. It was only some twenty years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in [*Attorney General v Guardian Newspapers Ltd \(No 2\)* \[1990\] 1 AC 109](#) . He said (page 281) that confidence could be invoked “where an obviously confidential document is wafted by an electric fan out of a window ... or ... is dropped in a public place, and is picked up by a passer-by.”

65. The domestic law of confidence was extended again by the [*House of Lords in Campbell v MGN Ltd* \[2004\] UKHL 21](#) , [2004] 2 AC 457, effectively to incorporate the right to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll* and [*Hellewell v Chief Constable of Derbyshire* \[1995\] 1 WLR 804](#) . In the latter case, Laws J suggested (page 807) that the law recognised “a right to privacy, although the name accorded to the cause of action would be breach of confidence”. It goes a little further than nomenclature in that, in [*Wainwright v Home Office* \[2003\] UKHL 53, \[2004\] 2 AC 406](#), the [*House of Lords*](#) held that there was no tort of invasion of privacy, even now that the [*Human Rights of Act 1998*](#) is in force. Nonetheless, following its later decision in *Campbell* , there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in [*Douglas v Hello! Ltd \(No 3\)* \[2005\] EWCA Civ 595, \[2006\] QB 125](#) , a

claim based on misuse of private information has been “shoehorned” into the law of confidence.

66. As Lord Phillips's observation suggests, there are dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell* , paragraphs [21], [85], namely whether the claimant had a “reasonable expectation of privacy” in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in [*Coco v A N Clark \(Engineers\) Ltd \[1969\] RPC 41*](#) , page 47, namely whether the information had the “necessary quality of confidence” and had been “imparted in circumstances importing an obligation of confidence”.)

67. As stated in Stanley on *The Law of Confidentiality: A Restatement* (2008), page 4,

“Cases asserting an ‘old fashioned breach of confidence’ may well be addressed by considering established authority [whereas c]ases raising issues of personal privacy which might engage article 8 ... will require specific focus on the case law of the European Court of Human Rights”. However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the confidentiality *genus* , the law should be developed and applied consistently and coherently in both privacy and ‘old fashioned

confidence' cases, even if they sometimes may have different features.

Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past twenty years.

68. If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, *a fortiori*, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. The notion that looking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (albeit perhaps only in equity) is also consistent with the decision of the Strasbourg court that monitoring private telephone calls can infringe the article 8 rights of the caller: see *Copland v United Kingdom* (2007) 25 BHRC 216, (2007) 45 EHRR 37 .

69. In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of

the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost.

70. In this connection, we were taken to the observation of Eady J in [White v Withers LLP \[2008\] EWHC 2821 \(QB\)](#), para [8], that “the mere receipt of documents by the solicitors from their client and their continued retention in connection with the matrimonial proceedings simply cannot give rise to a cause of action”. In our view, that observation (which may in any event have been limited to a cause of action in damages) should be taken as applying only to the receipt of documents by solicitors from their client; further, it should not be taken as suggesting that the claimant could not recover the documents from the solicitors.

71. The fact that the law of confidentiality was extended in Campbell for the purpose of giving effect to article 8 in English law, cannot, as we see it, mean that the law of confidentiality has somehow been circumscribed in other respects. The fact that misuse of private information has, as Eady

J said in *White v Withers*, “become recognised over the last few years as a wrong actionable in English law” does not mean that there has to be such misuse before a claim for breach of confidentiality can succeed, unless that was the position before the [Human Rights Act 1998](#) came into force, which it was not. (It is only fair to mention, that in *White v Withers* the appeal against Eady J's decision was not pursued on the issue of confidentiality: [2010] EWCA Civ 1122, [2010] 1 FLR 859, para [40]. Ward LJ's *obiter* approval (para [23]) of what Eady J said related to the suggestion of misuse by the solicitors.)

The relief to be granted where there is a breach of confidence

72. If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information.

73. An injunction to restrain passing on, or using, the information, would seem to be self-evidently appropriate – always subject to any good reason to the contrary on the facts of the case. If the defendant has taken the documents, there can almost always be no question but that he must return them: they are the claimant's property. If the defendant makes paper or

electronic copies, the copies should be ordered to be returned or destroyed (again in the absence of good reason otherwise). Without such an order, the information would still be “out there” in the possession of someone who should not have it. The value of the actual paper on which any copying has been made will be tiny, and, where the copy is electronic, the value of the device on which the material is stored will often also be tiny, or, where it is not, the information (and any associated metadata) can be deleted and the device returned.

74. A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules apply. Thus, while one would normally expect a court to grant the types of relief we have been discussing, it would have a discretion whether to refuse some or all such relief on familiar equitable principles. Equally, the precise nature of the relief which would be granted must depend on all aspects of the particular case: equity fashions the appropriate relief to fit the rights of the parties, the facts of the case, and, at least sometimes, the wider merits. But, as we have noted, where the confidential information has been passed by the defendant to a third party, the claimant's rights will prevail as against the third party, unless he was a *bona fide* purchaser of the information without notice of its confidential nature."

102. I note that in many of the cases cited injunctions appear to have been granted simply because the defendant held confidential information without authorisation from the claimant whose confidential information it was; and those injunctions included delivery up or destruction of the material, or material derived from it, and prohibitions of dissemination (see e.g.

Paragraphs 59, 60 and 62 dealing with Prince Albert v Strange, and Moat v Morison and Duchess of Argyll v Duke of Argyll, all cases of an innocent recipient from a wrongdoer).

103. I also note that in Paragraph 69 it appears to be held that the claimant should have, as a matter of right, the various injunctions. While Paragraph 69 refers at one point to there being a threat by the defendant to disseminate, Paragraphs 72 and 73 seem to impose no such limitation and proceed on the bases that (i) the information belongs to the claimant and no-one else should have it and (ii) the claimant should not have to face any risk of the defendant, even inadvertently, releasing it.

104. Mr Burton also took me to the House of Lords decision in Spycatcher 1990 1 AC 109 and pages 281C-282C

"...though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I

have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public - a point to which I shall refer in a moment. I have however deliberately avoided the fundamental question whether, contract apart, the duty lies simply "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained" (see *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. (No. 2)* (1984) 156 C.L.R. 414 , 438, *per* Deane J., and see also [Seager v. Copydex Ltd. \[1967\] 1 W.L.R. 923](#) , 931, *per* Lord Denning M.R.), or whether confidential information may also be regarded as property (as to which see Dr Francis Gurry's valuable monograph on Breach of Confidence (1984), pp. 46-56 and Professors Birks' *An Introduction to the Law of Restitution* (1985), pp. 343-344). I would also, like Megarry J. in [Coco v. A. N. Clark \(Engineers\) Ltd. \[1969\] R.P.C. 41](#) , 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment *282 or potential detriment to the

plaintiff will nearly always form part of his case; but this may not always be necessary. Some possible cases where there need be no detriment are mentioned in the judgment of Megarry J. to which I have just referred (at p. 48), and in Gurry, *Breach of Confidence*, at pp. 407-408. In the present case the point is immaterial, since it is established that in cases of Government secrets the Crown has to establish not only that the information is confidential, but also that publication would be to its "detriment" in the sense that the public interest requires that it should not be published. That the word "detriment" should be extended so far as to include such a case perhaps indicates that everything depends upon how wide a meaning can be given to the word "detriment" in this context. To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall revert to this limiting principle at a later stage.

