



Neutral Citation Number: [2021] EWHC 671 (Ch)

Case No: BL-2019-BRS-000028

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**INSOLVENCY AND COMPANIES LIST (ChD)**

Bristol Civil Justice Centre  
2 Redcliff Street, Bristol, BS1 6GR

Date: 25/03/2021

**Before :**

**HHJ PAUL MATTHEWS**  
**(sitting as a Judge of the High Court)**

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**Between :**

**(1) NIHAL MOHAMMED KAMAL BRAKE**  
**(2) ANDREW YOUNG BRAKE**  
**- and -**  
**(1) GEOFFREY WILLIAM GUY**  
**(2) THE CHEDINGTON COURT ESTATE**  
**LIMITED**  
**(3) AXNOLLER EVENTS LIMITED**

**Claimants**

**Defendants**

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**Daisy Brown** (instructed by **Porter Dodson LLP**) for the **Claimants**  
**Andrew Sutcliffe QC and William Day** (instructed by **Stewarts Law LLP**) for the  
**Defendants**

Hearing dates: 23-27 November 2020

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.**

**HHJ Paul Matthews :**

## **INTRODUCTION**

### **General**

1. This is my judgment on the trial of part of the claim, by claim form issued on 2 September 2019 for a final injunction and damages in respect of the alleged accessing, retention and deployment by the defendants of emails said to be private and confidential to the claimants and held within three email accounts. It is a trial of *part* of the claim because the full claim would have taken between 10 and 15 days to try, and so it was decided to try all the issues except the so-called “iniquity” defence advanced by the defendants. It was also decided to try, as a preliminary issue, the question whether the “iniquity defence” was available to the defendants as a matter of law. If the results of this part of the trial and of the preliminary issue show that it is necessary to go on to try the “iniquity defence”, then the time taken by this part of the trial and the preliminary issue will not have been wasted, because these always needed to be decided. But if they show that the trial of the remainder is not necessary, considerable time and money will have been saved.
2. Originally, the trial was intended to be conducted in person, because it was listed at a time when no “lockdown” was in place because of the Covid 19 pandemic. However, a further lockdown was imposed before the trial date, and I reconsidered the matter. Because of the new lockdown, the significant increase in the number of infections in the Bristol area, and the fact that Dr Guy (the first defendant) was shielding after a recent serious medical operation, I decided that the hearing would instead be held remotely. It was therefore conducted using the Zoom videoconferencing platform (curated by a third party rather than the court, because judicial laptops are not able to run Zoom), between 23 and 26 November 2020, although written closing submissions meant that the trial was not complete until 14 December 2020. As happened at an earlier trial between these parties, the hearing was live-streamed over the web, so ensuring public participation. Unlike that earlier trial, on this occasion the claimants, their lawyers and their witnesses (with one exception) all came to a single location namely, the offices of the claimants’ solicitors. This ensured both that the claimants themselves had access to high quality broadband video (which was sadly lacking at the previous trial) and that the claimants’ lawyers were better able to liaise with their clients and with the witnesses, and to provide copies of the bundles.
3. This claim forms a discrete part of wider ranging litigation between the claimants on the one hand and the defendants on the other. There are (or have been) a number of other claims between the parties. This is only the second of them to come to trial. There are others waiting in the wings. The background to the litigation in general, and therefore to this claim in particular, is complex and not easily summarised. Nevertheless it is necessary to paint a broad picture of the context in which this claim arises, before considering the elements of the claim and the evidence in relation to it in detail. I borrow parts of the following summary from summaries in other judgments I have given involving these parties.

## Background

4. In September 2004, the first claimant (then Mrs D’Arcy, but whom I shall call by her current name, Mrs Brake) acquired West Axnoller Farm (“the Farm”), near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second claimant (“Mr Brake”). Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the “cottage”).
5. In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm. Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The claimants therefore looked for an outside investor.
6. In February 2010 the claimants entered into a partnership with a limited partnership called Patley Wood Farm LLP (“PWF”), whose principal was Mrs Lorraine Brehme (“Mrs Brehme”). The new partnership (known as “Stay in Style”) was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The claimants contributed the Farm as partnership property, although it remained charged to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme, on 8 March 2010 the partnership acquired the cottage, the legal title to which was transferred to the claimants and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the claimants to stay in when the main house was let.
7. Differences arose between the claimants on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the claimants were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).
8. In October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited (“Sarafina”), said to be a corporate vehicle for the Hon Saffron Foster (“Mrs Foster”), a daughter of Lord Vestey, as well as a friend of Mrs Brake.
9. In February 2017 Mrs Foster sold the company to The Chedington Court Estate Ltd (“Chedington”, the second defendant), and its name was changed to Axnoller Events Limited (“AEL”). It is the third defendant in this claim. Chedington is an investment

vehicle for Dr Geoffrey Guy (“Dr Guy”, the first defendant). Mr and Mrs Brake were employed to continue to run the wedding and rental accommodation business as before. Relations between the parties broke down, and on 8 November 2018 notice was given of the termination of their employment. This led to proceedings in the employment tribunal against Chedington and others by each of the claimants (“the Employment Claims”), and proceedings in the High Court by AEL against the applicants to recover possession of the Farm (“the Possession Claim”).

10. Following this, in January 2019, Mr Swift as trustee in bankruptcy entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators’ rights in it. Chedington entered into back to back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing “unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage”. Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington (“the Eviction Claim”). So the position on the ground currently is that the claimants are in occupation of the house, but seek possession of the cottage, whereas the second defendant is in occupation of the cottage, and the third defendant seeks possession of the house. Trials of these two possession claims are currently listed for April and May 2021.
11. In addition, on 12 February 2019 the Brakes commenced insolvency proceedings (the “Liquidation Application” and the “Bankruptcy Application”) against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the trustee) to establish that the Brakes’ pre-existing interests in the cottage and the adjacent parcels had reverted in them and Mrs Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes’ sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 Mr Jarvis QC made two orders by consent, one removing Mr Swift from office, and another appointing his successors.
12. In January 2020 Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them. I struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing. An appeal against my decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against my decision in the Bankruptcy Application was however allowed, so that that application is yet to be tried (see [2020] EWCA Civ 1491 for both appeals). But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the reversioning issue under section 283A.
13. It is relevant to note that, on 4 May 2020, the claimants applied by notice in relation to that section 283A claim for me to recuse myself from trying it. I heard that

application on 7 May and gave judgment on 11 May 2020, refusing the application: see [2020] EWHC 1156 (Ch), [2020] BPIR 1254. Permission to appeal against my decision was refused by the Court of Appeal. So the section 283A claim was tried, and I gave judgment in July 2020, in favour of Chedington ([2020] EWHC 1810 (Ch), [2020] 4 WLR 113). An application for permission to appeal was refused by the Court of Appeal on 30 October 2020.

## **THE PRESENT CLAIM**

### **Procedure**

14. As I have said, the claim form in this claim was issued on 2 September 2019. The claim form made claims for a final injunction and damages based on causes of action in breach of confidence, misuse of private information, procuring a breach of contract, and compensation under article 82 of the (EU) General Data Protection Regulation. Particulars of claim were attached, seeking similar relief. On the same day, an application was issued for an interim injunction to restrain the defendants from dealing with the documents in the email accounts to which I have referred. It is important to be clear that at this stage the claimants did not have a complete copy of the enquiries account and there had been no agreed review by the parties of the documents contained in that account for the purpose of establishing what was and was not private and/or confidential.
15. On 28 November 2019 Mr John Jarvis QC, sitting as a deputy High Court judge, upon certain undertakings by the claimants, granted an interim injunction restraining the defendants until final determination of the claim or further order from disclosing or publishing certain documents within the email account identified by its then address, [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), and to delete private emails. The judge also ordered by consent that the defendants provide the claimants with a full copy of the account and directed a procedure designed to identify private documents in that account, together with ancillary directions.
16. The relevant provisions of the order are as follows:
  - “3. The Guy Parties, until final determination of the Documents Claim or further order, whether by themselves, their directors, partners, employees, agents or otherwise, shall not further disclose or publish or cause the disclosure or publication or make any further use of any documents within the Account (the ‘Injunction’).
  4. From 4 PM on Thursday, 21 January 2020, the Injunction shall not apply save in respect of documents within the Account identified by the Brakes as private pursuant to paragraph 14 below.
  5. The Injunction shall not apply in respect of the Guy Parties’ use of the bundles prepared for the hearing for the Documents Application and the LPP Application (‘the Hearing Bundles’) in order to:
    - i. Plead the Defence to the Documents Claim; and

ii. Draft the Appellants' Notice, grounds of appeal and skeleton argument and prepare the bundles to seek permission to appeal from the Court of Appeal in respect of the Documents Application and the LPP Application (and to argue such appeal in the event permission to appeal is granted).

6. This Injunction does not prevent the court or tribunal seised in any of the following proceedings from making an order for disclosure of inspection of documents in the Account:

i. The Insolvency Proceedings,

ii. The Documents Claim,

iii. The claims in the employment tribunal proceedings with claim numbers 1400598/2019 and 1400597/2019,

iv. The proceedings relating to West Axnoller Farm with claim number E00YE350,

v. The proceedings relating to West Axnoller Cottage with claim number F00YE085.

[ ... ]

13. By 4 PM on 9 December 2019, the Guy Parties will provide the Brakes with a full copy of the Account.

14. By 4 PM on Tuesday, 21 January 2020, the Brakes will provide the Guy Parties with an itemised list of the documents in the Account claimed by the Brakes to be private.

15. By 4 PM on Thursday, 20 February 2020, the Guy Parties will conduct a review and confirm to the Brakes in respect of each document identified at paragraph 14 above whether they:

i. agree that their copies of the document should be destroyed; or

ii. do not agree that their copies of the document should be destroyed.

16. By 4 PM on Thursday, 27 February 2020, the Guy Parties will destroy all copies in their possession of documents identified pursuant to paragraph 15(i) above and the Brakes shall destroy all copies in their possession of documents from the Account other than those identified pursuant to paragraph 14 above.

17. The Brakes are at liberty from Friday 21 February 2020 to apply to the Court for an order that the Guy Parties destroy all copies of any documents falling into paragraph 15(ii) above. Such application shall be:

i. made no later than 4 PM on Friday, 28 February 2020; and

ii. supported by a witness statement explaining, for each document in respect of which the Brakes seek relief, the basis on which a claim of misuse of private information is maintained.

18. For the avoidance of doubt, the Guy Parties are entitled to refuse to destroy a document if it falls within the scope of categories of documents set out at paragraphs 5 and 6 above.”

17. In relation to paragraph 16 of the order, I should say that, in correspondence between the parties’ solicitors in April 2020, it was agreed that no destruction of documents would take place pending trial, but that no formal variation to the order need be made. So, as I understand the matter, no destruction has yet taken place on either side.
18. There was also provision for the preparation, on joint instructions, by Matthew Blackband of Grant Thornton Digital Forensic Experts Services of a forensic IT report dated 5 March 2020. This report related to a particular aspect of the account, namely to seek to explain the discrepancies between two archived versions of the account, one made by Allen Computing Services and the other by Labyrinth Computers Ltd. The completed report was in the papers before me at the trial, although Mr Blackband was not called to give oral evidence
19. The judgment of the judge leading to the order of which I have just set out part, was lengthy and detailed. At this stage, it is only necessary to record that, in paragraph 35 of his judgment, Mr Jarvis QC said:

“I must remind myself that this stage that I am dealing with an interim application, and that it is inappropriate for me at this stage to make findings of fact.”

In his judgment on costs in relation to this judgment, on 7 December 2019, the judge repeated the point:

“I made it very plain that the findings which I made were interim only and could not in any sense be seen as final.”

20. For what it is worth, I made similar comments in my judgment on the application for security for costs in this claim (to which I shall come), on 11 June 2020 ([2020] EWHC 1484 (Ch)):

“62. Having considered all the material placed before me, and in the light of the comments of Mr Jarvis QC which I have quoted, I am quite satisfied that his judgment was purely interlocutory, and made no final findings of fact. All that the judge decided was whether on the material before him he should make the interim orders sought. ...”

21. I say this only because in paragraph 33 of the claimants’ opening submissions in this case the claimants say that at the injunction hearing “the judge made the following findings”, and then a number of matters are set out. Similarly, in paragraphs 3, 9 and 20 of the closing submissions on behalf of the claimants it is said that the judge at that hearing made certain findings. If this was intended to assert that these are findings which are binding on me, then the short answer is that they are not. The judge did not

hear the witnesses give evidence subject to cross-examination, and did not have the advantage of a full trial bundle compiled after (inter alia) disclosure had been given by both sides, whereas I did. As I have already made clear, the judge himself did not think that he was making final findings at all, and nor did I in the security for costs application. If on the other hand this was intended to say that the judge made findings *for the purposes of the interim injunction*, then that may be right (though it involves a different use of the word ‘findings’), but before me that is irrelevant. I regret to say therefore that I do not understand why I was pressed with this material.

22. In the meantime, on 25 March 2020, the defendants applied by notice for security for their costs of this claim. I heard that application on 1 June 2020, and gave judgment (refusing to grant security) on 11 June 2020: see [2020] EWHC 1484 (Ch). There was no appeal from my decision. On 9 July 2020, the claimants applied for summary judgment in this claim, seeking a final injunction in respect of their private emails. At first this was ordered to be listed for hearing for one day. Subsequently, however, on 31 July 2020, I ordered that the hearing of this application be listed for hearing together with the trial of the iniquity defence. This facilitated the hearing of the preliminary issue and the non-iniquity trial, as described earlier.
23. As I said at the beginning of this judgment, the present claim concerns the contents of three email accounts, which at the material time had the email addresses [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk), and [andy@axnoller.co.uk](mailto:andy@axnoller.co.uk). The most important of these is the first, which I shall refer to as the “enquiries account”, though I shall have to refer to the others as well.

### **Fact-Finding**

24. In my earlier judgment on the trial of the re-vesting issue, I set out some aspects of the fact-finding process which English civil judges go through. Given that that is available in my earlier judgment ([2020] EWHC 1810 (Ch), [2020] 4 WLR 113, [28]-[35]), and the parties will be familiar with it, I will not set it out again, although the process is of course the same. However, I will specifically repeat what I said about one point:

“31. Thirdly, in commercial cases where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses.

32. The relevant facts in this case go back about fifteen years. The present case is at least partly a commercial case, and there are sufficient written records, letters, emails and so on as to make the *Gestmin* approach relevant to this case. I will therefore give appropriate weight to both the documentary evidence and the oral evidence, bearing in mind both the fallibility of memory and the relative objectivity of the written evidence available.”

The material facts in the case before me now do not go back quite so far as in that case, but in my judgment I should take the same approach here. I remind myself that



CPR PD 32, para 27.2 provides that documents in the agreed bundle are admissible evidence, unless the court otherwise orders or a party objects.

## Witnesses

25. I heard oral evidence from the following witnesses: the first claimant, Stephen Ryde-Weller, Simon Windus, Andrew Allen, Simon Cattell, Carl Pearce, all for the claimants, and Russell Bowyer, Geoffrey Guy, and Harry Spendlove, for the defendants. I record here that, although the Hon Saffron Foster plays an important part in this story, and indeed made a witness statement at an earlier interlocutory stage, she provided no evidence for the trial and was not tendered for cross-examination. Similarly, Rebecca Holt played a smaller, but still significant, part. But she provided no evidence either (not even a witness statement). To my mind, these were curious and unexplained omissions. I give here my general impressions of each witness that *was* called.
26. The first claimant, Nihal (“Alo”) Brake, was also a witness in an earlier trial before me, between some of the same parties, which dealt with the so-called ‘revesting’ issue under section 283A of the Insolvency Act 1986. In view of comments that have been made (on both sides) in closing submissions, I should make clear that I have not sought, in assessing Mrs Brake’s evidence in this trial, to apply any impression gained from seeing and hearing Mrs Brake in that earlier trial, which was a different case, and when in any event conditions were sub-optimal. I am not sure whether it was being urged on me that I should have regard to my views of Mrs Brake’s evidence in the earlier trial, but I take this opportunity to state that I have reached my views of Mrs Brake’s evidence in the present case solely on the basis of the evidence that she gave in this case. In my judgment, in all the circumstances, it would not be right to do otherwise. My assessment of her evidence is accordingly as follows.
27. Mrs Brake was fluent, quick and self-confident. She had an impressive command of all the documents, conversations and events that favoured her case. But she also made speeches, exaggerated, split hairs, often indulged in legal argument instead of answering questions, and referred to the evidence of others rather than her own. She had to retract a number of answers when subsequently confronted with relevant documents. She also gave “tricky” answers to straightforward questions. One example comes from the morning of the second day, where, after an exchange between her and counsel for the defendants, I intervened and said:
- “I am sorry, Mrs Brake, do I understand your evidence correctly? When you were asked, ‘you got an email from Moore Blatch’? And you said ‘no, I never got an email from Moore Blatch’, what you meant was ‘I never got an email addressed directly to me from Moore Blatch even though they copied me into it’?”
- To this, Mrs Brake replied “Yes”.
28. At other times, she blustered, as when it was suggested that her solicitors would not have sent in a complaint to the Information Commissioner’s Office without her having previously reviewed the text (which she accepted was wrong):

“Mr Sutcliffe, I have given you my evidence. I have not signed this document. It is the first time – I was surprised to see it. I have not really – you know, so I am really sorry, I have not got any more to say except that I know AEL does not have its own servers so I would never have written that.”

Moreover, faced with difficult questions, she frequently fell back on alleged inability to remember, quite at odds with the impressive recall that she otherwise displayed. I am afraid that as a whole I distrusted her evidence, except where it was corroborated from an independent source. Where her evidence conflicted with that of Dr Guy, or Mr Spendlove, I preferred that of Dr Guy or Mr Spendlove (as the case might be).

29. Mr Ryde-Weller acted as solicitor for the vendor of Sarafina, the Hon Mrs Saffron Foster. He gave his evidence straightforwardly and was transparently honest. I accept most of his evidence, as far as it went. But his evidence was limited in scope, and I think some of it was mistaken. He had not for example met Dr Guy, nor spoken to him about the transaction. His information came from others, but principally Mrs Brake.
30. Mr Windus worked with Mrs Brake on two separate occasions, firstly during the subsistence of the partnership with Patley Wood Farm, and secondly once Mrs Foster had sold Sarafina to Dr Guy’s company, and it changed its name to AEL. Mrs Brake called him “one of my closest friends”. He was a cautious, but friendly and honest witness, prepared to accept correction where he was shown to be wrong. On the whole, I accept his evidence.
31. Mr Allen worked with Mrs Brake as her IT provider from about the end of 2012. He was a businesslike and precise witness who knew both his subject and his mind. But he was also partisan, and tilted his oral evidence to favour Ms Brake. He changed his evidence on important issues in order to do so. I am afraid that I regard much of his evidence with suspicion.
32. Mr Cattell was involved as an IT adviser for Ms Brake for a short time in 2011. He was a careful and knowledgeable witness, who would not be drawn further than he wanted to go. His evidence was accordingly rather limited. To that (limited) extent, I generally accept his evidence.
33. Mr Pearce was a forensic IT consultant, retained by Ms Brake during the litigation, to look at and report on data recovered from various electronic devices. He was a knowledgeable, exact and transparently honest witness of fact. He accepted correction where due. He was an impressive witness, with no axe to grind. To the extent that his evidence conflicted with that of Mr Allen or Mr Cattell, I prefer his evidence.
34. Mr Bowyer, finance director of the second defendant, was a straightforward and honest witness, who stuck to what he knew in cross-examination. I accept what he said as truthful.
35. Dr Guy, the owner of the second defendant and ultimate owner of the third defendant, was a polite, very precise and businesslike witness. He answered without hesitation, whether the answer favoured his case or not. He limited himself to what he knew or had reason to believe. I accept him as a witness of truth, upon whom cross-examination made no impact.