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point."

105. That decision concerned an application for an injunction rather than any question of damages. In those passages Lord Goff queried the general use of the confidor/confidee type of terminology, and referred to the situation of a duty of confidence being imposed in the situation of a simple obtaining of an obviously confidential document without its having been “confided” by anyone. He also expressly refused to engage with the question whether the duty arose from the circumstances themselves giving rise to an obligation of confidence or an analysis based on the claimant having a property in the information (which latter analysis might be said to give some support to Mr Burton’s contention that mere misuse is enough).
106. In relation to the points based on pleading and the CPR, Mr Cohen took me first to White Book 16.4.6 with its references to the purpose of a Statement of Truth being to avoid cases being pleaded which were unsupported by evidence. That may be one indirect purpose (as a belief would not ordinarily be held without evidence) but in my view, a Statement of Truth is precisely what it purports to be, i.e. a statement that someone believes (even if only on the civil standard of proof i.e. more likely than not) that an asserted fact is actually the case. Lack of evidential support may feed into that question, but CPR24 and its provisions for summary judgment are the CPR’s solution to claims brought without evidence.
107. In the context of both the test under CPR3.4(2)(a) “no reasonable grounds” and paragraph 41 of the APC and the pleading of “so far as the Claimant is aware” Mr Cohen drew my attention to Wrightson v Flor and Others 2018 EWHC 3036 where a Claimant was unsure of the identity of the correct

defendant (being the person responsible in fact or in law for allegedly placing a bottle of bleach on a desk, and which bottle he had consumed) and had said that he “does not know the precise contractual relationships” and “the following represents his understanding of the complex relationships between the parties” and after some years had still not definitively alleged who was responsible.

108. Mr Cohen referred me to Paragraphs 14-15:

"14. There has been an issue before me as to whether the court should look only at the statement of case or should look beyond that to the procedural context of the litigation in which this application is made. It seems to me that it would be artificial in the circumstances of this case to confine my considerations to the wording of the statement of case. It seems to me that a statement of case can clearly disclose grounds for bringing the claim, but what I have to consider is whether those grounds for bringing the claim are reasonable in the wider circumstances of the case, and that is the way in which I approach these applications.

15. I deal first with the allegation that the claimant is employed by either the sixth or tenth defendants made at para.27 of the draft amended particulars of claim. It is pointed out on behalf of the defendants that that is contrary to a number of previous assertions made by the claimant, first of all, in the letters of claim written to each defendant in 2014. It is contrary to an assertion made recently in an updated case summary prepared for the hearing before Master Thornett in April 2018, in particular, para.3 and para.7 of that case summary, and indeed it is

contrary to an assertion made in the claimant's skeleton for this hearing, at para.6, wherein it is asserted that the claimant was employed by the first defendant."

and then Paragraphs 21-25

"21. It seems to me that the difficulty with the claimant's position today is that he has not taken any steps, save by pre-action request, to obtain such disclosure, even though he asserts that he needs it in order to properly plead his case. That position is compounded by the order of Master Thornett when the claimant was given full opportunity to apply for directions in order to clarify his pleaded case and he chose not to, rather, it seems, relying on the pleading as it now stands and looking to the next stage of the procedural process for disclosure to take place within the litigation.

22. I accept that the claimant has little knowledge of the true position, but, even if he only has a suspicion or belief on which he wishes to found his claim, the basis of that suspicion or belief has not been set out when it could have been, so that the defendants know where they stand. Pleadings or statements of case are intended to be "a concise statement of the facts on which the claimant relies." [CPR 16.4\(1\)\(a\)](#) . They are intended to let an opponent know the case which he has to meet. They are also intended that the issues of fact or law can be identified at an early stage the statements of case and hopefully narrowed. This pleading in its amended form contains a bare assertion against a backdrop of denials from each defendant, both as to occupation and as to employment. It seems to me

that the defendants are no better off today in knowing the cases that they have to meet in relation to each of those issues than they did when the original particulars of claim were served in 2015.

23. It is now six years since the accident. It is four years since proceedings were commenced. It is three and a half years since the original particulars of claim were served. In this procedural context, the claimant has been given ample opportunity to amend and to seek directions to enable him to clarify his case, but he has failed to do that. In those circumstances, there being no factual basis pleaded on which the bare assertions of employment and occupation are made, I am afraid I cannot conclude that the grounds for bringing the claim which are pleaded are reasonably pleaded or are reasonable. As I say, it does not now lie well in the mouth of the claimant to say that he made need disclosure when he has had that opportunity for several years and was given it lastly by Master Thornett in April of this year.

24. I recognise that there are many cases where the claimant does not have the knowledge to identify the defendants or the basis of liability, in particular, where there are a number of organisations which might or could be related to the employment or the systems of work which a claimant has to deal with. But to wait six years post-accident before even attempting to find out the proper legal basis for the claim which is to be made, it seems to me, cannot be said to be reasonable. It is not reasonable after this length of time for the defendants to have to continue to investigate this case on the basis of an un-particularised allegation that

they owed a duty of care without any proper assertion as to how that duty of care arose.

25. I therefore conclude that there are no reasonable grounds pleaded for bringing this claim and, therefore, I would propose to strike out the amended particulars of claim, if an amendment were allowed. So the defendants' applications will succeed and the claimant's application will fail."

109. Mr Cohen relied on these Paragraphs to submit that the Claimant should by now know what its case is, and in particular after the investigations, affirmations and witness statements from the earlier interim stages of this litigation, and so has no excuse for either not pleading knowledge or pleading only "so far as the Claimant is aware" and submitted that now was the time to strike-out.
110. Mr Burton maintained that this litigation had not yet proceeded as far as disclosure, that the Claimant's case was clear, and should be seen (as per Paragraph 15) not just in the context of the APC but also the witness statements.
111. Mr Cohen took me to Rolled Steel v British Steel 1986 1 Ch 246 at pages 284G-286C

"But the maxim has its proper limits. ... It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he

who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done."

Mr. Heyman submitted that Lord Simonds's observation was confined to the particular facts of the case before him where the party seeking to take advantage of the rule was a director of the company and therefore under a duty to see that its transactions were effected in a regular manner: see p. 476. I do not, however, read Lord Simonds's statement of principle as confined in this manner. The decision of this court in [*A. L. Underwood Ltd. v. Bank of Liverpool \[1924\] 1 K.B. 775*](#), which was cited in [*Morris v. Kanssen \[1946\] A.C. 459*](#), in my opinion, illustrates that the very nature of a proposed transaction may put a person upon inquiry as to the authority of the directors of a company to effect it, even if he has no special relationship with the company. Whether in any given case the person dealing with the company is put on inquiry must depend on all the particular circumstances.

It follows, therefore, that, in my opinion, the judge was right in holding that the rule in *Turquand's case*, 6 E. & B. 327 is not a mere plea of law, which does not have to be pleaded. The plea asserting "entitlement to rely etc." is a plea of mixed fact and law. It may well be that, as Mr. Heyman submitted, once the point has been properly pleaded it shifts the onus of proof so that the presumption of regularity stands until rebutted: see *Mahony v. East Holyford Mining Co. (1875) L.R. 7 H.L. 869*. In my opinion, however, it was at very least incumbent on the defendants, if they wished to take the point, to plead in the alternative that, even if (which

they denied) the resolution of 22 January 1969 had not been duly passed, they did not know of this irregularity and were entitled to rely on it as one which had been duly passed. This would have been a conventional plea by way of confession and avoidance, which would have put the plaintiff's legal advisers on notice that they had to adduce evidence, if they could, to show actual or constructive knowledge of the relevant facts on the part of Colvilles and British Steel Corporation or their legal advisers and to explore these matters, so far as possible, in cross-examination of the defendants' witnesses.

As matters stood, the plaintiff and its legal advisers had been given no such notice whatever, either by way of pleading or by way of less formal warning, that the *Turquand's* case point was going to be taken until 31 March 1981, after the evidence had been closed. When, on 2 April, there was full argument as to whether the amendment should be allowed, Mr. Morritt pointed out that he had not cross-examined Mr. Edwards on this line at all and that, if he had done so or if he had opened the point, the defendants might have been obliged to call Mr. Shenton and his assistant Mr. Hoare, which they did not do.

When he came to give judgment, the judge rejected as "fanciful" the possibility that, if the defence had been properly pleaded, the evidence might have taken a different course. Not only did he give the defendants leave to amend to raise the *Turquand's* case point, he also decided that it afforded a complete answer to the otherwise unanswerable no due authorisation point raised by the plaintiff. In so doing he made no specific finding of fact as to Colvilles' state of knowledge. But, I think that, by

necessary implication, he found as a fact that Colvilles neither knew nor ought to have known that Mr. Shenkman had failed duly to declare his personal interest.

This court will always be slow to interfere with the exercise of his discretion by a trial judge in relation to the amendment of pleadings. For my part, however, with great respect to the judge, I feel no doubt that he erred in the exercise of his discretion in dealing with this point in the way in which he did. I am far from satisfied that Mr. Morrith's *286 complaints as to the handicaps in which the course of the proceedings had placed him in relation to the adduction of evidence were "fanciful." Though, for obvious reasons, these matters were never ventilated in evidence, I suspect, for example, that cross-examination of Mr. Edwards, as a well-trained lawyer, could well have elicited admissions sufficient to indicate that Colvilles and British Steel Corporation, through their legal advisers, were sufficiently put on inquiry in the relevant sense as to whether Mr. Shenkman had duly declared his interest. If, therefore, the onus were to be regarded as falling on the plaintiff to establish that Colvilles and British Steel Corporation had actual or constructive knowledge of the breach of the articles of the plaintiff, I do not think that the plaintiff was given a fair and adequate opportunity to establish this.

If, on the other hand, this onus is to be regarded as falling on the defendants, I do not see how it can be said that they have discharged it, since they called no evidence from Mr. Edwards, or anyone else, to the effect that they believed that the requisite declaration of interest by Mr. Shenkman had been made. The certified extract of the minutes of the

board meeting of the plaintiff which was supplied to Colvilles suggested quite the contrary."

112. It seems to me that these passages are authority for the propositions that, even if a pure matter of law does not have to be pleaded (although the modern practice may require it), a matter of mixed fact and law does, in order to give notice to the other party as to what is the case against it.
113. Mr Cohen then took me to Three Rivers v Governor and Company of the Bank of England (No. 3) 2003 2 AC 1 and paragraphs 183-191.1(3) of the House of Lords judgment

"The pleadings: demurrer

183. Having read and re-read the pleadings, I remain of opinion that they are demurrable and could be struck out on this ground. The rules which govern both pleading and proving a case of fraud are very strict.

In [Jonesco v Beard \[1930\] AC 298](#) Lord Buckmaster, with whom the other members of the House concurred, said, at p 300:

"It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires" (my emphasis).

184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr

on Fraud and Mistake, 7th ed (1952) , p 644; [*Davy v Garrett \(1878\) 7 Ch D 473*](#) , 489; [*Bullivant v Attorney General for Victoria \[1901\] AC 196*](#) ; [*Armitage v Nurse \[1998\] Ch 241*](#) , 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are *292 consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is

not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

187. In *Davy v Garrett* 7 Ch D 473 , 489 Thesiger LJ in a well known and frequently cited passage stated: "In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent." This is a clear statement of the second of the two principles to which I have referred.

188. In [*Armitage v Nurse \[1998\] Ch 241*](#) the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted "in reckless and wilful breach of trust". This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have

known why they were charged with dishonesty rather than with honest incompetence.

189. It is not, therefore, correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999, are to the contrary, I am unable to accept them.

190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to the court to draw the inferences necessary to find that the essential elements of the tort had been proved.

The evidential material: prospects of success

191. But I prefer to decide this appeal on the broader and simpler ground that the action has no real prospects of success. In reaching this conclusion I have not relied upon the Bingham report or its findings. My reasons are as follows:

1. The grant of the licence

(1) It is clear that the Bank was not entitled to grant the licence in reliance on the LBC. So the depositors can prove that the Bank acted unlawfully.

However, it was not unlawful for the Bank to grant a licence, but only to

do so without first making its own independent inquiries. It must now be a matter of speculation whether the Bank would still have granted the licence if it had made its own inquiries, so there is a difficult (though I am willing to assume not insuperable) question of causation. The burden of proving this lies with the depositors.

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(2) It is arguable that the Bank knew the facts which deprived it of the power to grant the licence in reliance upon the LBC and without making its own inquiries. But knowledge of facts which deprive a party of the power to take a particular course of action is not the same as knowledge that it is acting in excess of power. There is no reason to suppose, and not a shred of evidence to suggest, that any official of the Bank appreciated the position, or that any official suspected it but turned a blind eye. If the Bank had realised or suspected that it was not entitled to rely on the LBC, it would obviously have made its own inquiries. It had not the slightest reason not to do so. The facts pleaded, and all the evidence we have seen, are entirely consistent with an honest but (possibly) negligent failure to appreciate the legal consequences of the known facts. This is insufficient to sustain the claim, since the first element of the tort is lacking.

(3) Even if the depositors could establish the first element of the tort, they have no prospect of establishing the second. There is no case for supposing that in 1980 BCCI was in fact already insolvent or likely to collapse; and even if it was the Bank obviously had no knowledge or suspicion that it was. As Clarke J said: it defies common sense to suppose

that regulators would licence a bank which they foresaw would probably (or be at all likely to) collapse."

114. It seems to me that these make clear that:

- i) Fraud or dishonesty, or any similar claim of subjective wrong, must strictly be both alleged and pleaded. This flows from the seriousness of the allegation, the fact that it relies on subjective matters, and the CPR (both CPR16.4 and paragraph 8.2(1) of PD16) but also the historic practice of the court
- ii) Pleadings are essential to give proper notice of what is alleged to the other side and all the more so in relation to allegations of subjective wrong
- iii) However, these allegations of subjective wrong also require to be particularised in the sense of having the facts from which the court is going to be asked to infer the relevant subjective state of mind pleaded both in order to give notice to the other side and because those facts have to justify the inference of subjective wrong (and not merely accident, negligence or incompetence). While Ivey v Genting may have changed the focus in dishonesty cases to belief in particular facts (rather than consciousness of dishonesty (and cf. the judgment of HHJ Judge Hodge QC in Glossop v Contact [2019] EWHC 2314 at paragraphs 48-49 as to the difference in the tests between deceit and dishonesty in the context of fraudulent misrepresentation)) similar points apply

iv) On the other hand, the expression “fraud” is here being used in a specific context where subjective knowledge is required, and it does not follow that the expression “equitable fraud” necessarily involves a similar requirement as to knowledge.