36. Mr Spendlove, a solicitor for the defendants, gave evidence about the documents the subject of the dispute, having been intimately concerned in the reviews that were carried out pursuant to the order of Mr Jarvis QC. I accept that he was a truthful witness who was trying to assist the court. As I have said, where his evidence and that of Mrs Brake conflict on the question of the documents, I prefer his evidence to hers.

## **Facts found**

### *Technical terms*

37. This case concerns legal relationships, rights and duties in relation to email services. There are a number of technical terms which are commonly used in relation to such services. It is therefore desirable that I set out briefly what I understand those technical terms to mean, so as to make clear the premises upon which this judgment is based. Although there was no expert evidence given at this trial, significant (and largely concordant) factual evidence, including descriptions of how email systems work, were given by three professional witnesses working in the field of IT (Messrs Cattell, Allen and Pearce). I emphasise that this was not opinion evidence. It is like the ‘tutorial’ evidence that judges are often treated to in relation to, say, how an unfamiliar market operates: see *eg Darby Properties Ltd v Lloyds Bank plc* [2016] EWHC 2494 (Ch), [27], [45].
38. In addition, like many others, I have long been using email services myself (since approximately 1996 in my case), both in the public and the private sector. Obviously, I am not an IT expert, and nor am I giving evidence to myself. Nevertheless, in the same way that a judge who holds a driving licence and has experience of driving a car may take that experience into account in deciding (say) a running down action, I am of the view that in approaching this case I may take into account my everyday experiences and understanding of using email systems over 25 years. The following views therefore are the result of the factual evidence in this case, overlaid on my own experience and understanding, which I set out for the sake of transparency.
39. First of all, ‘emails’ are messages from one person to another containing data in electronic (dematerialised) form, which can be made visible by being shown on the screen of an electronic device or by being printed out onto paper or other material form. An electronic ‘mailbox’ is a storage location for emails in their electronic form. This mailbox can be hosted by an IT provider on its computer server (and accessed remotely by the user), or self-hosted by the user on his or her own computer. An email ‘account’ consists of a mailbox and related services provided by a ‘host’, in relation to a particular associated ‘domain’, although the mailbox and services can be provided by the user him- or herself without the need for a host. But there will still need to be a ‘domain’ involved.
40. A ‘domain’ is a limited part of cyberspace whose control is given to a particular person for a more or less limited time for a registration fee. It has to be renewed at periodic intervals (with further fees), otherwise it becomes available to others. It has some similarity (in the commercial sector, at least) with the concept of a trademark in intellectual property. Indeed, famous trademarks are often used as domain names. It is registered with an internationally recognised registrar (*eg* Nominet), who will have a system for dealing with applications for such domains, and also for resolving disputes concerning domain names. Sometimes the registered controller of the domain is

referred to as the ‘owner’ of it. In the sense that the concept of the ‘domain’ consists of rights having a value, this is uncontroversial. When we speak of ‘ownership’ of a thing, tangible or intangible, in English law, we usually mean to refer to ownership of a bundle of rights in that thing. Indeed, the European Court of Human Rights has held that a domain can be ‘possessions’ for the purposes of article 1 of protocol 1 of the European Convention on Human Rights: *Paeffgen GmbH v Germany*, Nos 25379/04, 21688/05, 21722/05, and 21770/05, 18 September 2007.

41. A ‘domain name’ is a way of identifying such a domain and distinguishing it from others. (Hence the utility of a registration process.) In practice, a domain name is used as the basis for identifying a website or group of websites, together with related email addresses. But sometimes it is used as the basis for identifying just an email address or group of addresses, where the controller of the domain does not operate any websites. A domain name will have a ‘top’ level, such as “.com” or “.net” or “.fr”. The next word to the left will be the next level down, but usually the most important word from a commercial perspective (such as the name of the company or business). However, there may be other (even more subsidiary) words to the left of that, representing subdivisions of the company or business. An email address consists of two parts, divided by the “@” sign. The second part is essentially the domain name, and the first part is a local identifier within the domain.
42. An email ‘address’ and an email ‘account’ are distinct, but related, concepts. The address is simply the unique identifier for a particular email mailbox (or mailboxes). But a mailbox is part of the bundle of services (including transmission and receipt of emails) provided by an email provider and called an email *account*. So, if an email *address* is not associated with a particular email *account*, an email sent to that address will not arrive in any mailbox. To take an analogy, a local authority may alter the address of a particular house (*eg* changing the number, or the street name), but the house will remain the same house, and in the same place. Similarly, a mailbox forming part of an email account may have a particular address one day, and a different address the next, whilst remaining the same mailbox within the same account.
43. The other side of the coin is that an address may be used to point to a particular mailbox one day, but changed to point to a different mailbox (whether in the same account or even a different account) the next. An email address can also be linked to more than one email account, and conversely a single account can be linked to multiple email addresses, by so-called ‘delegation’. In addition, an email account may have an address so that mail can be received on behalf of that account, but configured so that all such mail is immediately forwarded to a further account’s mailbox with a different address. Thus, in such a case the first mailbox (if indeed there is one at all) is always empty (unless it is configured so that copies of mail remain in it as well).
44. The difference between an email *address* and an email *account* is also shown by what happens when there is a change of account. Where an email account is changed, for example because an old, basic account is replaced by a new, more sophisticated account, or an email account hosted with one provider or hosting service is replaced by an account hosted with another, the new account will not automatically show emails sent and received by the old account. And this is so, even if (as commonly happens) the same address that was used for the old account is now being used to point to the mailbox in the new account. In order for email sent and received by the

old account to show in the new account, those emails will have to be ‘migrated’ to the new account, and this is a manual rather than an automated process.

45. Finally, there is no necessary connection between the ownership of the *account* and the ownership of the *domain* within which the mailbox address is located. For example, customers of an internet service provider (or ‘ISP’) may have email accounts with the ISP, and with addresses in the ISP’s domain, but (subject to the terms of any contract between them) the ISP does not own the accounts, and the customers do not own the domain.
46. In order to send and receive emails, different systems, or *protocols*, are used. An early one, which I used in the late 1990s for incoming mail, was ‘Post Office Protocol’, or POP3. This kept all incoming mail on the server until you connected your computer to it (in those days, usually by dialup connection) and downloaded your mail to a program on your own computer (called an ‘email client’), usually leaving nothing in your mailbox on the server, where storage was costly. You had to backup important emails yourself. Later, ‘Internet Message Access Protocol’, or IMAP, was introduced, by which incoming mail stayed on the server, but was also downloaded to your ‘email client’ so that you could deal with it offline, and then resynchronise your computer and the server next time you went on-line. Microsoft Outlook and Apple Mail are well-known email clients.
47. A quite different possibility is web-based access, using ‘Hyper Text Transfer Protocol’ (HTTP), or its more secure form HTTPS. Here there is no email client on your computer. All the software you need is on the remote server, which you simply access over the internet, using your web browser. If you go off-line, you immediately lose contact with your mailbox and your email. Hotmail and Yahoo, and others, operate in this way. (I should mention that there is a separate protocol for outgoing messages, Simple Mail Transfer Protocol (SMTP), or Extended Simple Mail Transfer Protocol (ESMTP), but that plays no part in this case, so I need not say anything more about it.)
48. All of this was and is sufficient for ordinary domestic and small business use. But larger organisations have in recent years been offered a more sophisticated product: so-called ‘enterprise servers’, running software such as Microsoft Exchange or IBM Domino. These servers hold and process not merely mail, but also calendars/diaries, contacts, journals, and other things of importance to the multiple users of a given organisation, including greater storage facilities. A further protocol for email, referred to by some of the witnesses, is called Messaging Application Programming Interface (MAPI). This was developed by Microsoft for use between Exchange server software and Outlook client applications. A MAPI email account will therefore be an Exchange email account. They (or their equivalent from other IT suppliers) provide a wider range of services than the more basic email accounts (which some of the witnesses referred to as IMAP accounts). So, as the witnesses said, whereas basic email accounts (especially web-based) are usually offered free by an internet service provider or hosting service, at least up to a limited number, Exchange email accounts generally have to be paid for.
49. A ‘host’ or ‘hosting service’ is an IT business which allows a domain to point to its servers for the benefit of the domain controller. If you have a website, whether for your business, or for you personally, you will need someone to host it for you, unless

you have a server of your own and host it there. But a hosting contract will usually include email services too, either free or paying, depending on the terms of the contract. The email accounts offered may be basic (and probably free) IMAP accounts, or there may be more sophisticated Exchange (or equivalent) accounts. If you only want email, and not a website, you do not need a host. An internet service provider will be able to supply email services on its own domain, along with its internet connection. Or you can use a web-based email service, using your existing internet connection.

*Before the PWF partnership*

50. On 20 October 2009, some months before the claimants entered into the partnership with Mrs Brehme’s vehicle PWF, an IT business called 0404 Creative Ltd, based in Bridport, registered the domains of “axnoller.com” and “axnoller.co.uk” for two years (renewable), on Mrs Brake’s instructions. The registrant was stated to be Simon Deverell of 0404 Creative, although the address given for him was West Axnoller Farm, that is, Mrs Brake’s own address. Mrs Brake’s own written evidence in the first witness statement made in these proceedings (on 2 September 2019, incorporated by reference into her witness evidence prepared for this trial) was that these domains were registered for future use, and indeed were not “used for a few years because instead we used a separate domain name, stayinstyle.co.uk”, which was used for business communications. This is consistent with the other evidence available, and I accept it. Indeed, the Amended Particulars of Claim ([13]) pleads that the axnoller domain remained dormant until 2013.

*The partnership with PWF*

51. On 19 February 2010 the partnership with PWF was entered into, to carry on the existing business of short-term letting of serviced luxury properties, already known as ‘Stay in Style’. The ‘stayinstyle’ domain continued to be used for email for the new partnership.
52. Between September and November 2010 Stephen Loveridge, of another IT company called Leofric Digital, had an email correspondence with Simon Deverell on behalf of Mrs Brake about the domains which 0404 Creative had set up for her the previous year. On 17 September 2010 Mr Loveridge wrote:
- “I am acting for Alo Brake and project managing a new website. I believe you have registered a number of domains on her behalf, including axnoller.com, which is likely to be her new primary domain.
- Could you let me have a list of the domains you registered for her and arrange for them all to be transferred. I have set up an account at Fasthosts for Alo. The email address for this (which I will receive) is axnoller @leofricdigital.com...”
53. Fasthosts Internet Ltd (“Fasthosts”) carries on business providing a hosting service for domains, websites and email services, as well as registering (and renewing) new domain names. The axnoller domains were hosted by Fasthosts from about 1 November 2010. It is not clear from the evidence whether the registration of the domains was transferred to Mrs Brake, as mentioned, or not. It appears from what

happened subsequently that at least the domain [axnoller.co.uk](http://axnoller.co.uk) was not in fact transferred to her, because she had to deal with this much later, in 2019.

54. There is no evidence to show where, if at all, the domains were hosted before Fasthosts. The email from Mr Loveridge does not refer to any previous hosting service. It does refer to “a new website” and to [axnoller.com](http://axnoller.com) becoming Mrs Brake’s “new primary domain”. But there is no evidence of a previously existing website in the [axnoller](http://axnoller.com) domains (which would require hosting). The inference which I draw from this email and the absence of other evidence is that the domains were not previously hosted at all. This is consistent with Mrs Brake’s written evidence, already mentioned, that the [axnoller](http://axnoller.com) domains were not used “for a few years” after being registered. It also appears, from other documents in the bundle, that the domain [axnoller.com](http://axnoller.com) was not renewed, because subsequently it came back onto the market, in July 2014, when Mrs Brake successfully bid for it. This domain was then hosted with Mr Allen’s own host “1 & 1”, rather than with Fasthosts.
55. Also in September 2010, Mr Loveridge introduced Mrs Brake to Simon Cattell, then managing director of Seamless Fusion Ltd, a digital marketing company based in Taunton. Mrs Brake asked Seamless Fusion to create websites and brochures for her business ventures, including Axnoller House and Voss, her show-jumping stallion. The website for Axnoller House was to have the url [www.axnoller.co.uk](http://www.axnoller.co.uk). In October 2010, the partnership (not Mrs Brake personally) paid Seamless Fusion £2937.50 for their work, and Fasthosts £38.46. In their oral evidence, both Mrs Brake and Mr Windus agreed that the partners of Stay in Style “decided to rebrand the partnership as Axoller or Axnoller Luxury”. As part of this work, in April 2011 Seamless Fusion set up new *Google mail* accounts for Mrs Brake and the office at Axnoller. I find that that was done for the partnership, and not for Mrs Brake personally.
56. Simon Windus began working as Mrs Brake’s assistant in February 2011. He wrote to Simon Cattell on 4 April 2011 from [enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com) as follows:

“I have spoken to Alo with regard to migrating email to Google mail, and we are happy that you go ahead and create the Google mail accounts, will need both ‘enquiries’ and office. Assume there be a switchover date and will the they [sic] run in tandem for a few days while we get used to them?”

In an email reply the next day, Simon Cattell said:

“The new accounts will be [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) but we will still have to sort out the stay in style accounts so you get everything into the same place.”

57. These emails confirm what I have already said, that at this time the existing email accounts for the business at Axnoller House had addresses in the ‘stayinstyle’ domain. They also make clear that the new email accounts, which were to be Google mail accounts, would have addresses using the domain “[axnoller.co.uk](http://axnoller.co.uk)”, just like the new website [www.axnoller.co.uk](http://www.axnoller.co.uk). Unlike the website, however, they would not be hosted by Fasthosts. There is a question as to when they actually began to be used. On the evidence before me, the new [axnoller.co.uk](http://axnoller.co.uk) website was available by November 2011. That website displayed the email address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk). So the enquiries address had at least been thought of by then. Mr Windus in his written evidence asserted that Mrs Brake was using the enquiries account as her main email account

from 2011. But in cross-examination he was taken to various documents in the bundle, and finally accepted that “it was 9 years ago, so maybe I was mistaken”. I find that he was.

58. Moreover, Mrs Brake in her written evidence claimed that axoller.co.uk was an unregistered trademark belonging to her since 2011. In the screenshot of the 2011 website for “Axnoller Luxury” in the bundle, there is a reference to ‘Axnoller’ being claimed as “a legal trademark of Axnoller”. However, the dispute with Mrs Brehme (referred to in paragraph 7 above) curtailed the website project before it went live. So it was never published. Mr Pearce gave some helpful, if inconclusive, evidence on the question of the *use* of the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) address, to which I shall return. The arbitration between the parties was commenced on 13 April 2012, and ended on 21 June 2013 with the arbitrator’s award in favour of Mrs Brehme’s vehicle PWF, and also dissolving the partnership.
59. At about the end of 2012, that is, during the arbitration, Mrs Brake engaged Andrew Allen of Allen Computer Services Ltd (“ACS”), based in Crewkerne, Somerset, as her new IT provider. This involved looking after the email accounts and website, and providing the IT backup, that Mrs Brake required both privately and for business. It also involved his becoming the administrator of the Fasthosts account set up in September 2010.

*After the dissolution of the partnership*

60. Because of the dispute with Mrs Brehme, Mrs Brake requested ACS to enter, and on 23 June 2014, that company indeed entered, into a confidentiality agreement with her, for a period of five years. This required that ACS keep confidential “all data and information relating to the business and management of [Mrs Brake] including proprietary and trade secret technology and accounting records to which access is obtained by [ACS]”. The confidentiality was expressly limited to information received “in and as a result of [ACS]’s retainer by [Mrs Brake]”. On its face therefore the agreement cannot cover information derived from any retainer by anyone else. The evidence of Mr Allen was that this agreement covered not only Mrs Brake’s business information but also her personal information. So far as I can see, however, there is no reference in this agreement to Mrs Brake’s *personal* information, nor to the information (business or personal) of any person other than Mrs Brake. The drafting of the agreement is entirely geared towards the confidential *business* information of Mrs Brake alone.
61. In early 2015, it appears that the Brakes were having internet connection problems at Axnoller, and on 8 February 2015 a Mark Culme-Seymour emailed Mrs Brake about her problems and to arrange a possible site visit. The significance of the email is that, in the version found in the bundle, it was addressed to Mrs Brake at [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk). This is several months before the sale of the property by the receivers and the incorporation of Sarafina. But the native copy of, and the metadata relating to, this email were not produced, and therefore could not be viewed or tested. Moreover, there is a strange line at the top of the page in the version in the bundle, suggesting that it is only part of a larger chain, which has not been exhibited. In any event, the email itself is quite anodyne and of no interest otherwise to this case.



62. Mrs Brake claimed to have paid the Fasthosts account payments herself even during the period of the partnership with PWF. However, she produced no documentary evidence to support this claim, even though this would come from her own bank or credit card company. I accept that the Fasthosts invoices were *addressed* to her throughout this time, as they were from 2009, but the evidence that I have seen satisfies me that during the continuance of the partnership with PWF it was the *partnership* which paid the invoices. It is therefore not necessary for me to resort to any presumption such as is found in cases like *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA.

*The claimants' bankruptcy*

63. As a result of a failure to pay costs orders resulting from the arbitration award, Mr and Mrs Brake were adjudicated bankrupt on 12 May 2015, and their estates vested (with the usual statutory exceptions) in the Official Receiver, and subsequently in their trustee in bankruptcy. It is convenient to record here that, when Mr and Mrs Brake subsequently provided the Official Receiver with details about themselves, neither of them gave the enquiries account address as a 'personal' contact detail. Mrs Brake gave [enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com). Mr Brake said that he had none at all. Mrs Brake also did not assert, either in the standard Bankruptcy Preliminary Information Questionnaire (dated 4 June 2015), or at the interview with the Official Receiver on 9 June 2015, that she owned the axnoller domain, or any associated email accounts.
64. On the day following the bankruptcy adjudication, that is, 13 May 2015, Mr Allen sent an email to Mrs Brake (at [enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com)). It said:

“Following our chat *this morning* please find attached our quote for a high spec HP 17 inch laptop for business use and a lower spec 15.6 inch personal laptop as discussed” (emphasis supplied).