115. Both parties referred me to Arab Monetary Fund v Hashim (No. 2) 1990 1 AER 673 at 679-680 where there were some limited particulars of an allegation of knowledge and it was held in that case it was permissible to so plead in general terms and defer particularisation of the case until after discovery. However, Mr Cohen submitted that here there was both no allegation and no particularisation at all.

Discussion

116. I have found various of these issues more difficult than others to resolve. However, it does not seem to me that it is right for me to refuse to deal with most of them at this point on the basis set out in the Altimo v Kyrgyz decision. The main questions here are not as to what matters in law may arise from the facts as they eventually turn out to be proved, but rather as to what facts are (properly) alleged and whether, if they are proved (and for the purposes of CPR3.4(2)(a) I am to assume that they will be), then what, if any, consequences in law, and in particular the relief sought by the APC, could follow from them. There is a modification of this in relation to the Injunctions sought as the grant of an injunction is discretionary assuming that the legal basis is shown, and to which I refer below. As far as pleading is concerned, both the CPR and the above decisions make clear that the function of the statement of case is both to alert the other side as to what is being alleged (so

they can conduct themselves accordingly) and to enable them and the court to test whether it is maintainable both procedurally and so as to justify the substantive relief sought; matters which are even more important where issues of subjective or objective knowledge arise; and the propriety of the statement of case in those terms has to be tested at this stage or otherwise it may be too late.

117. The first question is essentially where (as is common-ground here) a defendant has come into possession of information known to be confidential to the claimant and uses or retains that information, it is necessary, to give rise to a legal remedy in favour of the claimant, for the defendant to have knowledge that that use or retention is not authorised by the claimant.
118. It seems to me that there is an essential difference here between the various remedies sought and in particular (i) the Damages remedy and (ii) the Injunctions remedies. The Damages remedy is based on the Defendants having committed an actionable wrong in the past and is compensatory (or possibly restitutionary) arising from wrongful conduct. Injunctions do not necessarily require an actionable wrong at least by the defendant (the jurisdiction under section 37 of the Senior Courts Act 1981 is a general one of when “it appears to the court to be just and convenient to do so”), may well look to the future rather than the past, and may be granted, in appropriate circumstances, simply to protect proprietary or quasi-proprietary rights (or against a non-wrongdoer who has been caught up in the wrongs of others under the Norwich Pharmacal principle); although, obviously, there has to be

some good and sufficient reason for the court to intervene by a coercive order.

It seems to me that this difference is reflected in the case-law.

119. It is clear in relation to a damages remedy from such cases as Smith Kline, Vestergaard and Valeo Vision that there is an essential knowledge component of the cause of action, and which is required for that remedy to be ordered. That knowledge component is at least that the information is confidential to someone (who may not be known, see for example the situation of the lost diary considered by Lord Goff in Spycatcher). However, none of the cases, it seems to me, deals directly with the precise situation, which Mr Cohen accepts is pleaded, of where a confider (here Mr Vereschaka) provides a confidee (the First Defendant, and through him the Second Defendant) with information which the confidee knows is confidential to the Claimant and for a purpose which the Claimant had not consented to or permitted or authorised (actually or ostensibly) but where (at least on Mr Cohen's construction of the APC) it is not alleged (and so the court must proceed on the basis) that the confidee does know (whatever is the subjective or objective approach to knowledge in this context) of the absence of authorisation or consent or permission.

120. Mr Cohen submits that the accessory liability cases (and the text-book commentaries) such as Thomas v Pearce and the analysis of accessory liability in Vestergaard make clear that for a third party confidee to be liable then knowledge of the confidor's conduct being wrongdoing (i.e. breach of their duty of confidence is required). However, while this points towards the basis of a damages remedy being knowledge, I regard these cases as being potentially distinguishable from this one. Thomas appears to have been

argued and decided on narrow bases: being that only accessory liability was in issue; and with the distinction between knowledge that the information was confidential to the Claimant and knowledge of improper use not being not considered by the court, and so not seen by it as being potentially relevant; and an application of either approach might have justified the conclusion that the relevant test was of (subjective) knowledge of wrongdoing, and was not met. Moreover, in Spycatcher Lord Goff questioned whether accessory liability was the correct approach in many circumstances which might be termed that of a confidant; and he did so, it seems to me, in part because such a confidant might still themselves be making use of what they know to be the Claimant's confidential information for their own purposes, not merely assisting a confidant to do so, and thus was a primary actor rather than merely assisting another. Therefore different tests might apply dependent upon whether the circumstances were such that a "confidant" fell on the "primary" or the "accessory" side of the analytical line, and this case might be said to be "primary". In Vestergaard the relevant defendant could only be sued on accessory (or similar to accessory) grounds as she had merely set up and run a company and had not dealt with the confidential information herself. Nevertheless, these cases do place an emphasis on knowledge of one variety or another.

121. Mr Cohen relies on the references in various of the cases to unconscionability and equitable fraud, and including to knowledge being necessary for unconscionability (for example in Smith Kline and other cases adopting its reasoning such as DoH v Source). Again, this gives him some assistance, but in the context of equity "unconscionability" is very fact-dependent and neither

it nor “equitable fraud” necessarily imports subjective wrongdoing or (nowadays objective) dishonesty but can, for example, just be an improper or unjustified purpose (even if subjectively innocent, e.g. operating a power for a purpose not within the legitimate concept of the conferring instrument). More importantly, this point does not answer the question of whether it is unconscionable or equitable fraud for a person to use what is known to be someone else’s confidential information (the known possession of which is the essential trigger for obligations of confidence) unless they also know that they do not have that person’s authority to so use it.

122. Mr Cohen does, however, seem to me to gain substantial support from three cases, notwithstanding that they are all distinguishable on their facts.
123. The first is Smith Kline and its approval of a (USA) judgment requiring “fraudulent misuse” which tends to suggest some knowledge that the actions are or will be misuse.
124. The second is Vestergaard, While the decision is distinguishable as the relevant defendant did not act personally, but only set-up a company which acted wrongfully, paragraph 22 does suggest that personal liability requires knowledge of misuse. Although paragraph 24 in its dealing with Seager v Copydex can be said to impose a strict liability, that seems to be where there was knowledge of lack of permission in fact, and it was merely (wrongly) thought that there was no legal duty in the circumstances.
125. The third is Valeo Vision. Again, the decision is distinguishable on the facts as it was held that the defendant had had no reason to know that the information was confidential to the claimant at all. However, Aldous J’s

statement at page 228 lines 14-17 is quite clear that there needs to be knowledge (at least on an objective basis) that the use is wrongful for there to be a damages remedy. He draws a clear distinction in his judgment between what is required for a damages remedy and for there to be jurisdiction for the grant of an injunction.