The attached quotation (addressed to “Mrs N Brake” at “West Axnoller Farm”) was not only for the laptop and personal computers, but also for other services, including:

“Setup Business laptop, install all updates and programs as required. Transfer data from old work laptop as required, set up email accounts and import emails and address book. Transfer all data as required.... Set up Personal laptop, install all updates and programs as required, set up email accounts and import address book....”

65. Mr Allen re-sent that quotation by email on 18 August 2015, saying:

“Hi, Alo,

HP Laptop quote as sent in May – pricing may have changed a little but not radically, let me know what you think?”

It is clear that that resending was a response to something from Mrs Brake, but so far as I can see we do not have that in the material before me. It is nevertheless odd to find Mrs Brake considering the acquisition of assets for the purposes of carrying on a business, when not only is she an undischarged bankrupt, but also (by August)

prohibited by injunction from carrying on the business. But I heard no argument about this, and draw no conclusions.

*The sale of West Axnoller Farm to Sarafina Properties Ltd*

66. On 23 July 2015, West Axnoller Farm was sold, nominally by Mrs Brake as registered proprietor of the legal estate, but in reality by the Law of Property Act receivers appointed by the chargee of the property, and acting in her name. The purchase price was £2,460,000, plus any applicable VAT. The purchaser was Sarafina, a company incorporated on 2 June 2015, the sole share in which was issued to Mrs Brake's friend, the Hon Saffron Foster, a daughter of the third Lord Vestey. In Companies House records, BPE Solicitors LLP of Cheltenham are stated to have acted as her agent. In the bundle is an invoice issued by that firm for its services in incorporating Sarafina. It is however not addressed to Mrs Foster, but to a Ms Alice Wyatt at an address in Devon. An email in the bundle from Mrs Brake to Ms Wyatt dated 16 November 2017 suggests that she was Mr Brake's sister's daughter, and, in cross-examination, Ms Brown referred to Ms Wyatt as Mrs Brake's niece.
67. Ms Wyatt's role in relation to Sarafina is nowhere explained. She may, of course, have been an agent for Mrs Foster. But I also note that there is an email apparently from her dated 22 January 2018 in the bundle, in which she complains about a parking ticket issued to her in Beaminster, Dorset, where she was attending an urgent doctor's appointment on 19 January 2018. Why Miss Wyatt should have a GP in Beaminster, Dorset, when she lives in Devon, is not explained. But on the other hand Beaminster is very close to Axnoller. Moreover, the email is sent from the account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), which Mrs Brake said only *she* used, and not from the (different) email address to which Mrs Brake's email of 16 November 2017 (above) was sent. Mr Spendlove was cross-examined by Ms Brown about this email.
68. In the bundle there is also a copy of a report by Lorna Townsend dated 11 September 2019. She says that she is a former solicitor but now a consultant employed by Birketts LLP to conduct investigations into workplace issues. She was instructed by the defendants to investigate the conduct of the Brakes during their employment. At paragraph 3.127 she refers to evidence from the defendants' bookkeeper, Jo Hague, to the effect that the Brakes had told her that the car in the name of Alice Wyatt was their car, but as bankrupts they were unable to enter into a hire purchase agreement. But this is multiple hearsay, and none of it was put to Mrs Brake, so I do not know what she would say about it. I do not take it into account or draw any conclusions from it.
69. Mrs Foster did not put up any money to buy West Axnoller Farm. Instead, Sarafina appears to have borrowed all the money from a lender found by Mrs Brake, who seems to have made all the arrangements. The property was valued at £4.5 million by Savills, in a valuation arranged by Mrs Brake, but seemingly paid for by Sarafina itself. The lender, on the basis of this valuation, lent £2.88 million gross, that is £2.505 million net of fees and advance interest of £375,000. In other words, the lender lent more than the purchase price, even after deducting fees and advance interest. This is extraordinary. Commercial lenders do not usually do this. I am driven to the conclusion that either the lender was deceived into lending the amount it did, because the true value was the lower price that Sarafina paid, or the true value significantly exceeded what was paid by Sarafina, thus prejudicing the bank. Given the high

reputation in which Savills is held, I consider the latter to be the more likely. But for present purposes it is not necessary for me to make a finding about this.

70. As I have already said, Mr and Mrs Brake were prohibited by an injunction dated 1 July 2015 from continuing to run the wedding business at the property, for a period lasting six months. Nevertheless, Mrs Foster was apparently prepared to allow Mr and Mrs Brake to remain in occupation of the house rent free, thereby taking up space which could be used for the business, but apparently contributing nothing to it, which was to be run by another friend of Mrs Brake's, called Rebecca Holt, until the injunction ran out in January 2016.

*The business carried on by Sarafina*

71. Mrs Holt was appointed a director of Sarafina on 1 September 2015. She went on maternity leave in June 2016, and resigned in June 2017 before returning. Interestingly, there is in the bundle a copy of a statement from a Barclays Bank account in the name of Rebecca Holt dated 1 February 2017, which is plainly full of business transactions connected with the wedding business at Axnoller, such as staff wages, payments to outside contractors and so on, but also personal expenses such as school fees for Mrs Brake's son Tom and a standing order for payments in respect of a car for Alice Wyatt, whom I have already mentioned. This statement was not put to Mrs Brake in cross-examination, so I do not know how she would have dealt with it. But at first sight it is strange to find that an employee on maternity leave (as Mrs Holt then was) should be operating a bank account paying expenses for the Axnoller business and also paying Mrs Brake's (and Ms Wyatt's) own personal expenses.
72. An earlier bank statement, covering August 2015, also from a Barclays Bank account in the name of Rebecca Holt (but with a different account number), was put to Mrs Brake in cross-examination. She accepted that it contained business transactions connected with Axnoller and also some personal expenses of her own, including school fees and optician's bills, but also some transactions relating to Mrs Holt. In relation to this statement Mrs Brake rejected the suggestion that the account was a nominee account for her (as indeed Mr Davies QC had done on her behalf before Mr Jarvis QC in November 2019). She explained this use of Mrs Holt's bank account by reason of the fact that Sarafina did not yet have its own bank account, which was not set up until 19 August 2015. That may be for a good explanation in August 2015, but it does not help me to understand why there is a *further* bank statement in 2017, also in the name of Rebecca Holt, and apparently still dealing also with both Axnoller business *and* Mrs Brake's personal expenditure.
73. There is, incidentally, an email in the bundle dated 21 August 2015 from a man called Bob Holt (who may or may not be related to Rebecca Holt) to the Dorset branch of Handelsbanken, saying "a very good friend of mine Alo Brake owns Axnoller a prestige event complex in Dorset and she is looking to refinance". On 2 September 2015 Savills invoiced Sarafina for £4200, including VAT, to value West Axnoller Farm for "security" purposes. This is without doubt the invoice for the valuation on the basis of which the loan was made for the purchase of West Axnoller Farm. On 3 September 2015 there is further email correspondence between Mrs Brake and Santander in Bournemouth concerning a possible refinancing.

74. However that may be, in early August 2015, Mrs Brake had asked Mr Allen to set up a new Exchange account hosting package with Fasthosts. There is an email dated 5 August 2015 from Mr Allen to Mrs Brake (at [enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com)), saying that he needed some information before he could make any progress, because the domain axnoller.co.uk was hosted with Fasthosts and he needed to be able to login to that system. So he asked for the email address and password for logging into the control panel for Fasthosts. In a further email of 7 August 2015, he said that “axnoller.co.uk is hosted with Fasthosts but there is currently no email package.” I find that, at this stage, there was a domain (axnoller.co.uk), hosted on Fasthosts, but no email accounts so hosted. They were still Google mail accounts.
75. There is an invoice from Fasthosts dated 14 August 2015 stating that payment had now been collected for “Exchange 2013 Hosted Mailboxes – axnoller.co.uk (3 x 25 GB hosted Mailboxes, 2 x StarterPlus Mailboxes)”. Although initially paid by credit card (which during cross-examination Mrs Brake said belonged to Rebecca Holt), this was ultimately paid for by Sarafina, as indeed I find it ultimately paid for all Fasthosts invoices relating to the axnoller domain and email accounts until February 2017, and indeed thereafter, though under its new name, AEL. Then the next day, 15 August 2015, Mr Allen had sent an email, with subject “New Email Account Test”, to a number of addresses in the domain name “axnoller.co.uk”, including “alo@”, rebecca@”, “enquiries@”, “saffron@” and “andy@”. In cross-examination Mrs Brake said that the only new email account was that for Saffron Foster, but I do not accept this. The five addresses in the test email corresponded to the five new mailboxes in the exchange email package from Fasthosts. And certainly, on the evidence, this is the first time that any email account was given the address [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk) or [andy@axnoller.co.uk](mailto:andy@axnoller.co.uk). An email apparently sent on 18 August 2015 from [enquiries@axnollerevents.co.uk](mailto:enquiries@axnollerevents.co.uk) (rather than [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk)) acknowledged receipt of this test email.
76. The reference to ‘axnollerevents.co.uk’ in this acknowledgment email was initially puzzling, because it was common ground that *that* domain was not set up until December 2018. So something had happened to make the email sent in 2015 appear to have come from the newer domain. In evidence, Mr Pearce accepted at first that it was possible that this was the result of a so-called ‘delegation’ attempt. But he later agreed with the explanation given by Mr Blackband of Grant Thornton, who (as I have said) prepared the expert report in this matter ordered by Mr Jarvis QC. In his report Mr Blackband had said, in relation to emails appearing to have been sent from axnollerevents.co.uk on dates before that domain was registered, that:

“43. ... the appearance of some of the printed emails suggesting that they are originating from axnollerevents.co.uk is due to the emails being opened within the axnollerevents.co.uk mailbox. However, it needs to be noted that the original technical headers from the email do not get changed, only the way in which Outlook displays them within the mailbox”.

That explanation, adopted by Mr Pearce, is the same one as is given by Ms D’Albiac-Reay of Labyrinth Computers Ltd to Dr Guy in a letter of 10 June 2019. It is also consistent with the other evidence, including that of Mr Bowyer, and I accept it.

77. Accordingly, I find that, on 15 August 2015, new email accounts using the ‘axnoller.co.uk’ domain had been set up with Microsoft Exchange, hosted by

Fasthosts. As I have said, if there had been any axnoller domain email addresses before this, they had been used for Google mail accounts, unhosted. So, whereas the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), if it pointed anywhere at all, would have previously pointed to a Google mail account, from now on it pointed to a Microsoft Exchange account, with a mailbox on the Fasthosts server. (On the other hand, the addresses [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk) and [andy@axnoller.co.uk](mailto:andy@axnoller.co.uk), with their respective Exchange accounts, were entirely new at that stage.)

78. I find that, from the beginning, although she had her own axnoller account, with the address [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk), Mrs Brake used the (Exchange) account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) for her own private emails as well, even though she had other private email accounts as well (for example Gmail). But at the same time, as the Brakes accept, it was the main business email address for Sarafina, and held out as such, and continued to be after the purchase by Dr Guy, and the change of name to AEL, until at least November 2018.
79. I referred above to payment of Fasthosts invoices by Sarafina from August 2015 onwards. As I have also said, the invoices themselves were all originally addressed from 2010 to Mrs Brake personally. There is a dispute as to whether this continued through to November 2018. Mrs Brake says it did. Yet at least some of the invoices in the bundle seem to be addressed to AEL, although they date from before February 2017, when Sarafina's name was changed to AEL. I think the explanation for this is the one given by Mr Blackband in his report and accepted by Mr Pearce in his evidence, to which I referred above. Accordingly, it may well be that, until November 2018, the invoices were originally addressed to Mrs Brake, and she was Fasthosts' direct customer.
80. On the other hand, Mr Allen's invoices were addressed to 'Sarafina trading as Axnoller' from August 2015 onwards, and AEL after February 2017, and were paid by the business. I find that Mr Allen and his company were retained by Sarafina/AEL generally for computer services, as he said in his first witness statement, which was drafted by his own independent solicitors. I reject the view expressed in his second witness statement that he was engaged only by Mrs Brake personally. Indeed, in cross-examination he accepted that sometimes he acted for Mrs Brake and sometimes for the third defendant.
81. As I have said, Sarafina/AEL ultimately paid the Fasthosts invoices concerning the axnoller domain and emails. I reject Mrs Brake's evidence relating to the invoice for £284.28 for which only a draft ledger was produced. I also reject her evidence that it was she who in substance paid Fasthosts' invoices during the time of the partnership with Patley Wood Farm, and find that the partnership ultimately paid them. For the avoidance of any doubt, Mrs Brake had also registered other domains, connected with horses, including her stallion Voss. The renewal fees for these domains in 2017 had been paid for by Sarafina (by then AEL), who was subsequently reimbursed by Mrs Brake. I am not concerned with these other domains. But it is notable that Mrs Brake, in reimbursing the fees for these domains, made no claim that the axnoller domain and the associated email accounts *also* belonged to her, and did not offer to repay those. (Subsequently in her first witness statement in these proceedings, Mrs Brake implied, at [26], that the third defendant's funding the cost of the axnoller domain was an employee benefit. This is not supported, so far as I can see, by any other document.

In any event, on 15 January 2018 Mrs Brake told her own accountant in an email that she did not have any benefits in kind.)

82. In the trial bundle there is an email sent from a customer to Mrs Brake on 20 August 2015 and a reply the same day from Mrs Brake to that customer which refers to Rebecca Holt. As I have already said, she was the person engaged to run the wedding business at Axnoller for Sarafina during the time that Mr and Mrs Brake were not able to do so, by reason of the injunction granted against them on 1 July 2015 by Sir William Blackburne. These emails show that Ms Holt (or someone using her name) had been using the email address [rebecca@stayinstyleuk.com](mailto:rebecca@stayinstyleuk.com), but that towards the end of August 2015 it would change to [rebecca@axnoller.co.uk](mailto:rebecca@axnoller.co.uk). I say “someone using her name”, because there is an email in the bundle from Mrs Brake to a lady called Karen at House Party Solutions, dated 25 August 2015, in which Mrs Brake says “all my emails are signed Rebecca at the moment. I will call and explain. Best Alo.” In cross-examination, Mrs Brake accepted that she “did occasionally dip in and help [Rebecca Holt] to ... reorganise things”. The evidence before me suggests that it was rather more than that, but it is not necessary to decide the point now.
83. In addition, when the defendants’ solicitors suggested to the claimants’ solicitors during the litigation that Rebecca Holt used the enquiries account, the claimants’ solicitors denied it. Yet Mrs Brake also accepted in cross-examination that Rebecca Holt *did* use the enquiries account, and indeed the relevant software program was downloaded onto her work laptop for this purpose. So far as concerns Mrs Holt’s own account, the first use of [rebecca@axnoller.co.uk](mailto:rebecca@axnoller.co.uk) appears in an email dated 28 August 2015. Other email exchanges in the bundle between Ms Holt and customers show that the change from [enquiries@stayinstyle.uk.com](mailto:enquiries@stayinstyle.uk.com) to [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) occurred earlier, on 21 August 2015.
84. Mr Pearce, who was retained by Mrs Brake as a forensic IT specialist for the purposes of this litigation, examined such computer files as were made available to him, including an old hard drive which Mrs Brake located in March 2020. He gave evidence (which I accept) that he had not been able to recover any emails from any account using the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) before the test email from Mr Allen just referred to of 15 August 2015 (which was then pointing to the new Exchange account hosted with Fasthosts). However he also said (and I accept) that his forensic work on the materials provided to him enabled him to “see a count of 300,000 emails dated on or before August 2015 ... A subset of these emails were sent to and from [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk)”. (It is clear from this that – contrary to what Mrs Brake alleged in cross-examination – Mr Pearce was *not* saying that there were 300,000 emails in the account then addressed by [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), merely that some of them were.) But he was unable to obtain the substance of these emails.
85. Accordingly, a curious feature of this case is that, although Mrs Brake’s evidence is that the (Google mail) account using the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) address was in use between 2011 and 2015, we have almost no tangible evidence of this. One might have thought that, if Mrs Brake had used the account to email friends and family (at least), she could have counted on them to provide her with examples of that use *from their own email accounts*. Yet *none* has been provided (unless the single example from February 2015 about internet problems is one such). No explanation for this singular omission has been put forward.

86. In the trial bundle there was also an email referring to a ‘bounceback’ message received by a customer who had attempted to send an email to the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) on 20 March 2014. However, it was not possible to say what was the reason for the ‘bounceback’. It only showed that the message sent did not arrive in any mailbox. The email was subsequently forwarded by the customer to [enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com), and *that* transmission was successful. The failed email to [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) does not permit me to draw any inference, except that that address must have been displayed somewhere seen by the customer in order for him to try it.
87. There was also some evidence of use of an account using the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) having been used to login and amend a draft email template on the Stay in Style account (probably using ‘delegated access’). The important question was *when* this happened. That document had headers as follows:

**“From:** Stay In Style – Enquiries <[enquiries@stayinstyleuk.com](mailto:enquiries@stayinstyleuk.com)> on behalf of Stay in Style – Enquiries

**Sent:** 08 December 2011 12:18

**Subject:** Voltaire, Burggraaf and Axnoller House”

There was no header beginning “To:” and the body of the message began “Dear [blank].” Mr Pearce considered that this “was more a template than a draft”, because there was no “To:” header, but he could not confirm either way. He also considered that the date which had been put in the “Sent:” header did not mean that the message had ever been sent, but that it was simply the date that “this template was first created”.

88. In the metadata for this email the “delivery time” is stated as 5 November 2015, and that refers (in the words of Mr Pearce) “to the date and time that the template was last updated or changed in some way”. There was nothing to show that that updating change must have happened before 15 August 2015. Moreover, the metadata also showed that the account which accessed this template was a MAPI-LID Internet Account, that is, an account using MAPI. That indicates, as I have already said, and as Mr Pearce confirmed in his evidence, an Exchange email account and probably other Microsoft products (such as Outlook). Yet the evidence in this case shows, and I have found, that the first Exchange email accounts were not set up until August 2015. The previous accounts were Google mail accounts.
89. Unfortunately, this point was not put to Mr Pearce when he was giving evidence, and therefore I do not have the benefit of his response to it. But, on the face of it, it seems to me that, if the account which altered the template was an account using MAPI, and therefore an Exchange account, and the account indicated by the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) was a Google mail account until August 2015, when that address was transferred to a new Exchange server account hosted by Fasthosts, it follows that the change to the template must have taken place between August and December 2015.
90. The result is that I have been shown only a single example of an email successfully sent to or from the email address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) before August 2015, and

that is the one from Mr Culme-Seymour sent to that address on 8 February 2015 (which, because it cannot be tested, is not itself conclusive). I am however satisfied on this evidence (including that of Mr Pearce) that there was an email *account* in existence before August 2015 to which the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) pointed, but it must have been a Google mail account, and could *not* have been the Exchange server account created in August 2015. Moreover, on this evidence, I am satisfied that before then the business carried on by Mrs Brake (and, before that, the business carried on by the partnership) used email accounts based on stayinstyleuk.com (as Mrs Brake herself said in her written evidence).