126. I do not find the decision itself or the decisions cited in Tchenguiz of assistance here. Those decisions all seem to relate to the question of whether injunctions should be granted, and that seems to involve different considerations from a damages remedy both as matter of principle (as I set out above regarding the consequences of a wrong) and authority (Valveo Vision as above, and which is binding upon me).
127. It further seems to me to be consistent with principle that in order to be liable in damages, a defendant should have some knowledge of lack of authorisation, and hence misuse, as well as of the information being confidential to the claimant. The law professor's examples given in Spycatcher are potentially real-life situations and it is difficult to see why a use should give rise to a liability for damages even if the user is, for example, trying to assist (e.g. seeking to return the material to the claimant), in the absence of knowledge that the use is not in accordance with what the claimant wanted.
128. I have considered Mr Burton's point that a solution could lie in the concept of actual or ostensible authority, and so that a defendant would have to show that they had such authority, binding upon the claimant, in order to avoid committing a wrong in relation to what they know to be the claimant's confidential information. That would bring in similar factors to questions of

“knowledge” but with the burden being on the defendant to advance and justify a defence.

129. However, I do not think that that it is the answer, even were I not bound by authority. It is not referred to in any of the cases which proceed on a different “knowledge” basis. It may be consistent with a “property in the confidential information” analysis, as infringements of property rights are generally matters of strict liability, but Lord Goff’s dicta in Spycatcher are obiter and equivocal and none of the other cases cited go down that route but all emphasise the question of “conscience” and which is knowledge (of fact) based, and where the duty is usually upon the claimant to prove that the defendant’s conscience was bound to prevent them lawfully committing the act of which complaint is made. Also, the tests for authority, including ostensible authority, are complex and may not be coterminous with (even objective) knowledge in all situations.
130. I therefore conclude that it is necessary for there to be a damages remedy for the Defendants to have had sufficient “knowledge” that they lacked authorisation from the Claimant to act as they did. What I am not deciding is whether that knowledge has to be subjective i.e. actual present in their minds or Nelsonian deliberately or recklessly turning a blind eye, or objective i.e. what would have been acquired with the exercise of reasonable care. It seems to be that there is something of a tension between the accessory liability and primary liability cases (of which Valdeo Vision is one), and questions of fact as to upon which side of the line this case falls. The parties have also not

asked me to decide this question (but rather the contrary), and I do not do so in this judgment.

131. I also think that it is necessary for such knowledge, and the facts upon which it is based or to be inferred, to be pleaded i.e. to be stated in the Particulars of Claim. As a general rule, CPR16.4 provides that the facts relied upon are to be pleaded, and knowledge of absence of authorisation (and hence of misuse) is, I have found, an essential constituent of a cause of action leading to a damages remedy. Paragraph 8.2(5) of the Practice Direction to CPR16 provides that an allegation of notice or knowledge of a fact, and the absence of authorisation is a matter of fact, must be stated. While I do not think (but do not need to decide) that this species of “equitable fraud” is necessarily “fraud” for the purposes of Paragraph 8.2(1) of the PD16 (especially where the defendant is a primary user of the confidential information as here, even if relying upon another), the wording of Paragraph 8.2(5) of PD16 is clearly applicable. Thus, while the principles set out in Three Rivers may not strictly apply, those in Arab Monetary Fund as to stating knowledge with some particulars, even if limited before disclosure, do. It seems to me that all of this is consistent with the general purpose behind both the rules and the practice, that a party (and the court) is both entitled to and should know the basis of the claim against them and the case they have to meet, and which will govern (or at least influence) both their substantive and procedural responses (and as is affirmed by Rolled Steel and many other authorities (perhaps most recently in Scipion v Vallis [2020] EWHC 795 at paragraphs 58-60)).

132. Mr Burton submits that the APC contains sufficient statements of particular facts from which the necessary inferences of knowledge can be drawn. I do not think that this is a legitimate approach. The rule of pleading is that the essential fact i.e. the knowledge is pleaded, and that is what Paragraph 8.2(5) of PD16 says; that is the first stage and arises before the second stage of whether there are sufficient particulars of such an allegation of essential fact. It is putting the cart before the horse to say that it is sufficient to plead matters which would amount to particulars of an un-pleaded allegation. The matter can be tested simply by asking whether it is apparent from the APC as to whether there is an any allegation of knowledge of absence of authorisation and, if so, then of what knowledge (actual, Nelsonian, objective etc.), and there is not. The fact that some matters in the APC might be said to support an allegation of some form of knowledge is not sufficient to inform the Defendants (or the Court) of what is the case against them where, as here, there is no allegation at all of any knowledge of lack of authorisation or permission.

133. However, I would add that I am not convinced that there are statements which would amount to sufficient particulars of or so as to give rise to an inference of such knowledge, but that cannot be tested without knowing what is alleged by way of type of knowledge; and, as there is nothing in terms of “knowledge” pleaded, hence nothing in terms of “knowledge”, let alone any particular type of knowledge, is being alleged. I felt that in his oral submissions Mr Burton was accepting of this, although in his written submissions he has contended that the Defendants did know that they were not authorised to have, let along to use, the Confidential Information. However, and in any event, the Claimant

is limited by its own pleadings and, in my judgment, they neither make an allegation of knowledge (of lack of authorisation or misuse) nor particularise it (and as required by PD16 paragraph 8.2(5) and the above case-law), all of which simply reinforces what I have said above.

134. I would also add that there may be cases where it is obvious from pleaded facts that an allegation of known absence of authorisation or permission is made (e.g. perhaps the making use of a complex technical blue-print blown by wind out of a commercial building (to use one of Lord Goff's examples)), and where it might well not be necessary for such knowledge to be pleaded. However, that is far from this case and the APC, and where the APC refer to the Passwords being communicated to the Defendants by an IT employee of the Claimant with (at least inferentially as paragraphs 28 and 29 of the APC refer to Mr Samsonov's involvement, although Mr Burton says that this is no part of the Claimant's case and not accepted) the support of one or more significant beneficial shareholders and without any express allegation of wrongdoing; and Mr Cohen fairly raises the rhetorical question of "why should the Defendants have known that they were not authorised?"

135. Mr Burton's third point was to contend that the Defendants had clearly gone beyond any authorisation which they had been given by Mr Vereschaka. However, not only is the fact of going beyond any authorisation not pleaded (although it might just be inferred from the deemed requiring of proof by CPR 16.7 (in the absence of a Reply) of matters stated in a Defence; although, if so, the absence of a Reply seems unsatisfactory in defining the issues and the case the Defendants have to meet), but there is no allegation that the Defendants

actually knew or ought to have known or appreciated that this was the case. While, if correct, that this might be a significant matter to be relied upon in establishing, particularising and/or inferring some form of knowledge, it is not an allegation of knowledge and that is what is required.

136. Mr Burton further submits that the APC as a statement of case should be seen in the context of the witness statements etc. and they can be used to supplement the APC and so as to make various allegations of knowledge (as indeed they do). However, this seems to me to confuse (1) statements of case which are to contain facts (and not evidence) and set out a legal claim, and (2) witness statements which are to contain evidence (and not to set out legal claims). The Defendants are supposed to find the legal case against them set out in the statements of case, and, of course, this further demonstrates that the Claimant could have set out claims based on knowledge had it been minded so to do. Even if witness statements may in some circumstances flesh out an allegation, in this case, in the APC, there is no allegation of knowledge at all to be fleshed out, and I do not think that witness statements can be used so as to supply one where none appears in the pleaded case (and where PD16 paragraph 8.2(5) requires precisely that).