91. In my judgment, whether the allegation in paragraph 70(b) of the claimants' opening submissions that "the enquiries account [meaning the one using the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk)] was being operated by the Brakes since 2011 for several years before SPL was incorporated [and] therefore contains thousands of emails which could not possibly have anything to do with SPL" was right or not is irrelevant to this litigation. With one exception, we do not have any emails sent to or from the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) before August 2015, or any account to which that address then pointed, so that in effect (with that exception) there are none to argue about. The defendants do not have them, and cannot access them, any more than Mr Pearce was able to. The argument here must accordingly be directed to emails created from August 2015 onwards, which reside in a new Microsoft Exchange account, to which the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) from then pointed.
92. On 12 May 2016 the Brakes were automatically discharged from bankruptcy. On that day Mrs Brake enquired of the Official Receiver's Office whether that was correct. On being told it was, Mrs Brake asked for discharge certificates to be sent to her. In June 2016 Rebecca Holt went on maternity leave (as I have already said, in fact she never returned, resigning in June 2017), and Simon Windus came to work for Sarafina, in part to substitute for Mrs Holt. A new laptop and email address were provided for him. On 1 July 2016, Mrs Brake (using the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) address) sent an email to a potential customer describing herself as "the owner of Axnoller". On 22 July 2016, an administration order was made in relation to the former partnership 'Stay in Style'. To complete the story of the insolvency of Stay in Style, on 30 May 2017, a winding up order was made, and liquidators of the partnership were appointed.

#### *Sale of Sarafina to Chedington*

93. In the meantime, in February 2017, the share capital of Sarafina was sold by Mrs Foster to Chedington, owned by Dr Guy. Stephen Ryde-Weller of Verisona Law acted for Mrs Foster, and James Allen of Moore Blatch acted for Chedington. The transaction completed on 17 February 2017.
94. A curious feature of the negotiations leading up to the completion was that Mrs Foster took no part in them, apart from confirming to Mr Ryde-Weller, who was engaged as her solicitor, that he could take full instructions from Mrs Brake on everything. Dr Guy's evidence, which I accept, was that he met Mrs Foster only once, well into the transaction, and that there was no discussion between them (then or at any other time) of either the transaction or its details. Dr Guy's negotiations were with Mrs Brake, ostensibly on behalf of Mrs Foster. Of course, Mrs Brake had been running the business carried on at Axnoller, and would know more of the day to day running



matters than Mrs Foster. But Mrs Brake not only informed Dr Guy and Mr Ryde-Weller of the day-to-day matters, but also negotiated with Dr Guy on price, and gave instructions to Mr Ryde-Weller in relation to all the terms of the agreement being negotiated, including warranties, just as if she were the beneficial owner.

95. This strange impression is compounded by the terms of an email sent by Mrs Brake from the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) address to Mrs Saffron Foster on 17 February 2017 (the date of completion), in which Mrs Brake said

“Fortune favours the brave! You were incredibly brave to trust me and to lend us your very good name (as opposed to using our appallingly bad name!)”

This was in reply to an email from Mrs Brake to Mrs Foster asking for her bank account details. Mrs Foster had given these, which show that the bank account concerned is not in her name. On 17 March 2017, Mrs Brake gave instructions (from the same email account) to Mr Ryde-Weller to transfer £100,000 and £290,000 to that same bank account.

96. In this connection, I bear in mind the terms of Mrs Foster’s witness statement of 28 February 2019, made in these proceedings for an interlocutory purpose, in which she asserted that she had given the Brakes £2.6 million out of the proceeds of sale of Sarafina, and denied that there was any pre-arrangement between the parties. As I have said, Mrs Foster was not called to give evidence. These documents were not put to Mrs Brake in cross-examination, so I have not heard her explanation of them, and it is not necessary for me to decide anything about them now.
97. A further feature in relation to this case is that the original draft purchase agreement put forward on behalf of Chedington contained fairly standard warranties relating to intellectual property rights owned or enjoyed by Sarafina. Mr Ryde-Weller’s evidence was that Mrs Brake told him that Sarafina “had created a very minimal intellectual property rights and had little to no IT systems”. Mr Ryde-Weller sought to reduce the exposure of the vendor of the company by removing the intellectual property warranties. Although there was “push back” from Chedington’s lawyers in relation to the removal of *employment* warranties, there was none from those lawyers on removal of warranties relating to the intellectual property rights and IT systems. Mr Ryde-Weller gave evidence that he thought that Dr Guy was not interested in the wedding business, because he wanted the property for other, equestrian uses.
98. Mr Ryde-Weller may well have obtained that impression. As I say, I found him to be an honest witness. But, if so, I do not think it was a true or a complete impression. After all, he never spoke to Dr Guy. Most of his non-documentary information came from Mrs Brake. It is to be noted that, once Chedington had acquired Sarafina, it employed the Brakes to continue the business as before. And Dr Guy’s evidence was that the business was important, not only to pay for the upkeep of the property (including any equestrian facilities), but also because (as Mrs Brake herself says in her written evidence) the company would be a business asset for tax purposes. He negotiated a significant figure with Mrs Brake for the value of the business on top of the value of the real estate. He would not have done this if he had thought that it was valueless. He is, after all, a successful businessman. I find therefore that Dr Guy was very interested in the wedding business, and that Mr Ryde-Weller was in this respect mistaken.

99. The negotiations between Mrs Brake and Dr Guy involved provision for assets to be excluded from the sale, such as the furniture in Axnoller House, and the wedding licence. Despite the absence of the IP warranties, there was never any suggestion that the domain [axnoller.co.uk](http://axnoller.co.uk) or the email account then bearing the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) should be excluded. Nor was there any suggestion that Sarafina did not own them. Indeed, Mrs Brake had told Dr Guy in an earlier email that Sarafina owned everything and she and her husband owned nothing. It is also the case that the statements made by the Brakes to the Official Receiver at the time of their bankruptcies in May 2015 make no reference to any domain names, email accounts or websites as forming part of their assets, although there are references to the Stay in Style email accounts in relation only to business addresses. In cross-examination, Mrs Brake said it did not enter her mind to tell Dr Guy that the sale of Sarafina did not include the account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk).
100. Moreover, a due diligence letter sent by the purchaser's lawyers to the vendor's lawyers by email dated 7 January 2017 included a request for:

“5.2. Details of the computer hardware, databases, software and networks owned or used by the Company (Computer System).

5.3. Details of, and copies of all documents relating to:

5.3.1. any element of the Computer System that is owned by 1/3 party and licensed or leased to the Company, including all open source software licenses; and

5.3.2. any software used by the Company and hosted by a third party application service provider or cloud service provider, whether as a software as a service, platform as a service or as an infrastructure as a service arrangement.

5.4. Details of *any assets used by the Company in connection with its business that are owned by, or shared with, either the sellers or any other person.*” (Emphasis supplied.)

Mrs Foster signed a disclosure letter dated 17 February 2017 in connection with the sale and purchase. It refers for example to the wedding licence, but it does not refer to the domain or to the account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk).

101. In its final form, the agreement entered into provided for the sale and purchase of the share capital of Sarafina to Chedington “subject to the terms of this Agreement”. Those terms included certain covenants, indemnities and warranties. The general warranties included (at schedule 6, part 1):

“5.1. The Company has all necessary licences, and consents, currently necessary to carry on the business that it has carried on up to and including the date of this Agreement in the places and in the manner and with the frequency in which its business is carried on, all of which are valid and subsisting.

5.2. The business to which paragraph 5.1 above relates is the wedding and private events business as well as the holiday rental business.

5.3 There is currently no known reason why any of those licences or consents should be suspended, cancelled, revoked or not renewed on the same terms.

[ ... ]

13.1. The Company is the full legal and beneficial owner of, and has good and marketable title to, all the assets included in the Accounts, any assets acquired since the Accounts Date and *all other assets used by the Company* except for those disposed of since the Accounts Date in the normal course of business and such assets are free from any Encumbrance.

[ ... ]

13.3. The Company is in possession and control of all the assets included in the Accounts, or acquired since the Accounts Date and *all other assets used by the Company*, except those Disclosed as being in the possession of a third party in the normal course of business.” (Emphasis supplied.)

102. Mrs Brake was not formally a party to the agreement between Mrs Foster and Chedington. But she had negotiated it in detail, and knew everything that was in it. She was and is an experienced businesswoman, with a background in finance and asset management. In her witness statement dated 9 July 2020 (stated to be the fifth, though it follows her seventh, of 1 June 2020), she refers at paragraph 12(b) to the warranty at para 13.1 (set out above) that Sarafina owned the assets it used in the business. She said of this: “as Dr Guy was told at the time of the sale of the share capital that did not include the website or domain, and by extension the email accounts”. In his own evidence Dr Guy denies being told this. Mrs Brake was cross-examined about this at some length during the trial. She initially said that she “probably” informed Dr Guy “indirectly”, through Mrs Foster’s solicitors. But later in the cross-examination she changed ground, and instead insisted that, without ever being informed of it, Dr Guy nonetheless knew that the sale did not include these things, *because* the intellectual property rights warranties had been removed from the sale and purchase agreement, and this would have demonstrated to him that those rights were not included.
103. In cross-examination, Dr Guy said that he was aware that the intellectual property right warranties had come out, but that he was told by his lawyers that they were over excessive for this type of transaction. He further said that he was comfortable, because what he needed was covered by clause 13, which was simpler. He agreed that this was not a technology or pharmaceutical company, or a company with many inventions. He said that the request by Mrs Foster’s lawyers to remove the warranties was simply put on the basis that they were too complex and burdensome for this kind of arrangement.
104. I consider that Mrs Brake’s conclusion, that the removal of the warranties showed that domain, website and email accounts were excluded from the sale, does not follow from the premises as a matter of either construction (in which it is indeed irrelevant) or logic. But secondly, and in any event, I do not accept her evidence on this point. Instead, I find that neither Mrs Brake nor anyone on her behalf or that of Mrs Foster so informed Dr Guy. It is not simply that I prefer the evidence of Dr Guy to that of Mrs Brake on this point (as I do). Or that there is an absence of any supporting

evidence on the point from Mr Ryde-Weller as Mrs Foster's solicitor (as there is). He was called, and if it were true that he or someone in his team had told Dr Guy this I would have expected him to say so. But he did not. Moreover, he confirmed that Mrs Brake had never told him that Sarafina did not own its own email accounts, and nor did she tell him that she owned them. He said (and I accept) that, if she had, he would have regarded it as a material matter to disclose to the purchaser. It is true these things were not on the fixed asset list. But Dr Guy said that in his experience such things would not be expected to be. I accept this.

105. But, over and above these matters, it is also such an obvious thing, in selling such a business in 2015, which had no "passing trade", but instead depended on positively attracting the public, for the purchaser to have the domain, the website and the email accounts used by the business up until then. As Dr Guy said in cross-examination, the contrary proposition, that the purchaser would have been "untroubled" by *not* buying these things, is "nonsense". Indeed, in a brochure prepared by Mrs Brake to seek refinancing from Santander Bank in September 2015, it says "90% of the business [is] derived from the axnoller website and the other 10% from agency websites". In cross-examination at the trial Mrs Brake however denied that the goodwill of the business was bound up in its website and email address. She insisted it was bound up in its bricks and mortar.
106. However, I accept Dr Guy's evidence that Mrs Brake had explained to him before the purchase that the main sources of business were other wedding sites which were linked to the Axnoller website and Instagram account. It is clear that, if you do not have such things, the business is much less visible to the public, and less attractive to investors. The interest of the vendor lay in maximising the price, and, indeed, Dr Guy appears to have paid a very high price. If there had been the slightest suggestion that the domain, the website and the email accounts were not included in the sale, I am certain that Dr Guy, as an experienced purchaser of commercial companies, would have noticed, and would have queried it.
107. Mr Ryde Weller gave evidence (which I accept) that he did not remove the IP warranties on the basis that the email accounts did not belong to the company. In my judgment, the absence of those warranties does not show that these things were not being sold. Their absence was reasonably explained by Mrs Brake, and in terms which did *not* include "Oh, but these things are not included". In cross-examination Mrs Brake even said that the fact of not telling Dr Guy about the non-inclusion of the email accounts was "de minimis. Nobody even thought about the email accounts", though a short time later in her cross-examination she retracted this.
108. I further find that Mrs Brake knew well at the trial that she was changing her story that Dr Guy had been told, and that what she had said was not true. In addition, I find that Dr Guy believed that he was buying not only the business but also the associated domain, the website and the email accounts based on that domain, and that his belief was a reasonable one. What was the effect *in law* of the arrangements entered into is a different matter, of course, and one to which I shall return.
109. After the purchase of Sarafina, Chedington procured the change of name of that company to AEL, which took place on 18 July 2017. Mr and Mrs Brake were employed to continue the business of hosting weddings and providing short stay luxury accommodation. The same email accounts were used in this business as before,

based on the “axnoller.co.uk” domain, and all hosted with Fasthosts. In particular, the account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) continued to be the primary account used by customers to contact the business, and vice versa. It appeared on the website. The claimants accepted in their written opening that the hosting costs of the accounts were met by the third defendant at least from February 2017.

110. In addition to Mrs Brake, Simon Windus also used the enquiries account for the purposes of the business. There is no evidence that he did so for private purposes, and I find that he did not. As I have already said, there was a question mark as to whether, before going on maternity leave in June 2016, Rebecca Holt had also used the account, but in cross-examination Mrs Brake accepted that she did. Again there is no evidence that Ms Holt used the account for private purposes, and I find she did not do so. As before, however, Mrs Brake continued to use this account also for her personal, non-business emails, as well as the account with the address [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk). Mr Brake used the account with the address [andy@axnoller.co.uk](mailto:andy@axnoller.co.uk). In May 2017 Mrs Brake also authorised Andrew Allen to provide Simon Windus with the password for the account with the address “alo@”. She said that was because that was when she began medical treatment which took her out of the office.
111. Dr Guy and the other directors of Chedington and AEL left the management of the business in the hands of Mrs Brake and the other employees, and did not use or seek access to the enquiries account. Nor did they ask Mrs Brake for the passwords to the Fasthosts or enquiries account. But Dr Guy and Mrs Brake discussed updating the website, and Mrs Brake never told Dr Guy that the axnoller domain belonged to her personally, even though it would have been obvious to her that he thought he had bought them along with the business.
112. In cross-examination, Dr Guy accepted that he assumed that at this time Mrs Brake would have private emails on the enquiries account, because of his past experience with staff in other companies. He also accepted that Mrs Brake would not want others to see such private emails. The contracts of employment between Mr and Mrs Brake and the third defendant were formal documents negotiated between the parties at the time of the sale and purchase of Sarafina. As originally drafted, they contained clauses dealing with surveillance of employees’ actions and privacy. In particular, they made clear that employees had no expectation of privacy in relation to the use of the employer’s telephones, computers and email systems. However, these clauses were deleted by the time that the final version was signed.
113. In an email dated 14 February 2017 to her lawyers, Mrs Brake explained that she understood why Dr Guy used such clauses in medical marijuana business, but said that she was unhappy with this in the wedding business. The lawyers passed this on to Dr Guy, who also said in cross-examination that Mrs Brake had told him that she thought it was “a bit heavy-handed”, although “she did not tell me why”. Nevertheless, Dr Guy accepted the deletion by email on 17 February 2017. The clauses which *were* included (at [16] and [20]) are more limited. Nonetheless, there is an obligation in clause 16 to “return ... anything in your possession which belongs to the Employer ... which contains ... any confidential information ... in whatever form ... including computer programmes with related storage media.” Clause 20 provides for Mrs Brake to consent to the processing of her data (and sensitive data) by the third defendant for the purposes of her employment. I do not think that this latter clause is of any significance in the context of this dispute. However, I also do not consider that

the deletion of draft clauses can be admissible evidence in relation to the construction of what is left.

*Dismissal of the claimants*

114. Unfortunately, relations between Dr Guy and Mr and Mrs Brake deteriorated over time. It is said against her, for example, that Mrs Brake refused to allow the directors of AEL access to company and management information, and that she also restricted access to Axnoller House. I do not need to resolve any of that in this claim. But there was a stormy meeting between them on 6 November 2018, which concluded badly, and on 8 November 2018 Mr and Mrs Brake were dismissed. They were given written notice expiring on 30 November 2018, with garden leave in the meantime, and payment in lieu of notice and holiday pay thereafter. One thing that the letter did not do was to ask Mrs Brake for the passwords to any of the various axnoller email accounts or the Fasthosts account.
115. As a result of the dismissal, however, Dr Guy was very concerned about the enquiries account in particular, to which Mrs Brake still had access, and he did not. This was AEL's main business email account. He telephoned Mr Allen, who was still the administrator for the various IT accounts. But he said he could take instructions only from Mrs Brake. Simon Windus informed Dr Guy of the nondisclosure agreement between Mrs Brake and Mr Allen. Dr Guy emailed Mr Allen at 21:36 that evening, referring to any nondisclosure agreement that there might be (but whose terms he had not then seen) as having no validity now that Mrs Brake had been dismissed. Later the same evening Mr Allen replied, saying that there *was* an agreement, and that he would take legal advice.
116. On the morning of 9 November 2018, Dr Guy telephoned, and subsequently visited, Mr Allen, and instructed him to change all the passwords to the Fasthosts account and associated email accounts so that Mr and Mrs Brake were no longer able to access them. I find that Dr Guy did not threaten to sue Mr Allen if he did not comply, but he did warn him that there might be legal implications. Mr Allen said he would take independent legal advice. I also find that Dr Guy and Mr Allen did not discuss the question of intellectual property rights, despite the suggestion to the contrary in Mr Allen's second witness statement.
117. On the same day, Mrs Brake asked Mr Allen if she could come in to see him and discuss the email accounts, but he said he was seeking his own legal advice, and had to refuse. She then sent him an email saying:

“the only thing I was going to get you to do is to take my personal stuff off the business accounts and anything on live drive so you could go ahead and release the passwords and change them for them”.

It will be noted that this email makes no claim to ownership of the domain, the website or the email accounts. Nor does it refer to the 2014 nondisclosure agreement between them. It simply makes an understandable request for Mrs Brake's own personal data. And, in an email to Dr Guy's then lawyer, Rod McDonagh, on the same day, she said:

“I have no interest in interfering with the axnoller enquiries or staff emails, but I do not want Guy or anyone else at axnoller having any access to my private emails”.

118. However, in a follow-up email to Mr McDonagh she added:

“there are emails on this account that predate the creation of Sarafina Properties Ltd and Axnoller Events Limited and they are my husband and my private property”.