137. Mr Burton further submits that it is too soon, before disclosure, to require a pleading of knowledge while the Claimant cannot be sure of what has happened. I deal with this further below in relation to Paragraph 41 of the APC but, while the Court may allow some latitude regarding particularisation (as in Arab Monetary Fund), I cannot see that this can permit not pleading

knowledge at all and still contending that the facts actually pleaded (if proved) would justify a damages remedy.

138. It therefore seems to me that the APC does not disclose reasonable grounds for bringing the claim for the Damages Remedy and that the claim for damages (being paragraph 54 of the APC and paragraph (3) of the Prayer for Relief) should be struck out both under CPR3.4(2)(a) and CPR3.4(2)(c) (failure to plead knowledge as required by PD16 paragraph 8.2(5)). However, this is subject to the usual principle that the Court will consider any application to Re-Amend the Particulars of Claim before finally striking out these elements. I will return to paragraph 32 of the APC below.

139. Mr Cohen also seeks reverse summary judgment on the basis that any claim based on knowledge (of any type) has no real prospect of success in the light of the communications by Mr Vereschaka and others. Technically, this does not presently arise as the APC contains no allegation of knowledge and any such question is, presently, hypothetical and speculative especially as the court does not know what the allegation would be.

140. However, and without having made any decision, I do note at this point that:

(1) The Authorisation Preliminary Issue has been directed and on the basis that there is a live and real issue between the parties as to whether Mr Vereschaka had actual or ostensible authority to permit the Defendants to use the Passwords either at all or as they did. Mr Cohen in his further submissions following the initial draft judgment has questioned this and whether there was such a “live and real” issue as at the time of Master Gidden’s direction or, if there was, whether such remains the case

following this judgment. I do not find the Defendants' (current) position at all clear as to this, and it may be that Mr Cohen is simply reserving his position as to the importance (or lack of importance) of Mr Vereschaka's having (or not having) had authority for the future. However, at first sight, if the Defendants have acted on the basis of authorisation from an employee who did not actually have actual or ostensible authority, it seems to me that, dependent on all the circumstances, that is at least a start to the Claimant being able to assert that the Defendants (subjectively) knew or (objectively) ought to have known that that was the case

- (2) In English company law, it is the directors of a company who authorise the operations of the company, and the shareholders (let alone those who only have beneficial interests in only some of the shares) have no power or authority to authorise those operations or the use of the company's assets, let alone the shutting out of the directors (or other shareholders) from the company's systems. In the absence of expert evidence as to foreign law, it is generally presumed to be the same as English law
- (3) The witness statements adduced by the Claimant contain reasoned allegations of various material knowledge on the part of the Defendants as to Mr Vereschaka not having authority to bind the Claimant, and also as to their having gone beyond Mr Vereschaka's permissions
- (4) At first sight, it is obvious that shutting out the sole legal shareholder and the main executives of a company (and in particular one conducting an online business) from that company's systems is something extraordinary and which would require very real justification indeed. To do that at the

apparent behest of a person who appears to wish to take-over that company, but who has not yet done so, would seem, at least potentially, to be something would raise serious questions in the mind of a reasonable person.

(5) This is all to be balanced against the fact that the request comes from the company's own IT employee, but that involves an exercise which requires careful considerations of the facts and would not ordinarily justify summary judgment.

141. I now turn to the claim for the Injunctions which, it seems to me, falls to be treated differently. The first question is whether knowledge of misuse (in the sense of absence of authorisation) is a requirement, either by way of jurisdiction or principled exercise of discretion (for what is a discretionary remedy). As to this, Aldous J in Valveo Vision at pages 227-8 makes clear that Injunctions may be granted, even though in that case they were not granted on its particular facts, even where there is no knowledge but simply to protect the claimant's rights in and to the confidential information. This is further a theme which runs through the judgment and historical analysis in Tchenguiz from such old cases as Prince Albert v Strange and Moat v Morison and Argyll to Tchniguiz itself. As said in paragraph 72 of Tchenguiz it would be surprising if the Claimant could not stop further use being made of what is the Claimant's Confidential Information; and that case-law all seems to me to support the existence of a jurisdiction to grant Injunctions even where no cause of action exists for damages.

142. An alternative way of looking at it, is by reference to what may happen at a trial where, as here, the Defendants have had, and used, the Claimant's Confidential Information, and, I have to assume for these purposes, on the basis that Mr Vereschaka either did not confer or did not continue to confer authority. I can see no reason why, following Valdeo Vision and Tchenguiz, there should not be jurisdiction to grant Injunctions.
143. Mr Cohen seeks to counter this in various ways, both on a strike-out CPR3.4(2) basis involving just looking at the APC and on his reverse summary judgment application basis under CPR24.3 saying that there is no real prospect that the Injunctions (or some of them) would be granted.
144. First, Mr Cohen, submits that the claim for Injunctions is not open to the Claimant on the APC as the APC is only concerned with the events of 11 January 2019 and not any future or continuing position.
145. I do not think that this is correct in fact, as paragraph 41 of the APC alleges the creation of the back-up copy and paragraph 44 the opening of the 159 emails by the First Defendant and the opening of the 51 email by the Second Defendant, and which involve a continuing holding of confidential data and knowledge; and, of course, the Passwords, even if changed, have been obtained and used so as to access the Claimant's systems and all so as to at least learn of confidential information.
146. I also do not think that it is correct in law. Once confidential information has been obtained, Tchenguiz (and Valdeo Vision) holds that there is jurisdiction to grant Injunctions, even if only to protect against an entirely unthreatened and inadvertent further use or dissemination (see the end of paragraph 72 of

Tchenguiz). Whether an Injunction is to be granted is then a matter of discretion in the light of the evidence but at first sight the Claimant has a right to at least a Prohibitory Injunction (as well as a Mandatory Injunction to compel destruction or delivery up of the confidential information or any confidential (and perhaps other) information derived from it).

147. What is, perhaps, less clear is whether at first sight the Claimant has a right to further Mandatory Injunctions, effectively to compel the Defendants to reveal what, if anything, they have done with the confidential information (or confidential, and perhaps other, information derived from it), including transmission to others (and possibly ancillary matters such as orders to deliver up devices for inspection). I cannot see as to why in principle, where a serious unauthorised invasion of computer systems has taken place, and all the more so at the behest of others, which is all alleged by the APC, there should not be jurisdiction for the grant of Mandatory Injunctions of this nature. While the point is not specifically considered in Tchenguiz, it seems to me to be consistent with the analysis of the entitlement to protect the confidential information, and if a Prohibitory Injunction (and Mandatory Injunction to deliver/destroy) can be granted then I can see no reason why further or ancillary orders cannot also be granted. As I say above, the grant of Injunctions is discretionary and can generally be triggered by invasion of a proprietary or quasi-proprietary right, and it is then for the court on the evidence to consider what Injunction is appropriate. For all these reasons, I do not regard the APC as disclosing no reasonable grounds for the (potential) grant of that relief.

148. In any event, this seems to me to an unclear and fact-dependent area of the law, and the Altimo dicta and guidance are to the effect that I should be cautious to strike-out in such circumstances, and I am not prepared to do so.