I have already found that no such emails on the enquiries account are now accessible, with one immaterial exception. But it is notable that, in these emails, Mrs Brake makes no ownership claim to the Axnoller enquiries account from the time of the incorporation of Sarafina, that is June 2015, and neither does she complain of any interference with the nondisclosure agreement.

119. Mr Allen took independent legal advice, as he had said he would, and was told that Dr Guy owned the company and its intellectual property rights and therefore he should comply. He did so. Thereafter, on 9 November 2018 Mr Allen made backups of the axnoller accounts, to be kept by his solicitors, Humphreys Kirk, until the situation was resolved. However, it appears from the (unchallenged) joint expert report of Mr Blackband of Grant Thornton that Mr Allen copied only the *inbox* of the enquiries account, and not the *outbox*. Mr Allen also changed the password for the enquiries account, so that Mrs Brake no longer had access to it, but the defendants did. (I record that there was a gap of about 30 hours before access was switched off for Mrs Brake, but it is not clear if she took any advantage of that.)

120. Until 12 November 2018 Mr and Mrs Brake continued to have access to the accounts with the *alo@* and *andy@* addresses. But on that day, Mr Allen removed access from the Fasthosts server and migrated their contents to a portable format for Mr and Mrs Brake to take away. These were made available to the Brakes or their solicitors on the same day, although not collected until later. The defendants at no time had access to these accounts or to any of the data in them, and Mr Allen did not give them any. The suggestion in the Brakes’ opening skeleton at paragraph 8 that the defendants have read, retained and shared such documents is on the evidence before me entirely without foundation. In particular, I accept Dr Guy’s explanation for disclosing the few documents that had been sent to or from [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk), that they must have come into the defendants’ hands through other routes than retention by them. The defendants had no interest in these accounts. At the same time AEL would not have been able to use the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) account for its business, so it had to set up new ones. I deal with this further below.

121. On 13 November 2018 Labyrinth Computers Ltd became administrator of the enquiries account in place of Mr Allen and his company. As administrator, that company was able to provide direct access to the enquiries account to those authorised. It also made a copy of the enquiries account. The jointly instructed expert, Mr Blackband of Grant Thornton, found that this copy contained both the *inbox* and *outbox* of the account, and also emails from other ‘axnollerevents’ email accounts. Dr Guy originally agreed with Simon Windus that the latter (as a trusted colleague of Mrs Brake’s) would go through the enquiries account to remove Mrs Brake’s personal

emails. Mr Windus was understandably uncomfortable with this, but in any event Mrs Brake objected, and it did not happen.

122. Dr Guy said he would find another way to solve the problem. In particular, in legal correspondence between the 9 November 2018 and 12 November 2018, the defendants' solicitors on their behalf offered to give unsupervised access to Mrs Brake, subject to her giving undertakings as to not accessing, editing or deleting commercially sensitive information or business data and removing only her and her husband's personal information. But the undertakings requested were not forthcoming. It should be noted that Mrs Brake's position at this time was not that she owned the account. On the contrary she accepted in an email to Mr Allen on 9 November 2018 that it was a business account; it was simply that she had some personal material in it, and wanted access to it.
123. On 15 November 2018 the claimants offered an undertaking in narrower terms than that requested by the defendants, and asked also for a cross-undertaking and warranty from the third defendant. On 21 November 2018 the defendants proposed different and simpler wording for the claimants' undertakings. That was refused by the claimants the same day, who insisted on their own versions and the cross-undertaking and warranty. On 26 November 2018 the defendants offered the claimants supervised access as an alternative. This was repeated on 27 November. On 29 November 2018 the claimants returned to the question of unsupervised access, but offering undertakings only on their own terms.
124. The same day, the defendants again offered supervised access to the account. In response to a request from the claimants, the defendants explained on 30 November 2018 what would be involved in supervised access. On 3 December 2018 the claimants returned to ask for unsupervised access with undertakings. On 4 December 2018, the defendants' solicitors said that this was no longer an option. But on 5 December 2018 the defendants changed their minds and agreed to this, subject to undertakings. However, on 12 December 2018 the claimants refused to give the undertakings required by the defendants, and proposed their own. On 17 December 2018 the defendants rejected these. The claimants accordingly did not have access to the enquiries account.
125. I find that the defendants wished as quickly as possible to "purge" the enquiries email account of the claimants' personal emails, so that the business could move on. I also find that they had no interest in or desire to read the claimants' personal emails. My own assessment, after hearing both Mrs Brake and Dr Guy, and reading the relevant documents, is that the defendants bent over backwards to accommodate Mrs Brake, consistently with their business needs and the data protection rights of third parties, but for some reason Mrs Brake was unwilling to agree to any of the offers. I find that the defendants' actions in this regard were appropriate and reasonable, both in the making and in the withdrawing of offers of access, especially in light of the fact that the claimants at that stage had made no claim to the ownership of the enquiries account.
126. At the time Mrs Brake, and subsequently her solicitors, made numerous complaints that the defendants were acting unlawfully in denying the claimants access to their personal emails in the enquiries account. So Dr Guy was well aware of the Brakes' position. But I find on the evidence that he honestly believed that he was not acting



unlawfully in withdrawing the Brakes' access to what he reasonably believed was the company's email account on their dismissal.

127. From 12 November 2018, by her solicitors Mrs Brake made various subject access requests, and other requests for access to the account. She did this, not claiming to be its 'owner', but instead under data protection legislation, and for the purposes of a forthcoming disciplinary appeal hearing relating to the Brakes' dismissal. At the same time, she insisted that the defendants should not access, copy, transfer or remove her personal emails or files in the account. It was not clear to Dr Guy how the defendants could respond to the subject access and other requests without being able first to see the contents of the account. He was also mindful of the rights of third parties to data protection. There were many discussions between the two sides as to how the subject access request was to be satisfied and, if searches were to be used, what keywords should be used in making those searches.
128. There was also a dispute between the parties because the defendants placed CCTV cameras at various points on the Axnoller Estate. The Brakes complained that these infringed their data protection and GDPR rights. On 19 December 2018, the defendants' solicitors provided the claimants with a link (limited to expire on 4 January 2020) to the CCTV data, for them to view or download as they wished. In relation to the disciplinary appeal hearing, the appeals themselves were filed out of time, although this was extended, and the hearing date originally fixed of 29 November 2018 was postponed because of indisposition on the part of the Brakes. They were offered the opportunity to deal with the matter on paper, but this was not accepted.
129. In the meantime, Dr Guy authorised direct access to the enquiries account in November 2018 via Labyrinth Computers to his own solicitors and to a directly instructed barrister, Mr Martin Palmer, in relation to the actual or potential litigation in relation to claims relating to employment, data protection and the continued occupation by the Brakes of Axnoller House. Both the solicitors and Mr Palmer began to review the account from those points of view. Neither was instructed to look at purely personal emails. Mr Palmer was assisted by his wife (who is not a lawyer) in reviewing the contents of the account, under his supervision.
130. In answer to a request from Dr Guy's solicitors of 17 December 2018 to know on what basis they were entitled to the data in the account, the solicitors for the Brakes said in an email on the same day that data from before the incorporation of Sarafina in June 2015, "does not belong to your client and is being unlawfully withheld". This confirmed the view expressed in an email from Mrs Brake dated 9 November 2018, to which I have already referred. The defendants' solicitors replied on 18 December 2018 to say that the pre-June 2015 emails "must mostly be connected with Axnoller business. This is the business that is owned by our client and is on an email account that has been paid for by our client." In an email of 18 December 2018, the claimants' solicitors say, as to the *pre-June 2015* data:

"This is not your client's data. It belongs entirely to our clients and does not form part of any purchase of the former business. The company your client purchased was not in existence then, hence title has never been transferred".

131. In an email dated 4 December 2018, the claimants’ solicitors asked the defendants for all emails predating 2 June 2015, on the basis that that was when Sarafina was incorporated, and therefore the preceding emails could be of no relevance to the defendants, and the defendants had no right to them. The point was repeated in an email of 12 December 2018. As I have already said, however, no one now has access to these emails, except the one dated 8 February 2015 from Mr Culme-Seymour to Mrs Brake, which appears to be of no interest to anyone. The question about these emails, if indeed there are any, is therefore academic.
132. As a precaution, in December 2018 Dr Guy registered a new domain, axnollerevents.co.uk. Initially the website simply pointed to the website at axnoller.co.uk, although there were also new email addresses using the new domain, because the old enquiries account was the subject of the dispute with Mrs Brake. The new axnoller website (which had previously been discussed between Dr Guy and Mrs Brake) went live in early 2019.

*Allegations against Mrs Brake*

133. Some 10 days or so after the dismissal of the Brakes, Dr Guy received a telephone call from William D’Arcy, the former husband of Mrs Brake. Mrs Brake had in fact obtained employment for him by Chedington at a property which it owned in Spain. He alleged that Saffron Foster had never been the true owner of Sarafina, and that Mrs Brake had been behind it all. Mr D’Arcy further told Dr Guy that evidence supporting these allegations could be obtained from someone called Bruce Barclay in Switzerland. In passing, I note that Mr Barclay is referred to in the bundle. There is an email exchange between Mrs Brake and Bruce Barclay on 29 July 2015, in which Mrs Brake says “It may interest you to know that we have completed the deal!!!” The email goes on to talk about the site having “huge potential” for development, and offering “to host” him there in the future. Mr Barclay replied “Congratulations. Well done”. These emails were not put to Mrs Brake in cross-examination, and therefore I do not have the benefit of her explanation of them. I draw no conclusions from them.
134. Having received the information that Mr Barclay might be able to supply information, Dr Guy contacted him, and was apparently supplied with some documentary evidence. Dr Guy became concerned from this material that there might have been wrongdoing by Mrs Brake. However, he told me – and I accept – that he

“didn’t for one minute imagine that there would be other evidence of this wrongdoing sitting in the company’s email account.”

He went on to say – and I further accept – that

“I still did not imagine that Mrs Brake would have left any evidence in the company’s email accounts of wrongdoing.”

135. As I have said, access to the enquiries account was provided to the defendants’ solicitors for their review. This showed that the account contained more than 70,000 emails from 15 August 2015 to 8 November 2018. After obtaining details of the Brakes’ advisers, the defendants’ solicitors found that in that account, of those 70,000+ emails, there were some 2209 emails between the Brakes and those advisers. I find that the purpose of this review was to enable the defendants to deal with the

litigation or contemplated litigation concerning the Brakes' employment, their data protection rights and the property possession claims. Although lawyers had access to the account, the defendants' own staff did not.

136. However, on about 2 January 2019, Dr Guy first looked for himself at the enquiries account (through direct access from Labyrinth Computers) in order to familiarise himself with other aspects of the business. But, as he put it (and I accept) in his oral evidence, he

“stumbled across ... a number of emails that corroborated entirely what I had been told by Mr Barclay beforehand”.

137. However, he made clear that he did not look at personal emails relating to Mrs Brake, such as those in connection with her health, members of her family, or other personal matters. The only purpose for which he accessed the account was to familiarise himself with the business, but (once he had established that there might be information relating to Mrs Brake's wrongdoing) also to see what such evidence there was, not only in relation to that wrongdoing, but in particular in relation to the ongoing litigation with the Brakes, such as the employment claim, and the possession claim. I accept this evidence. I do not accept that Dr Guy deliberately read any email with a view to discovering personal information relating to Mr or Mrs Brake. I find that, where Dr Guy looked at an email and found that it related to personal matters that did not concern his company or his business, he did not read it further. I further find that Dr Guy never had any interest in the Brakes' purely personal information.

138. I also accept that his instructions to his lawyers were to find and note material which related to the business, and not to find material which was personal to Mr and Mrs Brake. It is in the nature of such an exercise that, in deciding whether a particular document relates to the business or is purely personal, some elements of the document must be read and understood. I accept that Dr Guy and those advising him did not read further than they needed to in order to establish that documents were of a personal rather than a business nature. However, if they considered that it was an email which concerned the business, then they read on.

#### *Dispute over the axnoller domain*

139. In July 2019, two months before the commencement of this litigation, Mrs Brake contacted Simon Deverell of 0404 Creative, who had registered it originally in 2009 on her instructions, but was named as the registrant with Nominet. Thereafter, in September 2019 she procured the registration of the axnoller domain in her own name, in place of him. A dispute is pending under the Nominet dispute resolution system as to whether she was entitled to be so registered. That dispute is stayed pending the outcome of this litigation. The website on the axnoller domain appears to have become inaccessible to the public in October 2019. Exactly why that happened does not matter for present purposes. But, as a result, the axnollerevents domain became the primary domain for the business website.

#### *Contact between Dr Guy, Mrs Brehme and Mr Swift*

140. After the dismissal of the Brakes (but not before) there was contact between Dr Guy and Duncan Swift, the Brakes' trustee in bankruptcy. It came about in this way. Dr

Guy was put in touch with Lorraine Brehme through a mutual acquaintance. She initiated a meeting, at which she recommended his meeting both the liquidator of Stay in Style and the trustee in bankruptcy. Dr Guy agreed, and a meeting was set up. Dr Guy's email telling Simon Lowes (the liquidator of Stay in Style) that he would be delighted to meet is dated 30 November 2018. That was a reply to Mr Lowes' email confirming their own contact, by telephone that morning. The meeting with Mr Swift was fixed for 7 December 2018. Mrs Brehme appears to have attended as well.

141. The meeting was concerned largely with chattels. It did not discuss the ownership of the axnoller enquiries account or the axnoller domain or website. Mr Swift raised with Dr Guy the question of the sale to the defendants of the Stay in Style chattels, and also the Stay in Style domain and its related email accounts and website. This was referred to in an email from Mr Swift to his lawyer dated 9 December 2018, and another email from Mr Swift's lawyer to Dr Guy of 10 December 2018. However, this was not pursued because Dr Guy was not interested in the Stay in Style brand, believing that with the purchase of Sarafina he had bought the axnoller brand (including domain, website and related email accounts). In particular, I find that Dr Guy did not ask Mr Swift whether he could buy any of the axnoller domain, website or email accounts.
142. At Mrs Brehme's request the defendants' lawyers in June 2019 sent her some emails relevant to her, but none that was purely personal to Mrs Brake. Mrs Brehme was not given access to the account. The defendants' lawyers selected which documents were sent to her. However, Mrs Brake was not informed that any material had been sent to Mrs Brehme.
143. Dr Guy told Mr Swift by email dated 18 January 2019 that boxes of files apparently belonging to the Brakes had been found at the cottage by his staff. On the same day, Mr Swift instructed an agent to collect and securely store those files, giving instructions that they were not inspected or reviewed until the court decided what should be done with them. There were 34 boxes in total. The trustee in bankruptcy justified his actions under section 311 of the Insolvency Act 1986. I find that the defendants did nothing in relation to the boxes except to inform the trustee of their presence in the cottage. In particular, they did not "steal" them, or interfere with or review them.

#### *Use of a press agent and public relations lawyers*

144. Subsequently Dr Guy asked Mr Palmer to supply a press agent (Mr Jonathan Hawker), who had been engaged to advise, with some information from the account. This came about because a number of allegations had been made in national newspapers in March 2019 against Dr Guy, which Dr Guy believed to have come from the Brakes. Dr Guy decided to deal with these allegations by seeking the advice of a press agent and specialist public relations lawyers (Harbottle and Lewis). I deal with this in more detail later. The defendants did not however tell the claimants beforehand that this was being done.

#### *The claim to ownership of the enquiries account*

145. It is a curious feature of this case that no claim was made on behalf of Mrs Brake to the ownership of the enquiries account until August 2019, just before this litigation was commenced. Her solicitors wrote to the defendants' solicitors on 5 August 2019

to deal with an aspect of the disclosure process in other, existing proceedings between the parties. That letter said that the account had been set up by Mrs Brake before the incorporation of Sarafina. It asserted Mrs Brake's privacy in relation to her private emails in the account, but did not claim ownership of it. A letter in reply from the defendants' solicitors to claimants' solicitors of 23 August 2019 said that the account was an asset of the third defendant's business, and that the second defendant owned the third defendant. It went on in some detail to deny various factual assertions in the letter of 5 August 2019. The claimants' solicitors replied two days later, on 23 August 2019, and for the first time asserted Mrs Brake's claim to ownership of the axnoller domain and the other axnoller email accounts. Ten days later, the claim form in this claim was issued.

146. The amended particulars of claim at [21] allege that, despite the acquisition of West Axnoller Farm by Sarafina in 2015, Mrs Brake retained and used the axnoller email accounts as her own. At [22] they allege, correspondingly, that Mrs Brake did not sell the domains or the accounts to Sarafina. And at [28] they allege that all the information in the enquiries account was private and confidential to the Brakes except as to Mrs Brake's use of it as an agent for "AEL" (which I assume is intended to refer to Sarafina once sold to Chedington), and that the Brakes had reasonable expectations of privacy and confidentiality.
147. In the bundle there is a copy of an undated complaint made by Mr and Mrs Brake to the Information Commissioner's Office about data protection breaches allegedly committed by the defendants, including the release of personal data (or access to it) to a range of persons including "legal firms involved in the dispute" and "the courts". Internal information shows that it postdates 28 March 2019. It was filed on 29 August 2019. It appears that this copy of the complaint was passed by the ICO to the defendants for their comments. The first sentence of paragraph 3 of this complaint says

"During the course of our employment, much of our personal data was retained on the servers of AEL and CCEL – specifically emails on the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk), [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk) and [andy@axnoller.co.uk](mailto:andy@axnoller.co.uk) accounts."

148. Mrs Brake's evidence was that she did not sign the document, she did not write it, and that the first sentence of paragraph 3 was wrong. I accept that this complaint may well have been drafted by Mrs Brake's lawyers for her, rather than by herself. It was put to Mrs Brake that her solicitors would not have submitted it to the ICO without her seeing it first. Mrs Brake's response to this (which I set out earlier) was simply bluster, which did not answer the question. I find that she was sent a copy of the complaint to review before it was sent to the ICO. It would be good practice by lawyers to do so, as much to protect themselves as their client, and it would be in keeping with Mrs Brake's general approach to business matters to wish to review it before it was sent. Accordingly, I have no doubt that she saw and approved this wording. I add that I have not seen the decision of the ICO on this complaint, but I understand from Dr Guy's evidence that it ruled that there was a lawful purpose in providing the contents of these accounts to the defendants' lawyers and to the court.