149. I add that Mr Cohen has submitted that I am effectively allowing a claim for a quia timet injunction (an injunction granted where there is a real threat of wrongful conduct) to proceed without the relevant threat or grounds for believing there to be a threat being pleaded, and that the claim of the Injunctions should be struck out on that basis. I do not accept this as:

- i) I do not see these heads of relief as necessarily amounting simply to quia timet injunctions. On the Claimant's pleaded case, an invasion of its rights to confidentiality, or at least an unauthorised use of its Confidential Information involving an invasion of its computer systems, has already taken place. This is not the standard quia timet situation where nothing untoward has yet happened. Various of the Injunctions are directed towards ascertaining what has actually happened to and with the Claimant's Confidential Information as part of and as a result of such invasion (even if in itself the invasion does not amount to an actionable wrong conferring a damages remedy), and to prevent it being further (mis)used. I do not see why, in principle, further pleading of grounds is a necessity either as to jurisdiction to grant Injunctions or as a pre-condition of exercising such a resultant discretion
- ii) I am not sure that it is strictly necessary under the rules of pleading for the grounds for seeking a quia timet injunction (as opposed to the

grounds for asserting the underlying right) to have been pleaded. However, assuming that they do, it seems to me that the pleading of an extensive (even if personally innocent) unauthorised invasion of the Claimant's Confidential Information and computer systems, including an allegation of the retention of a back-up copy of 5MB of data including a substantial number of emails; and all at the apparent behest of an external party (Mr Gilfanov) who was allegedly seeking to take over the Claimant and to create dissension between its beneficial shareholders (paragraphs 25 and 26 of the APC) does amount to a pleading of grounds which could justify (although I do not have to decide whether they would result in) the grant of quia timet relief. In essence once that has happened, it gives rise to grounds in fact for a fear that it could recur and/or a fear that information obtained could be (mis)used

- iii) Further, Tchenguiz seems to place these Injunctions in the context of an alleged obtaining of Confidential Information potentially in a special category as paragraphs 72 to 73 appear to hold that Prohibitory Injunctions can be granted simply because confidential information has been obtained, and because it may be inadvertently disclosed or a person may change their mind as to not disclosing it. I cannot see why it should be necessary to plead in addition to the obtaining of the Confidential Information that the defendant may inadvertently disclose it; at least where, as here, it is alleged that it has been obtained without the Claimant's permission and in the circumstances mentioned in the previous sub-paragraph

- iv) In any event, questions as to whether to actually grant particular Injunctions, being discretionary, and here being linked to a pleaded quasi-proprietary right and its alleged invasion, are fought out very much on the basis of the evidence. While the Court has a discretion to direct specific statements of case as to particular justifications for Injunctions to be granted, it has not done so here (as yet)
- v) Further, not only is this fact-dependent (and where I refuse reverse summary judgment in the light of the matters and reasons set out above and below) but it involves questions of law which are tied up with the facts and where the Altimo judgment guidance and dicta are against my striking-out in such circumstances
- vi) According, I reject this argument for strike-out (or for reverse summary judgment).

150. Although, despite my invitation, neither side has made any submissions in relation to the Norwich Pharmacal jurisdiction of injunctions being granted to disclose knowledge of being caught up in the wrongs of others (and so I am not relying on it in this judgment), this conclusion seems consistent with that jurisdiction and the principles underlying it.

151. Mr Cohen further submits that the claim for some or all of the Injunctions has no real prospect of succeeding as the confidential information remains with, and has been regained, by the Claimant and is no longer held by the Defendants, and has not been transmitted by them to others, and that all this is clear on the evidence. I am not persuaded by this and in particular as:

- i) The Defendants will still retain the knowledge that they gained on 11 January 2019 from an in-depth invasion of the Claimant's systems and of and from the use of the Passwords (even if they have now been changed). The use of this can (and should) be restrained on the authorities

- ii) The Claimant alleges (in the APC) and in the witness statements that the Defendants have obtained and retained, on at least one of their own devices, the back-up copy of some 5MB of important email data. It is now accepted in Response 20c of the Part 18 Response that 5MB of data was downloaded (and, I think, retained on the relevant device), and it is accepted that the Defendants made (at least) a mistake in previously denying this. Mr Cohen points out that the Defendants assert that this data did not include the substance of emails and was (or at least is now) unimportant. However, Mr Burton has confirmed in his answers to my clarificatory questions following the initial draft judgment that the Claimant challenges asserts that emails and (or being) important data were downloaded and retained, and it seems to me that paragraph 43 (as well as paragraph 41) of the APC contains a pleaded challenge to such effect. I cannot resolve those factual issues at this hearing, and it does not seem to me (as I refer to below) that the Claimant should have had to take the exceptional step of seeking to obtain early disclosure and inspection of the Defendants' devices in order to further investigate this. The admission seems to me to support Mr Burton's contention that there are real issues as to whether this 5MB included important confidential data (whether emails or other

important data). It further raises the question of whether there could be other retained confidential information, and gives some (albeit only some) reason to doubt the Defendants' other assertions

- iii) The Claimant has in its witness evidence raised substantial material pointing to their being close business connections between the Defendants and Mr Gilfanov at least in terms of their employment and/or involvement in Mr Gilfanov's own or associated company. In all the circumstances, there seems reason to anticipate that disclosure or inspection of the Defendants' devices (which has not yet taken place or been considered by the court) or cross-examination (or inferences if the Defendants do not give evidence at trial) could well justify a finding or sufficient inference of, or of likely, further use or communication so as to justify a discretionary grant of a Mandatory Injunction, and I do not regard that in the circumstances of this case as being pure "Micawberism". While the Claimant could have tried to make applications for early disclosure or for cross-examination by now, those would be exceptional orders, and I cannot see why the Claimant should be criticised or barred for not having made them
- iv) In any event, it is a high hurdle to surmount for a party to allege no real prospect of the grant of an Injunction, being a discretionary matter, where there seem to be grounds as a matter of jurisdiction for its being granted. Although, in any event, I consider these matters involve sufficient elements of fact to render them inappropriate for summary judgment, I also do not see sufficient to say that it is obvious that an

grant of an Injunction will necessarily be an improper exercise of what is a wide discretion.

152. Mr Cohen also submits that the Second Defendant is in a different position from the First Defendant as acting on his instructions. I cannot see a distinction here in this context, as the underlying questions here are ones of fact and discretion where each has invaded and obtained and used confidential information regarding the Claimant's computer systems, and it is the Second Defendant who appears to have created the back-up copy and to have opened some emails.
153. Mr Cohen also submits that there is nothing really left in the litigation as the Defendants accept that they should not use any of the Claimant's material in the future (and I am striking-out the damages claim). I do not see why that should prevent Injunctions being granted for the reasons given above, although the court would, of course, consider carefully any proffered permanent undertakings. Also, where, as here, there are cross-undertakings as to damages and very sizeable costs already incurred, something would have to happen with regard to the past, but, at least pending disclosure (and resolution of any question regarding inspection of devices), I can see no reason why the Claimant should be prevented from pursuing the litigation in the ordinary way.
154. Mr Cohen also submits that there is more to this litigation than appears on the surface of conflict between these particular parties. I do have some suspicions that this litigation could possibly, in reality be a "proxy" fight where the real "war" is between Mr Ponkratenko and Mr Gilfanov. However, that it is speculation, can, even if it is the case, only be a factor in discretionary

considerations involving many other factors, and is of dubious relevance where the Defendants have actually (and on the assumption that this was unauthorised) invaded the corporate Claimant's systems. I do not think that I can base anything upon this mere possibility.

155. Accordingly, I am not going to strike-out or grant reverse summary judgment in relation to the claims for the Injunctions.

156. I turn next to the Declarations sought. The grant of Declarations is discretionary, and such are only to be granted with care and for good reason.

157. The first Declaration is that the Confidential Information is confidential to the Claimant (paragraph 49 of the APC). This is, in fact, admitted. Mr Cohen submits that it is simply and obviously unnecessary. I do, however, see force in Mr Burton's submission that it is of importance to an entity such as the Claimant, and which serves and holds the confidential and private information of its customers in a sensitive and regulated area (of on-line gambling), to achieved a judicial recognition to the world that this information is confidential to it, and especially where the information has been invaded (at least to some extent) by others. I do not see that there is no real prospect of the discretion to grant a Declaration being exercised here, and I refuse to strike it out or to grant reverse summary judgment.

158. The second Declaration is that "the Defendants, and each of them, were not entitled to use and/or access the Confidential Information in the way that they did and/or generally." – paragraph 51 of the APC. Mr Cohen submits that it follows from my conclusions on knowledge and strike-out of the damages claim that this Declaration will not be granted. In my view, it has become

apparent that the word “entitled” is ambiguous in this context as it could mean either (i) that the Defendants were not actually authorised by the Claimant to act as they did (which remains or possibly (as Mr Cohen disputes that it does) remains a live issue) or (ii) that the Defendants acted wrongfully in law in what they did (which I have held not to be properly alleged in the light of the limited pleaded facts). It seems to me that paragraph 51 should be redrafted to make clear what is sought; but I accept Mr Burton’s submission that the possible importance to the Claimant and its customers and regulations of a judicial determination that what happened was without its authority is such that I do not see that there is no real prospect of the discretion to grant a Declaration being exercised here, and I refuse to strike it out or to grant reverse summary judgment. Mr Cohen has now further submitted that any question of absence of authority is, and would need to be litigated, as between the Claimant and Mr Vereschaka. I have not reached any conclusion as to that, and which can be considered further during the hearing of the remainder of the Applications, although at first sight the submission has an air of unreality where Mr Vereschaka is still working for the Claimant and the Defendants have not (as far as I can tell) admitted that Mr Vereschaka had no authority (actual or ostensible) to authorise them to act as they did on 11 January 2020 (or, as Mr Burton contends, also to retain data later).

159. I now turn to three particular paragraphs in the APC. The first two are paragraph 32 which says that “... the Defendants, and each of them, breached the Claimant’s right to confidentiality...” and paragraph 33 which refers to particulars of “breaches”. Mr Cohen complains of the use of the word “breached” (and, I think, the word “breaches”) on the basis of my accepting

his submission, as I do, that the APC does not plead sufficient to amount to a cause of action for damages. He has submitted that those words are something of a “term of art” and convey a meaning of an actionable (in the sense of giving rise to a claim for damages, at least if loss is suffered) wrong. I am not sure that this is necessarily correct as “breached” can be a way of simply describing an invasion of a right as a matter of objective fact, and where, as here, the Claimant’s Confidential Information has been used and obtained (and allegedly retained) in ways which it is alleged that the Claimant has not authorised. The question is more as to what relief may then be justified by the pleaded facts and I have dealt with that above. However, I will consider whether some other (re)formulation is more appropriate, so as to avoid doubt, at the hearing consequential upon this judgment.

160. The third paragraph is paragraph 41 of the APC and the introduction by way of agreed amendment of the words “... and so far as the Claimant is aware...” I can see why Mr Burton may say that it is odd for the Defendants to have consented to the introduction of these words only then to seek to strike out all or some of the paragraph in consequence. However, I do have to ask myself whether or not this is a proper pleading and I do not think that it is.

161. Particulars of Claim have to state “facts”, see CPR16.4, and the reason for that is a trial is concerned with the Court trying out (a) whether those or some of those facts are proved and if so (b) whether those facts gives rise to a legal consequence of, or of the existence of a discretion to grant, certain remedies. The use of the words “so far as the Claimant is aware” leads both to uncertainty as to what is being alleged and to be proved and suggests that the

“fact” is either not being asserted or is a mere awareness. In any event this phraseology is, at best, confusing and equivocal, but more, it seems to me, does not amount to a proper statement of “fact”. Parties (and the Court) need to know what is alleged, and that underlies the reasoning in Wrightson (albeit that the claimant there had had longer to formulate his case).

162. I do not accept Mr Burton’s submission that this wording merely reflects the rules regarding statements of truth. The purpose of the Statement of Truth is to ensure that a party is only advancing a factual case that it honestly believes to be true (and this has been accentuated by the recent amendments to the form of a Statement of Truth as required by PD22), and where the party must think very carefully about whether it has evidence which can justify that belief (cf. Clarke v Marlborough 2002 EWHC 11 cited in White Book 16.4.6). It has been held that a party may believe that one (but at least one) of one or more alternatives is the case, and also that alternative A is more likely than alternative B but that one of them is the case. The belief need only be an honest one, and the belief need only be to the civil standard i.e. that it is more likely than not that the fact is the case (as that is still an honest belief that it is the case). However, while the content of the pleading (such as a plea of alternatives) may condition the form of the Statement of Truth (which can be adapted appropriately – see e.g. Binks v Securicor 2003 1 WLR 2557 cited at White Book 16.4.6), it is not the function of a Statement of Truth to condition the form of the pleading. If the Claimant wishes to allege a fact and the person signing the Statement of Truth is concerned about their belief, then they should consider modifying the Statement of Truth and consider whether the end result still satisfies the above policies such the court would be

prepared to allow it. I have doubts whether the court would in this case, but, in any event, the pleading, in my view, contravenes the rule.

163. In any event, it seems to me that the introduced words are inappropriate. First, because Mr Burton has confirmed (I think in his oral submissions, but certainly in his answers to my clarificatory questions following the initial draft judgment) that the Claimant does actually “allege” the relevant facts as to what has happened. Mr Cohen submits that it is not for counsel to verify a statement of case, and which requires a statement of truth. In view of the existence of paragraph 43 of the APC I am not sure that there is anything in this point, but, if there is, then the next form of the pleading can have a fresh statement of truth (containing any appropriate modification to the standard form) appended to it (and while Mr Cohen submits that the Claimant should have to explain a change of mind, I do not see the inconsistency as a party can “believe” that something has occurred even though it is only “aware” of some facts which support that belief (on the balance of probabilities), and the change is being forced upon the Claimant by the Court). Second, because paragraph 43 of the APC seems to contain such an unequivocal allegation. Third, because the Part 18 Response has, at least, admitted the existence of the back-up copy even though it is disputed that it contained emails or important data. I am going to strike out those words.

Conclusion

164. Accordingly:

- i) Paragraph 54 and Prayer (3) of the APC (and thus the claim for the Damages Remedy) are to be struck-out although I will consider any proposed re-amendment which is said to justify a damages claim
- ii) The words “so far as the Claimant is aware” are to be struck-out of paragraph 41 of the APC
- iii) Certain paragraphs of the APC should be better drafted or clarified as I refer to above
- iv) Otherwise I dismiss the applications to strike out the APC and for reverse summary judgment. However, I have not considered in this judgment any contention by the Defendants that the Claim should not proceed on the basis that the relief sought is not worthwhile albeit that I have difficulty (without having come to any final decision) in seeing (in the light of what I say above) as to why I would come to such a conclusion prior to disclosure and in the absence of appropriate undertakings.