*Disclosure of information from the enquiries account to third parties*

149. The defendants provided information from the enquiries account in November 2018 to their solicitors Radius Law and directly instructed counsel Martin Palmer, and in about June 2019 to their later solicitors Stewarts Law. The solicitors had access to both the Allen copy and the Labyrinth copy. Mr Palmer had access only to the latter. The solicitors and Mr Palmer also shared the emails from the enquiries account with counsel instructed in specific legal proceedings for the defendants. These counsel were Andrew Sutcliffe QC, William Day, Edwin Johnson QC, Niraj Modha, Robert Bowker, Alex Halban and Philip Roberts QC. In all these cases documents were provided to these advisers for the purposes of the legal proceedings in which they were individually instructed, and held subject to the usual duties of confidentiality of members of the bar. I understand that each of the counsel concerned has confirmed that there has been no further dissemination.
150. I should specifically mention the case of Mr Palmer. He was instructed by direct access. Apparently, he has a secondary residence close to Dr Guy, and they know each other. That cannot make any difference as to the propriety of disclosing documents to him for the purposes of his professional advice, or the degree of confidentiality imposed upon him as a result. It also appears that his wife (who is not legally qualified) assisted him in reviewing the enquiries account for the purposes of his advice. I have no doubt that she was well aware that the contents of this account were confidential and not to be disseminated further. Given that she had access to the account under the supervision of her husband, a qualified barrister, and only for the purposes of assisting him in his work, the fact that she is not herself a qualified lawyer is in my judgment irrelevant. She was and is in the same position as any unqualified fee earner in a firm of solicitors, working under the direction of the qualified staff. I am satisfied that she has not disseminated any of the information further.
151. As I have said, limited information was also provided to Jonathan Hawker, the press agent, and to Harbottle and Lewis, public relations lawyers, for the purpose of advising the defendants on media issues during the period when information was published in the national press making allegations against Dr Guy. These allegations included one that Dr Guy had threatened to kill the claimants' horses. This was published in the national press on 31 March 2019. But the news stories referred to a letter written by the defendants' solicitors some four months earlier, at the beginning of December 2018 to the claimants, apparently giving them 96 hours to remove their horses from the defendants' property. So far as I can tell, this letter is not in the papers before me, and I am unable to ascertain the circumstances or the words used. In the claimants' chronology prepared for the trial, the following statement appears under "3 December 2018":
- "Dr Guy writes letter through solicitors threatening to shoot the horses stabled at the farm if the Brakes do not move them within 96 hours."
152. The truth or falsity of this allegation was not an issue before me, and I say nothing about that. However, in the face of this allegation published in the national media only after some three months had elapsed from when the letter concerned was written, I can well understand why it was thought desirable for the defendants to engage a press agent and specialist lawyers to advise them. The information supplied to the press agent and the lawyers was however for self-briefing, and not for further dissemination. There is no evidence that it was disseminated further, and I find that it was not.

153. On about 15 November 2018, the defendants through their solicitors instructed Gillian Craik, a human resources adviser, to investigate allegations of potential misconduct by the claimants during the course of their employment. No documents from the enquiries account were disclosed to her for this purpose. However, some documents sent by Mrs Brake from the enquiries account to Dr Guy's own email account were supplied to her. Obviously they would not have been private or confidential to Mrs Brake as against Dr Guy.
154. In February 2019 the defendants further instructed Lorna Townsend, another human resources expert (and indeed a qualified solicitor) to prepare a report on suspected misconduct by the claimants during their employment. However, no emails from the enquiries account were provided to her and neither did she have access to the account. However she was provided with some emails sent by Mrs Brake from the enquiries account to Dr Guy's email account or that of the bookkeeper Jo Hague. Again, these would not have been private or confidential to Mrs Brake as against Dr Guy.
155. Lawyers acting for the Brakes' trustee in bankruptcy, Mr Swift, wrote to Dr and Mrs Guy on 20 March 2019 to request the supply of information, and referred to the trustee's being "entitled under section 366 of the Insolvency Act to receive from any person information that they have in relation to the bankrupts or their dealings, affairs or property". It does not appear that at any time an order was made requiring any of the defendants to comply with such a request under section 366 of the Insolvency Act 1986. However, Dr Guy's instructions to his legal team were to do what was necessary to respond. As a result, they shared certain documents with Mr Swift, namely, the 202 documents from the enquiries account listed in appendix B to Dr Guy's Affidavit of 16 December 2019.
156. In June 2019, following a specific request by Lorraine Brehme for information concerning the involvement of a particular accountant in matters concerning the claimants' bankruptcies, Martin Palmer supplied some 67 emails to her from the enquiries account, as set out in appendix A to Dr Guy's Affidavit of 16 December 2019. Dr Guy's evidence is that he understands that some of these documents were referred to at a court hearing on 10 June 2019, before Mr Jarvis QC.
157. A number of documents from the enquiries account have been deployed in court proceedings, either by being exhibited to witness statements on behalf of the defendants or by being disclosed in the proceedings to the claimants as part of the disclosure procedure. The former disclosures are set out in paragraphs 33 to 40 of Dr Guy's Affidavit of 16 December 2019, and the latter at paragraphs 41 to 44 of the same affidavit.

*The impact of disclosure on the claimants*

158. Mrs Brake gave written evidence about the impact on her of what she claims to be the misuse of her confidential information and the breach of her privacy by the defendants. I am satisfied that she has been both distressed and embarrassed by what has happened. However, I do not accept that the degree of distress and embarrassment is as great as she makes out. First of all, she assumes that everyone on the defendants' side, including all members of their legal teams, has read everything. I do not accept this. Secondly, I am satisfied that Dr Guy and his advisers have approached the difficult task of working out what to do with the information they came across with an

appreciation of the sensitivity of what they were doing, and a desire to respect the rights of others, including Mrs Brake. Thirdly, I do not accept that the defendants and their advisers have deliberately disclosed private or confidential information about Mrs Brake to third parties for the purpose of distressing or embarrassing her.

159. Moreover, it must be borne in mind that in our system the default position is that justice is done in public. This public aspect is not however there for the delectation or enjoyment of members of the public, or for the media to be able to make money by selling the information as “news”. It is there to ensure the quality and impartiality of justice. There must therefore necessarily be an element of disclosure of otherwise private or confidential information in vindicating rights which have been infringed. There are exceptions, and indeed during the course of the trial of this claim I sat in private at certain points. But the fact remains that some exposure of private life is almost inevitable when parties litigate about the breakdown of a relationship, whether business, employment or purely personal. Lawyers on both sides will see documents disclosed to them (under an obligation of confidentiality) which would not otherwise see the light of day, and some of those documents may be included in the hearing or trial bundle and then referred to in open court. In my judgment, none of this is in itself actionable.
160. Mrs Brake needs to show something over and above this. But I am not satisfied on the material before me that she has done so, apart from the modest distress and embarrassment caused to her by the knowledge that persons who were never intended to read her private correspondence have done so. I should also add that this is not the kind of case where celebrities have had their mobile telephones hacked, or their privacy otherwise invaded, so that private information could be published in national and international media for profit. The Brakes are entitled to their privacy, but they are not celebrities. The public will not be very interested in their private information. They do not have a ‘brand’ to be damaged (*cf* the model Naomi Campbell, for example). Nor indeed was any of the information leaked to or published in the media. This is, at best, a case of limited damage to the claimants. In the restricted contexts in which disclosures have been made, I consider that no reasonable person of ordinary sensibilities would be substantially offended.
161. In addition, Mrs Brake says that she has spent enormous legal costs in other litigation which would not have happened if Dr Guy had initially permitted her to retrieve her personal information from the account, and claims these as special damages. I accept that she has spent large sums of money in legal costs, but I do not accept that this is all to be laid at the door of the defendants. As I have already held, the offers which were made by the defendants to permit the claimants to have access to their personal information in the account were reasonable and appropriate at the time, but the claimants chose not to take them up, instead seeking to impose unreasonable conditions. In any event, if the claimants win their litigation, they can expect to be awarded their legal costs of that litigation. But if they lose a claim (where there is claimants or defendants), and are ordered to pay the other side’s costs, they cannot normally seek to recover those costs (or indeed their own) as damages in some other claim.
162. The claimants additionally say in their closing submissions that they have suffered a loss under Art 6 of the ECHR by being deprived of a copy of the emails in the enquiries account whilst the defendants were litigating against them in relation to



those emails. They accept, however that, since they were provided with a copy after the November 2019 hearing, there is no continuing loss under this head. For my part, in these circumstances I do not see how they have suffered any compensable loss at all. They have prepared for the trial, having had the emails for almost a year, and fought it with their full benefit. If they win their claim, their only loss is any extra costs they can prove, but these would form part of any costs award in their favour. If they lose, again their only loss is being put to extra costs at an early stage, and this can be taken into account in any costs award made by the court.

163. Lastly, under this head, I record that there was no evidence before me of any loss occasioned to Mr Brake by any misuse of confidential information or breach of privacy that might be proved by him against the defendants. As a result, I find that there is no such loss.

### **Identifying documents**

164. It is necessary to bear in mind that this is a claim for final injunctive relief, including the destruction of documents. It is therefore important to be able to descend to detail. If the claimants do not make out a case for an injunction in relation to a specific email, I cannot make that order, unless the defendants agree, or the court decides, that it is to be governed by the case of another email or group of emails in relation to which injunctive relief has also been agreed or decided. As I have already said, this case does not concern emails in any account using the [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) address before August 2015 because, with one trivial exception, there are none shown to be in the hands of the defendants (or anyone else).
165. At or before the hearing before Mr Jarvis QC in November 2019, the parties agreed a mechanism for reviewing the emails in the enquiries account. In his judgment, the judge said:

“21. (2) ... It was not in dispute that some of those documents would be purely business documents which belonged to AEL and that they should be retained by AEL. It was also not in dispute that some would be confidential, private emails belonging to the Brakes. Where that line should be drawn could only be decided by examination of the particular documents, a course which could not practically be carried out by the court. The parties have agreed a mechanism for dealing with these documents...”

But all that was in the context, and for the purposes, of an interim injunction application, where the evidence before the court is normally written, rather than a full trial, where it is usually oral.

166. I note also the comments of the Court of Appeal in *Imerman v Tchenguiz* [2011] Fam 116, [78]:

“However, at least in the written submissions made on behalf of the defendants in the Queen’s Bench Division appeal, it was contended that, until Mr Imerman had specifically identified the documents which contained confidential information, and the grounds for claiming confidentiality, his claim in confidence should be rejected. No authority has been cited to support the proposition that, in every case where it is said that breach of confidence

has occurred, or is threatened, in relation to a number of documents, the claimant must, as a matter of law, identify each and every document for which he claims confidence, and why. In some cases, that may be an appropriate requirement, for instance where a claimant is seeking to enjoin a former employee from using some, but not all, of the information the latter obtained when in the claimant's employment, as in *Lock International plc v Beswick* [1989] 1 WLR 1268, page 1274B. However, in the present case, the imposition of such a requirement is unnecessary (as it is obvious that many, probably most, of the documents are confidential or contain confidential information), disproportionate (because of the sheer quantity of documents copied), and unfair on Mr Imerman (in the light of the number of documents copied, and the fact that the copying was done without his knowledge, let alone his consent). It is oppressive and verging on the absurd to suggest that, before he can obtain any equitable relief, Mr Imerman must identify which out of 250,000 (let alone which out of 2.5 million) documents is or is not confidential or does or does not contain confidential information.”

167. Those comments too were made in the context of an interlocutory appeal against the decision of Eady J to grant summary judgment to the claimant on a claim to restrain the defendants from communicating the contents of his confidential documents to third parties and requiring the delivery up of those documents. They were not made at a trial or on an appeal from a trial. I do not read these comments as meaning that it is *never* necessary to look at the individual documents. But it shows that in *some* cases (particularly for interlocutory purposes) it is not necessary to do so. Each case must turn on its facts.

#### *Review mechanism*

168. As I have said, a review mechanism was instituted by the order of Mr Jarvis QC. That mechanism has been implemented, at least to some extent, although there have inevitably been disputes about it. Both Mrs Brake and Mr Spendlove gave evidence about this, and both were cross-examined before me. The evidence of Mrs Brake was more general, and in round numbers, compared to that of Mr Spendlove, which was more detailed and more precise, but there are nevertheless some points of comparison. Mrs Brake said that there were about 63,000 emails in the enquiries account, and that the claimants accepted that “around 35000” of the emails in it were business emails, and not private or confidential. She said that the defendants accepted that “around 5000” should be deleted as private and confidential. Mr Spendlove said that there were 62,524 emails, and that the claimants had actually accepted 33,528 emails (about 60%) as business related. He further said that the defendants had initially accepted that 3,878 emails, and later a further 1,633 emails, totalling 5,511 emails in all (about 9%), should be deleted. Beyond that point, however, agreement was less obvious.
169. Deducting 33,528 from 62,524 leaves 28,999 emails which were initially claimed by the claimants to be private. After further review, in October 2020, the claimants divided these 28,999 emails into three categories. The **first** consisted of 13,464 emails (Mrs Brake said “about 13,500 emails”) which the claimants continued to insist were private. As I have said, the defendants finally accepted that 5,511 of these were indeed private. Deducting 5,511 from 13,464 leaves some 7,953 of the 13,464 as still disputed. Mr Spendlove says in his evidence that the disputed number is 7,998. I am not clear why there is a difference of 45 between these two numbers. The **second** of

the three categories put forward by the claimants consisted of 4,338 emails which were now accepted by the claimants as business emails, and no longer claimed to be private. It is not necessary to say anything further about this category.

170. Deducting the 13,464 of the first category and the 4,338 of the second category from the initially claimed 28,999, leaves a **third** category of 11,197 emails. In a letter from the claimants' solicitors to the defendants' solicitors of 6 October 2020 the claimants' solicitors said that these emails

“are extremely difficult to categorise and most are emails between the two parties which means it is disproportionate to have a dispute. Our clients will seek a variation to the order of Mr Jarvis QC such that neither they nor your clients need to delete their copies of these”.

The defendants accordingly understood, in my view not unreasonably, that the claimants were abandoning their claim to a permanent injunction against the defendants in respect of these 11,197 documents. That however proved to be a mistaken assumption. I will come back to this category.

*The claimants' first category: 13,464 emails*

171. I return to the first of the claimants' three categories, that is, 13,464 emails claimed to be private. As I say, the defendants accept that 5,511 of them are private and should be deleted, leaving 7,953 (or 7,998) in dispute. Of the documents in dispute, the defendants claim to be entitled to retain 3149 emails as business emails, and 4,849 emails as evidence of alleged wrongdoing by the claimants (3,149 and 4,849 total 7,998). The defendants say (in an overarching submission applying to the whole account) that the claimants had no reasonable expectation of confidentiality or privacy in the account at all, and fail at the outset on that basis. But, subject to that, they do not defend the retention and use of the 4,849 emails on any basis other than the “iniquity defence”. I will deal with each part of the disputed documents separately.
172. **The first part of the residual category:** As to the first part of the residual category (which Mr Spendlove says amount to 3,149 emails), both Mrs Brake and Mr Spendlove gave written evidence. Mr Spendlove set out subcategories of documents in this category, and adduced reasons for assigning each subcategory to the class of documents which were business emails, not private or confidential to the claimants. In her evidence, Mrs Brake challenges the defendants' categorisation of emails as business emails as containing “obvious errors”. However, the examples which she gives do not appear to relate to the 3,149 emails, because the descriptions do not correspond. For example, she refers to 640 emails regarding the administration/liquidation of Stay in Style. But these do not appear in this subcategory according to Mr Spendlove. On the other hand, he has 782 emails in the *second* subcategory of 4,849 emails, which he says relate to disputes between the Brakes and PWF. I do not know, because this was not explored before me, whether the 640 emails referred to by Mrs Brake were among those 782 emails. But, if they were, they would fall into the second subcategory of 4,849 emails.
173. It is also correct (as defendants say) that none of these 3,149 emails in the first subcategory was put to Dr Guy, and only two of them to Mr Spendlove. As to these two documents, the first was an email between Mrs Brake and Andrew Allen in which

Mr Allen asked whether Mrs Brake wanted to carry on with the stayinstyleuk.com domain. Mr Spendlove accepted that this was not an AEL business email. He also accepted that an email between Mrs Brake and Mrs Foster *after* the sale of Sarafina was not an AEL business email either. He further accepted that the review exercise could be refined so as to exclude emails of this kind which had been miscategorised. The parties did not agree that these two emails could be taken to be representative of all 3,149 emails, and I do not accept that they necessarily would be. I would expect counsel to pick the strongest examples to put to the witness first.

174. Although no individual documents from this subcategory were put to Dr Guy, certain *descriptions* of documents were put to Dr Guy in cross-examination. He accepted in a general sense (but without reference to any documents) that, if the emails were not AEL business emails, they were private emails. This is not conclusive. The defence submits that there was no reasonable expectation of privacy, and no confidentiality, in the enquiries account. I did not understand Dr Guy's answer to be abandoning that primary submission. He also said that emails between the Brakes and their trustees in bankruptcy were private emails, apart from the "iniquity defence". He also accepted that emails between the Brakes and their lawyers were private. But documents with these descriptions are not included in the first subcategory of 3,149 emails according to Mr Spendlove's evidence.
175. The defendants in closing accept that it is not necessary to cover each individual email of those remaining in dispute in cross-examination or evidence. But they submit that the claimants have not proved that any of the documents in this subcategory are private and confidential to the Brakes. (They make a similar submission in relation to other parts of the account.) Indeed, the most detailed and comprehensive evidence before me setting out the categories of the documents concerned was that of Mr Spendlove, which was concerned to show that these documents were *not* private and confidential to the Brakes. One of these categories was 1,191 "social media" emails. These do not have the necessary quality of confidence, being trivia. Indeed, Mrs Brake accepted in cross-examination that they "really should not be part of the discussion. It's de minimis..."
176. The claimants made a written submission in reply to this. They say that, although they attempted to identify which emails were actually disputed, it was only on 22 October 2020 that the defendants replied that *no* emails were private or confidential. It would have been impossible to include all the disputed emails in the trial bundles. They further say that it was agreed between the parties that the emails would be dealt with as categories. They say that if there remains a dispute or any doubt over *particular* emails, then a further hearing would be necessary. Finally, they say it is not necessary for an email to be put to a witness to resolve whether it is private and confidential.
177. The defendants lodged a written note in response to the claimants' reply. They agreed (as they had already said in closing) that it was not necessary for every single document to be put to witnesses. But they said that

"there had to be some attempt by the Brakes to take the court systematically through the different subcategories of disputed documents (including examples from each subcategory). None of that was done."

They also submitted that there should be no further hearing to deal with particular emails, because this was the trial of all the non-iniquity issues.

178. I accept that this is the trial of the non-iniquity issues in this claim. Unless it is agreed between the parties that there should be a further hearing (and it is clear that it is not) I can see no good reason why the resolution of uncertainty on those issues should be further delayed. On the first part of the residual category, on the evidence before me I conclude that, with the exception of the two emails put to Mr Spendlove in cross-examination, the claimants have not satisfied me that they were private or confidential to the claimants, rather than business emails.
179. **The second part of the residual category:** As to the second part of the residual category (4849 emails), the claimants say that these too are private and confidential to them, but *also* say that at least some of the emails in this category were ‘plainly’ private on their face. As I have said, in addition to their overarching submission as to the lack of a reasonable expectation of confidentiality or privacy in the account, the defendants say that these documents evidence wrongdoing which deprives the claimants of any rights of confidentiality and privacy that they might otherwise have (the so-called “iniquity defence”). Once more, however, the claimants bear the burden of proving their case. In order for the court to be satisfied that a document was “plainly” private on its face, then in the absence of agreement the court would have to see it. Yet only three of these documents were put to Dr Guy in cross-examination, and just eight more were put to Mr Spendlove.
180. As to these 11 documents, the three put to Dr Guy were as follows. One was an email exchange with Mrs Brake’s brother in November 2015 (during the currency of the Brakes’ bankruptcy), which concerned a watch that had been stored in a safe, and which she sent to him. Dr Guy said that he did not read this email, but he understood that his lawyers had passed it to the trustee in bankruptcy, Mr Swift, because it concerned a valuable asset. The second was a letter dated 26 September 2007 from Stuart Ritchie to Mr Brake regarding his father’s estate. Dr Guy said he had not read this. It was the lawyers who decided to give it to Mr Swift, and he assumed that this was because it referred to a disposition of funds. The third document was a letter of wishes written by Mrs Brake to Simon Windus. It was given by the lawyers to Mr Swift because it referred to the disposition of £2.7 million. I accept that these three documents are private “on their face”, but contain information which may bear on the “unlawful scheme”, and have been retained on that basis.
181. Other documents put to Dr Guy included a written advice (it is not stated by whom, though I understand from Ms Brown that it was a member of the Bar) dated 17 July 2014 “summarising the law relating to the creation of a Trust seeking to protect the interest of members of the Brake Family in the event of bankruptcy”. There was also a set of instructions to counsel (it is not stated which counsel) prepared by Peter Williams of Michelmores in September 2014 to advise in relation to the setting up of a discretionary trust for the benefit of Mrs Brake’s son Tom. Dr Guy understood that these documents had been passed to Mr Swift in response to a request under section 366 of the Insolvency Act 1986. But he had not personally made the decision; he had left it to his lawyers to deal with. Again, these are private “on their face”, but have been retained because they are assumed to concern matters of interest to the Brakes’ trustee in bankruptcy.

182. As to the eight documents put to Mr Spendlove, the first was an email from Mrs Brake's accountant Stuart Ritchie to her in March 2017, indicating that in future he would be charging her normal fees, because she now had assets. The defendants sought to retain this as evidence of the receipt of proceeds from the so-called "unlawful scheme". The second was an email from Mrs Brake to the official receiver checking the date on which she was discharged from bankruptcy. This was retained as a document (albeit mundane) relevant to the Brakes' bankruptcies, because of concerns about their conduct in those bankruptcies. The third and fourth documents were emails from Mrs Brake to Mr Swift's solicitor relating to a forthcoming hearing. These too were retained as documents relevant to the Brakes' conduct in the bankruptcies. The fifth document is an email in April 2017 from Peter Williams to Mrs Brake wishing her well after illness. The defendants seek to retain it because there are questions over Mr Williams' involvement in the "unlawful scheme". The sixth document is an email in March 2018 from Mrs Brake to her accountants concerning the accounts for Loxley & Brake Ltd. The defendants seek to retain this on the basis that there are issues about Mrs Brake selling furniture from her company to the third defendant. The seventh document is an email in January 2018 apparently from Alice Wyatt (but, as put in cross-examination by Ms Brown, really from Mrs Brake) seeking to appeal against a parking ticket issued in Beaminster. The defendants seek to retain this on the basis that it suggests that she was using her niece's name when she was bankrupt to enter into a hire purchase transaction. The last document was an exchange of emails between Mrs Brake and the finance department at her son's school about arrears of school fees. The defendant seek to retain that on the basis that it concerned significant expenditure at a time when Mrs Brake had the proceeds of what is alleged to be the "unlawful scheme". None of these is an AEL business email, and I assume from Dr Guy's answers in cross-examination that he would accept them as 'private', subject to the overarching submission that there was no reasonable expectation of privacy in the account. The defendants also claim to retain them as part of the "iniquity defence" argument.
183. During the cross-examination of Mr Spendlove, it became apparent that there was an issue between the two sides as to the meaning and effect of provisions in the order of Mr Jarvis QC of 28 November 2019. (This had also been raised during the cross-examination of Dr Guy.) Paragraphs 14 to 17 of that order provided a mechanism for the review of the documents in dispute and for the destruction of documents which were either not in dispute or the court decided should be destroyed. Paragraph 18 of that order however provided that:
- "For the avoidance of doubt, the Guy Parties are entitled to refuse to destroy a document if it falls within the scope of categories of documents set out at paragraphs 5 and 6 above."
184. Paragraphs 5 and 6 created exceptions to the injunction granted in paragraph 3 of the order. Paragraph 5 is accepted not to be relevant to the present question. It is paragraph 6 that matters. This states that the injunction "does not prevent the court or tribunal seised in any of the following proceedings from making an order for disclosure or inspection of documents in the Account", and then reference is made to 5 sets of proceedings, including this one. The defendants have interpreted paragraph 18, taken together with paragraph 6, as meaning that, if a document is disclosable in any of the listed proceedings, then they are not obliged to destroy it.

185. On this question, the critical words are “the scope of categories of documents set out at [paragraph 6] above.” Do they mean (i) documents *ordered* to be disclosed in the listed proceedings? (ii) documents which *will be disclosable* in the listed proceedings? Or even (iii) documents which *may be disclosable* in the listed proceedings? The claimants argued for (i), the defendants for (ii). I did not understand anyone to argue for (iii). In the context in which the order was made, at a time when no disclosure orders had been made in any proceedings, and it was not likely that any would be made before the review contemplated by the order was carried out, it makes little sense for the words to bear meaning (i). Also, it is not clear to me why the court would wish to distinguish between documents which had already been ordered to be disclosed and those which would be so ordered in due course. In my judgment, meaning (ii) is to be preferred to meaning (i).
186. As to the remaining 4,838 documents in this category, the defendants say that the court has no evidence, and therefore is in no position to decide, that they are ‘plainly’ private on their face, or indeed simply private. The court has not been taken to them. To judge from the evidence of Mr Spendlove, some of them contain no private or confidential information at all, such as emails to and from estate agents making property enquiries. This information is publicly available. This is not a technical point. The court is being asked to grant an injunction, failure to comply with which may result in committal to prison. It is a serious matter. The case for the injunction has therefore to be shown. However, there is a further question. Whatever the result of the first enquiry, the defendants claim to retain these documents as evidence of the alleged “unlawful scheme”. I cannot determine whether they do evidence such a scheme, because the iniquity defence has not yet been tried. For present purposes, therefore, I am not satisfied that, if there was a reasonable expectation of confidentiality or privacy, they cannot be subject to the iniquity defence. So a final injunction could not be granted in relation to them at this stage.

*The claimants’ third category: 11,197 emails*

187. Returning now to the “third category” of 11,197 emails, it will be recalled that Mrs Brake in her evidence makes a claim to privacy or confidentiality only in relation to 9,500 documents. It is not clear what has happened to the 1,697 documents which are not included in the 11,197. I must assume that no claim is made to them. Unfortunately, that means that I do not know which are the 9,500 that Mrs Brake does claim as private and confidential to her. Moreover, in her written evidence, Mrs Brake accepts that some of these 9,500 (which I shall call the first subcategory) are not confidential from the defendants, because the defendants or their agents sent them to Mrs Brake during the course of her employment, and they relate to her position as an employee of the third defendant. For example, they deal with her salary or her tax affairs. Such things are not confidential as against her employer, but they are or may be as against third parties. Mrs Brake says that she should not be required to destroy such emails.
188. In principle I accept that Mrs Brake should not have to destroy such emails. She was intended to receive, and is entitled to retain, information from her employer dealing with her employment. At the same time, I do not understand Mrs Brake to object to the defendants’ being able to process and use the same information for the purposes of their business. I accept that, if they have passed any of these documents to third parties, a question may then arise as to breach of confidence. But this question is fact-

sensitive. It would need to be considered document by document. I would need to see *this* document (or group of documents) as having been passed to *that* person, in *these* circumstances. However, none of these documents was put to any witness, or drawn to the attention of the court.

189. Mrs Brake says that others of the emails in the third category (the second subcategory) are communications “with Mrs Foster and/or her advisers, and/or relate to the sale” of Sarafina to Chedington. But communications about the affairs of Sarafina or its sale between its director/shareholder and its employees cannot be private or confidential as against Sarafina/AEL itself. Their mere retention by the defendants cannot be unlawful. In any event, I have heard no evidence as to which emails fall within the second subcategory. Mrs Brake refers only (and in general rather than specific terms) to the witness statement of her solicitor Mr Christian Smith dated 9 July 2020. But this was a witness statement made in support of the Brakes’ application for summary judgment, and not as evidence for the trial. Moreover, Mr Smith was not tendered for cross-examination. To the extent that Mrs Brake sought to incorporate passages by reference into her own evidence, as a kind of list of documents, I think it would be of some assistance. But I cannot locate in that witness statement any reference to “personal emails with Mrs Foster and/or her advisers and/or relating to the sale of her share to Dr Guy/Chedington”. So in fact it does not help me. None of these emails was put to a witness, or shown to the court.

#### *Factual conclusions on categories*

190. The factual conclusions which I reach on this part of the case are therefore these. The parties have agreed that (i) 33,528 of the 62,524 emails in the enquiries account are business emails and the claimants make no claim to them, and (ii) 5,511 emails (subject to reasonable expectation of privacy) are private to the claimants, and the defendants have agreed to delete them. As to the remainder, (iii) the 11,197 emails (9,500 according to Mrs Brake) in the third category have not been shown to be private or confidential as against the defendants. Finally, (iv) as to the 7,798 emails in the residual category, the first subcategory of 3,149 are *not* private to Mrs Brake, whereas the second of 4,849 (but subject to the question of reasonable expectation of confidentiality or privacy) *are* prima facie private to her, but are also subject to the possible application of the iniquity defence. For the sake of clarity, I repeat that the other accounts, with addresses “alo@” and “andy@”, were never disclosed to nor accessed by the defendants.

#### **Expectations of confidentiality/privacy**

191. There is one important factual issue remaining for determination. That is the question of the parties’ expectations of confidentiality and privacy in the enquiries account, and if so whether they were reasonable expectations. However, I cannot resolve that question without first considering certain matters of law. One of these matters relates to the ownership of the axnoller domain, website and related email accounts. This cannot of course be the end point of the expectation debate. I accept that “Confidentiality is not dependent upon locks and keys or their electronic equivalents”: *Imerman v Tchenguiz* [2011] Fam 116, [79], [88]. The relevance of the legal position is that it is part of the context in which the question arises whether there were reasonable expectations of privacy or confidentiality in the account.



192. I will also need in due course to deal with the evaluation of the factual elements involved in the reasonable expectations of privacy and confidentiality. But I will postpone discussion of these until I have dealt with the relevant law, so that they can be seen in their context.

## THE ISSUES

### Pleaded cases

193. I turn now to the issues that arise in this case. It is desirable to begin by reminding myself of the pleaded cases of the parties. Although I have read and take account of the whole of the particulars of claim and the defence (there is no reply) I emphasise here certain key points.

194. Paragraph 13 of the Particulars of Claim says:

“13. In October 2009, unrelated to the Partnership, the Brakes registered the domain name “*axnoller.co.uk*” (“Axnoller Domain”), which remained dormant until the formal dissolution of the Partnership in 2013.”

195. The claimants go on to refer in the Amended Particulars of Claim to “any email accounts within the Axnoller Domain” as “the Axnoller Accounts”, and go on to say:

“16. The Confidential Documents/Information within the Axnoller Accounts include:

- (i) Private correspondence to friends and family.
- (ii) Private correspondence with legal advisers.
- (iii) Private correspondence with accountants.
- (iv) Private correspondence with medical professionals.

Many of the emails contain information of an intensely personal nature including medical test results, a letter of wishes, feedback from Mrs Brake’s son’s school teachers and emails within the family and friends.

17. The Confidential Documents/Information contain the Claimants’ personal data within the meaning of Article 4 of the General Data Protection Regulation and sensitive personal data within the meaning of Article 9 of the General Data Protection Regulation.

[ ... ]

21. Following the acquisition of the Farm by SPL/AEL in 2015, Mrs Brake continued to employ ACS personally under the Confidentiality Agreement, retaining and using the Axnoller Accounts as her own.

22. In particular, Mrs Brake:

a. did not sell or transfer the Axnoller Domain or the Axnoller Accounts to SPL/AEL; and

b. used enquiries@ as her personal email account, with the result that all of her private information and contact details were stored there.

[ ... ]

28. All information contained within the Axnoller Accounts was private and confidential to the Brakes with the exception of any booking or AEL-related emails sent or received by Mrs Brake at enquiries@ in her capacity as agent for AEL (“Booking Emails”). The Brakes had a reasonable expectation that all Confidential Documents/Information within the Axnoller Accounts (i.e. not including the Booking Emails) would remain private and confidential. SPL under the control of Mrs Foster and AEL under the control of Dr Guy left the management of the Booking Emails to Mrs Brake and never once requested access to the same.”

[ ... ]

41. The access to and copying of the Confidential Documents/Information by the Guy Parties is improper and unlawful:

(i) The Guy Parties did not (and do not) have permission from the Brakes to access the Axnoller Accounts or to process the Confidential Documents/Information.

(ii) It was in breach of ss 1 and 2 of the Computer Misuse Act 1990.

(iii) It was in breach of s 170 of the Data Protection Act 2018.

(iv) It constituted a personal data breach within the meaning of the general regulation on data protection.

(v) It was in breach of the Brakes’ rights under Article 8 of the European Convention on Human Rights, including their rights to private life and correspondence

(vi) The accessing, deployment and distribution of the Confidential Documents/Information constitutes a course of conduct which the Guy Parties knew or ought to have known amounted to harassment of the Brakes within the meaning of the Protection from Harassment Act 1997.

(vii) The availability to the Guy Parties’ legal team of unfettered access to the Confidential/Information denies the Brakes of their rights under Article 6 of the European Convention on Human Rights to a fair trial.

42. Further, the Guy Parties have procured a Breach of the Confidentiality Agreement by ACS. In particular, in accordance with the terms of the Confidentiality Agreement, ACS was bound not to disclose Confidential Documents/Information to the Guy Parties and all such data should have been returned to the Brakes.”

(The underlined words were added in the amended particulars of claim.)

196. In their defence the defendants say:

“55. Paragraph 13 is denied. The domain name axnoller.co.uk was originally used in connection with the Partnership business and the Brakes are put to proof that it was not acquired using Partnership funds. The domain name was subsequently not renewed by the Partnership and was instead renewed by and registered to SPL/AEL.

[ ... ]

59. As to paragraph 16, no admissions are made in respect of the Personal Accounts. As regards the Enquiries Account:

(1) It is denied that there are any confidential or privileged documents in the Enquiries Account.

(2) It is admitted that there are a number of emails on the Enquiries Account of a personal nature. Paragraphs 7, 8, 13 and 14 above are repeated.

(3) It is denied (if it is alleged) that Mrs Brake’s correspondence with legal advisers or accountants engaged by SPL/AEL could be confidential or private or privileged as against the Guy Parties.

(4) Paragraph 16(i) is embarrassing for want of particularity and the Guy Parties cannot plead to it. The Guy Parties may seek to amend this Defence on provision of further and better particulars from the Brakes.

60. It is averred that categories of documents identified paragraph 16 comprise only a small proportion of the emails in the Enquiries Account. Further, in the Review, the Brakes have labelled a large number of other emails as private which do not fall into any of the categories pleaded at paragraph 16 including (but not limited to):

(1) Emails between Mrs Brake and Dr Guy;

(2) Emails between Mrs Brake and Mrs Guy;

(3) Emails between Mrs Brake and other former SPL/AEL employees, namely Ms Holt and Mr Windus;

(4) Emails between Mrs Brake and AEM accountants and financial advisers Milstead Langdon, Old Mill and AFB Accountants;

(5) Emails between Mrs Brake and the Guy Parties’ solicitors, Verisona Law and Moore Blatch;

(6) Emails between Mrs Brake and SPL/AEL’s former IT provider, ACS; and

(7) Emails sent and received by Mrs Brake in the course of working for SPL during the period prohibited by the Second Blackburne Order.

None of these emails is, or could be, private, confidential or privileged against the Guy Parties.

61. It is admitted that the Enquiries Account contains some data within the meaning of Articles 4 and 9 of the General Data Protection Regulation (GDPR). Paragraph 17 is otherwise denied.

[ ... ]

64. Save that it is admitted that SPL acquired the Estate in 2015, paragraph 21 is denied. ...

65. Alternatively, Mrs Brake and any assets belonging to Mrs Brake vested in her trustees in bankruptcy at that date such that, on SPL's acquisition of the Estate, she could not have continued to have treated the Enquiries Account and the Personal Accounts even if (which is denied) they had been set up prior to SPL's acquisition of the Estate.

66. Paragraph 22(a) is:

(1) Admitted insofar as it relates to the axnoller.co.uk domain name. The domain name was not Mrs Brake's asset to sell or transfer. ...

(2) Admitted insofar as it relates to the Enquiries Account and the Personal Accounts. The Enquiries Account and the Personal Accounts did not belong to Mrs Brake such that she could sell or transfer them to AEL. ...

67. Paragraph 22(b) is denied, save that:

(1) It is admitted that Mrs Brake used the Enquiries Account to send and receive a small number of personal emails. Mrs Brake and a number of other email accounts and she is put to proof of all email accounts operated for personal purposes (and the extent they use) at all material times. It is denied that all of Mrs Brake's private information and contact details were stored on the Enquiries Account.

(2) It is averred that Mrs Brake only had access to the Enquiries Account by reason of her work for AEL. ...

[ ... ]

74. Paragraph 28 is not admitted insofar as it concerns the Personal Accounts. Save that it is admitted that Mrs Brake received emails as an agent of SPL/AEL and that she had access to the Enquiries Account only for the purpose of, and by reason of, working in SPL/AEL's, paragraph 28 is denied as regards the Enquiries Account. In particular:

(1) it is denied that any email in the Enquiries Account could be confidential because there was no reasonable expectation of confidentiality for reasons aforesaid.

(2) It is denied that there was any reasonable expectation of privacy in respect of the enquiries account as a whole for reasons aforesaid.

(3) It is averred that many of the documents labelled by the Brakes as private in the Review fall within the definition of ‘booking emails’ and therefore are not private and confidential even on the Brakes’ own pleaded case. Paragraphs 4 to 5 and 60 above are repeated.

(4) It is denied that SPL was ever under the control of Mrs Foster for reasons aforesaid.

75. Further, and in any event:

(1) It is denied that any emails evidencing wrongdoing on the part of the Brakes are confidential or private against the Guy Parties. The Guy Parties are entitled to use such documents in their litigation with the Brakes.

(2) It is denied that confidentiality and privacy can be asserted over any emails which evidence matters that may be the subject of legitimate interest to the Brakes’ trustees in bankruptcy or the partnership’s liquidators and which the Guy Parties wish to disclose to the same.

(3) It is denied that any emails evidencing or sent in furtherance of the Unlawful Scheme are confidential or private.”

197. So the main claim by the claimants is that *all* information contained within the enquiries account was private and confidential to the Brakes *except for* AEL-related emails sent or received by Mrs Brake on behalf of AEL. The main defence is to deny the claim on the basis that there was no reasonable expectation of confidentiality or privacy in the account. In addition issues arise about the setting up of the Axnoller domain and the email accounts, and who “owns” them.

198. The claim form does however mention other claims, namely procuring a breach of contract, and the claim for compensation under article 82 of the (EU) General Data Protection Regulation. The particulars of claim also include a claim under the Protection from Harassment Act 1997. In addition, they allege that criminal liability under the Computer Misuse Act and the Data Protection Act was engaged, and rely on this as support for claims for breach of privacy. I deal with these points later, to the extent necessary.

### **List of issues**

199. The parties agreed a list of issues that were said to arise in this claim. I set it out here before going on to consider matters of law.

#### **“The context to the Enquiries Account**

1. When was the domain name ‘axnoller.co.uk’ set up and for whom?
2. When was the Enquiries Account set up and when were the first emails sent to/from that Account?

3. To whom do the domain name and/or the Enquiries Account belong (and to whom have they belonged since their creation)?
4. Was the Enquiries Account primarily used as SPL/AEL's main business email address? Was it held out to the world as such?
5. Did SPL/AEL pay all costs and expenses associated with the domain name and the Enquiries Account between the time they were set up and 8 November 2018?
6. Who had access to the Enquiries Account, for what purposes and to what extent did they use the Enquiries Account for personal rather than business purposes?
7. What was the purpose of the passwords to the Enquiries Account, the Personal Accounts and the Fasthosts Account, who held those passwords, and was SPL/AEL entitled to instruct (i) ACS to change the passwords to the Enquiries Account and/or (ii) employees (including Mrs Brake) to provide it (SPL/AEL) with the passwords?
8. Did the Guy Parties invite the Brakes' trustee in bankruptcy or the liquidators of the Partnership to sell to AEL the website [www.axnoller.co.uk](http://www.axnoller.co.uk), the associated domains and the email accounts including the Enquiries Account?

### **Confidentiality and privacy**

9. Was there a reasonable expectation of confidentiality in respect of the Enquiries Account as a whole, save for Booking Emails (as defined in the APoC)?
10. Was there a reasonable expectation of privacy in respect of the Enquiries Account as a whole, save for Booking Emails (as defined in the APoC)?
11. In answering issues 9 and 10 above, what effect do the following contracts have:
  - i) The terms of the Brakes' employment by SPL/AEL and/or Chedington.
  - ii) The warranties in the SPA. In particular, did Mrs Foster warrant that the Enquiries Account belonged to SPL/AEL in the SPA?
  - iii) The ACS Confidentiality Agreement. In particular, is the Enquiries Account within the scope of the ACS Confidentiality Agreement? If so, was it breached?
12. Are any of the documents in the Enquiries Account private and confidential to the Brakes?

### **Guy Parties' use of material from the Enquiries Account**

13. What were the Guy Parties' reasons for seeking access to, copying and denying the Brakes access to the Enquiries Account?

14. What use have the Guy Parties made of information in the Enquiries Account and with whom have they shared that information?
15. Was any of the information found to have been used at issue 14 above, confidential or private to the Brakes?
16. What offers did the Guy Parties make to the Brakes (and on what terms) for them to remove any personal emails in the Enquiries Account? Were those offers reasonable and was the withdrawal of those offers reasonable?
17. Did the Guy Parties retain any emails or copies of emails from the Personal Accounts?

### **Miscellaneous**

18. For the purpose of a claim in confidentiality or privacy are any of the following provisions relevant in law and/or actionable:
  - iv) Sections 1 and 2 of the Computer Misuse Act 1990;
  - v) The General Data Protection Regulation 2016;
  - vi) The Protection from Harassment Act 1997; and
  - vii) Articles 8 and 6 of the European Convention on Human Rights?
19. If so, have the Guy Parties breached those provisions?

### **Preliminary Issue on Iniquity/Public Interest Defence**

20. On the facts and matters pleaded by the Guy Parties at paragraphs 16-17, 19-47 and 75 of the Defence, is an iniquity or public interest defence available to them in law?

### **Remedies**

21. Are the Brakes entitled to damages and, if so, in what amount?
22. Are the Brakes entitled to a final injunction and, if so, in respect of what documents?
23. Are the Brakes entitled to an order for destruction and, if so, in respect of what documents?"

### **Ownership of the domain and email accounts**

200. The first few of the issues in the list set out above deal with the question of ownership of the domain and the email accounts. In order to be able to take account of my conclusions in the following sections of this judgment, I will deal with them here.

#### *Ownership of the axnoller domain*

201. First of all, I deal with the axnoller domain. This was registered with Nominet in 2009 on the instructions of Mrs Brake. It was at a time when Mr and Mrs Brake were in partnership together, before the partnership with PWF. The actual registrant was Simon Deverell, but, as between him and Mrs Brake, the latter must have been beneficially entitled to all such rights in the domain as there were. These would have included rights to prevent others from using the same domain without consent. Such rights constitute a chose in action or bundle of choses in action. It is not clear whether Mrs Brake personally paid the costs, or whether they were paid by Mr and Mrs Brake's original partnership of 2008. But here there is no issue as between Mr and Mrs Brake, and so I need not consider that. I will simply assume that it is Mrs Brake.
202. When in February 2010 the partnership with PWF was entered into, it used the Stay in Style domain, and email accounts with addresses in that domain, rather than the axnoller domain. However, I have held that the new partnership ultimately paid the bills for the axnoller domain, including renewal fees. At that time Mrs Brake was the managing partner, and PWF (and Mrs Brehme) had no right to make decisions about how the business was conducted day to day. In my judgment, Mrs Brake's decision that the partnership should pay the whole of the invoices relating to the domain, rather than a proportionate share of them, is only consistent, in the case of an honest managing partner, with a decision that the axnoller domain should be renewed for the benefit of the partnership, in return for the partnership indemnifying her against the present and future expenses. However, the liquidators of the partnership however have not been parties to this claim, and none of this has been argued before me. So any decision could not bind them. The partnership was dissolved in 2013, and put into liquidation in 2017. I note that there is no evidence of any attempt by the partnership or the liquidators to deal with the domain thereafter.
203. In May 2015, the Brakes were adjudicated bankrupt. Their beneficial property vested at first in the Official Receiver, and then in the trustees in bankruptcy. If therefore Mrs Brake still possessed any residual rights in the domain, then those vested in the trustees, for the benefit of Mrs Brake's creditors, under section 283(1) of the Insolvency Act 1986. The claimants did not seek to argue that section 283(2)(a) of the Act applied, and I proceed on the basis that Mrs Brake was entirely divested of any remaining rights in the domain, for the benefit of her creditors.
204. The sale of West Axnoller Farm to Sarafina by the LPA receivers in July 2015 cannot in itself have made any difference to the beneficial ownership of the domain. This is because the sale was only of the property charged by Mrs Brake to the bank, and that did not include the domain. So the receivers had no authority to sell it to Sarafina, even if it still belonged to Mrs Brake. However, Sarafina then carried on the business previously carried on by Mrs Brake, which she was now prohibited by injunction from carrying on. For this purpose, the company used the domain to provide a space for its website and addresses for its email accounts. The existing email accounts were replaced by new Exchange accounts in August 2015, using the axnoller domain. As I have also held (see [76]), from the time of its purchase of the Farm in July 2015, Sarafina ultimately paid all the Fasthosts invoices in respect of the domain, including renewal fees. By virtue of the same reasoning as in relation to the partnership, the domain passed from the partnership to Sarafina. If I were wrong, and Mrs Brake still had any residual rights in relation to the domain, they would nonetheless have vested



in Sarafina, which paid to renew the domain. (Unlike the case of the partnership, all the relevant parties are before the court.)

205. In February 2017, Chedington bought Sarafina, together with the business it carried on at Axnoller. As I have held, Dr Guy negotiated for the property itself, and also for the business on top of that. Clause 5 of the written agreement made clear that the business was included in the sale, and clause 13 warranted that Sarafina owned all the assets which it used in the business (except those disposed of since the date of the last accounts). Mrs Brake was not formally a party to this agreement, even though the defendants allege that she was in fact the beneficial owner of Sarafina. I ignore that allegation for present purposes. But nevertheless she, and not Mrs Foster, negotiated the formal agreement, and therefore knew every detail of it.
206. I have already held that Sarafina was already the beneficial owner of the domain by virtue of having paid to renew it, and subject to that it owned any residual rights that Mrs Brake might have had in the domain. But, in case I am wrong about that, I consider that, as a result of the negotiations between them, Dr Guy reasonably believed that the sale included the domain, that Mrs Brake was well aware of that, and that yet she did nothing to disabuse Dr Guy of that view, so that he went ahead with the purchase in reliance on that belief. Now (but only years after the event), she seeks to assert that *she* nevertheless remains the owner of the domain.
207. It was not argued before me, but it is however elementary justice that, as Lord Cranworth says in *Ramsden v Dyson* (1866) LR 1 HL 129, 140-141:

“If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.”

(See also Lord Wensleydale at 168.)

208. Cases dealing with insurance policies show that the principle is not confined to land, but extends even to personal intangible property, and extends beyond building on the property to merely preserving it: *Falcke v Scottish Imperial Insurance Co* (1887) 34 Ch D 234, 242–43; *Re Foster (No 2)* [1938] 3 All ER 610, 613. These cases were not cited before me, but they are well-known, as also is the principle for which they stand. In my judgment, that principle extends to intangible rights such as those in relation to an internet domain. Here Mrs Brake said nothing to Dr Guy, letting him go ahead with the purchase despite her realising that he thought Sarafina was selling him the domain. It cannot be right or just in those circumstances that Mrs Brake can now assert that she continues to own the domain. To the extent that she in fact retained any rights in relation to it, she would be estopped, as against the defendants, from asserting them.
209. In 2019 Mrs Brake procured the registration of herself as registrant of the domain in place of Simon Deverell, who had been the registrant since the domain was originally

registered in 2009. But since Mrs Brake had notice of the defendants' rights, and moreover did not pay Mr Deverell for giving up his paper title, she cannot claim to be a good faith purchaser of the legal title without notice, giving her priority over an existing beneficial owner. Accordingly, the registration in her own name cannot put her in a better position than she was beforehand.

210. As a result of all this, my *primary* view, and the basis on which I now proceed, is that, from the time that Sarafina began to carry on the business at Axnoller in 2015, at least as between it and Mrs Brake, it beneficially owned the axnoller domain. My *secondary* view, if the primary view be wrong, would be that, as between Sarafina and Mrs Brake, it owned the domain from the time of the sale to Chedington in 2017. I say 'as between Sarafina and Mrs Brake' because the liquidators of the Stay in Style partnership are not parties, have not been heard on the question, and are therefore not bound by my decision. But on any view Mrs Brake is not the beneficial owner.

*Ownership of the axnoller email accounts*

211. I turn secondly to consider the email accounts depending on the domain for their addresses. As I have already said, an email account is a bundle of rights belonging to the account holder, including rights to an electronic mailbox and transmission and reception services. This is another bundle of choses in action. But there is no necessary connection between the ownership of the account and the ownership of the domain. The *address* of the *mailbox* is not the *account*. In the present case there appears to have been a Google mail account with the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) dating from before August 2015, even though the contents of that account are no longer available to us. That account was not set up at the same time as the domain was registered, in 2009, but only at some point *after* April 2011, either during or even after the partnership with PWF and at the partnership's expense. In my judgment, these accounts belonged to the partnership and not Mrs Brake personally.
212. However, it does not matter exactly when the Google mail accounts were set up. In August 2015 those accounts (with Google) were replaced by Microsoft Exchange email accounts hosted by Fasthosts. These were entirely new accounts, where the counterparty was Fasthosts rather than Google, and the services provided by Fasthosts were more extensive than those provided by Google. They were set up for the purposes of the business at Axnoller which was by then being carried on by Sarafina, and Sarafina ultimately paid the costs relating to these accounts. Mrs Brake obviously does not assert that she was carrying on the business at this time. But undoubtedly she knew all about it. Yet she still did not assert any rights to ownership of these accounts. Indeed, her emails of 9 November 2018 to Mr Allen and Mr McDonagh positively disclaim any interest in the accounts, and instead assert rights of privacy in personal emails, and of ownership only in pre-2015 emails.
213. In the result, I hold that these accounts belonged to Sarafina. They were assets of Sarafina at the time of the sale of that company to Chedington in 2017, and passed therefore to the defendants. If I were wrong about that, they belonged to the partnership and not to Mrs Brake. Even if I were wrong about *that*, and Mrs Brake somehow had or retained rights in the accounts, she would be estopped from asserting them as against the defendants, for the same reasons as in relation to the domain.

*The contents of the accounts (and the website)*

214. I am not here concerned with the question of ownership of the *contents* of the accounts. The contents are information, which may (depending on the circumstances) be protected by aspects of intellectual property law, such as copyright and trademarks, and also by the law of breach of confidence and indeed the new law on privacy (as this claim itself asserts). In addition, the *medium* on which the information is recorded can be the separate subject of ownership, just as a handwritten letter is a physical piece of paper, as well a series of pieces of information. In the present case, there are no claims to ownership based on ownership of the medium.

215. Subject to that, it has recently been held that there is no property in the contents of emails as information. In *Capita plc v Darch* [2017] EWHC 1248 (Ch), the claimant sought interim relief against former employees to restrain the use of information contained in emails forwarded from a company email account to a non-company email account. It was argued that the information was the company's property. Richard Spearman QC, sitting as a deputy judge of the High Court, examined a number of decisions from the last ten years and said:

“I am unable to accept Mr Quinn's submission that Capita is, at least arguably, entitled to this relief on the basis that the emails in question or their contents are the property of Capita.”

216. There are however earlier authorities which do not appear to have been cited to or discussed by the judge in that case. The claimants' opening submissions very properly recognise this. For example, in *Aas v Benham* [1891] 2 Ch 244, 258, Bowen LJ referred to information as partnership property, and in *Re Keene* [1922] 2 Ch 475, the Court of Appeal treated trade information as 'property' for the purposes of the Bankruptcy Act 1914. More recently, in *Boardman v Phipps* [1967] 2 AC 46, 107, Lord Hodson said:

“I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called 'know-how' in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust.”

And Lord Guest said (at 115):

“If Boardman was acting on behalf of the trust, then all the information he obtained in phase 2 became trust property. The weapon which he used to obtain this information was the trust holding, and I see no reason why information and knowledge cannot be trust property.”

217. On the other hand, in the same case Lord Upjohn said (at 127-28):

“The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain

the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, 'know-how', confidential information as to the prospects of a company or of someone's intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship."

And even more recently, in *Douglas v Hello! Ltd* [2008] 1 AC 1, Lord Nicholls (dissenting in the result) said:

"275. ... information, even if it is confidential, cannot properly be regarded as a form of property."

218. Overall, the matter is perhaps more open than might appear from *Capita plc v Darch*. It also seems to be context-specific. However, it is not necessary to decide this difficult question in the present case, and I see no need to express any opinion. I add only that, as the claimants submit in closing, whatever may be the position in relation to communications generally, in any event *legal privilege* in communications does not vest in the trustee in bankruptcy: *Shlosberg v Avonwick Holdings Ltd* [2017] Ch 210, CA.
219. As for the axnoller website, there may be similar protection given by intellectual property rights as for the contents of email accounts. It is less likely that questions of privacy and confidentiality will arise compared to email accounts, because websites are normally intended to convey information to the public. But some websites are subject to restricted access, for example being password-protected, and so some elements of privacy and confidentiality may arise even there. Here in the present case there are no issues arising over the website, and I see no need to explore how far it may be said to 'belong' to one person than another.

## **CLAIMS IN BREACH OF CONFIDENCE AND BREACH OF PRIVACY**

### **Distinctiveness of claims**

220. I come now to the question of the claims made by the Brakes in this action. The main ones are claims in breach of confidence and in the tort of breach of privacy. The first point to note is that it is necessary to keep these two causes of action separate. In *Douglas v Hello! Ltd* [2008] 1 AC 1 AC 1, [255], Lord Hoffmann (in the majority) said:

"118. It is first necessary to avoid being distracted by the concepts of privacy and personal information. ... 'OK!'s' claim is to protect commercially confidential information and nothing more. ... The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information."

221. And Lord Nicholls (dissenting in the result) agreed with this when he said:

“255. As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct. In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public. Conversely, and obviously, a trade secret may be protected as confidential information even though no question of personal privacy is involved. This distinction was recognised by the Law Commission in its report on Breach of Confidence (1981) Cmnd 388, [1981] EWLC 110, pages 5-6.”

222. In *Racing Partnership v Sports Information Services* [2020] EWCA Civ 1300, Arnold LJ (dissenting in the result) referred to this case and said:

“70. Secondly, counsel for SIS submitted that the judge's conclusion was inconsistent with the law of privacy, which only applies to information in respect of which the claimant has a reasonable expectation of privacy. I do not accept this submission. As Lord Hoffmann pointed out in *Douglas v Hello!*, commercial confidentiality is distinct from privacy. This is reinforced by the subsequent decision of the Court of Appeal in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 that breach of confidence and misuse of private information are two separate and distinct causes of action which rest on different legal foundations and protect different interests, and hence a claim for misuse of private information is ‘made in tort’ even though a claim for breach of confidence is an equitable one.”

223. I should also refer to the judgment of Mr Jarvis QC, in deciding whether to grant the interim injunction sought by the Brakes pending trial. He too distinguished between ‘private’ and ‘confidential’:

**“d) Is the enquiries account private as opposed to confidential to the Brakes?**

48. In the light of my earlier decisions, the answer to the question is obvious. In *Imerman* at paragraph 76 Lord Neuberger MR said:

‘76. Communications which are concerned with an individual's private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality, and are specifically covered by article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence.’

49. Other than the documents which relate to the business carried on by AEL, the emails in the enquiries account will be private. The means of determining

the dividing line has now been agreed in the mechanism set out in paragraphs 1 to 5 of the revised draft order provided by the Guy Parties.”

224. As the claimants said in closing, something that is *private* is concerned with a person’s private life, and is protected by article 8 and the new tort of breach of privacy. On the other hand, something that is confidential, and protected by the doctrine of breach of confidence, such as trade secrets, may not be *private* as well. It is possible (though perhaps less likely) that something may be private, but not confidential, in the sense that it relates to a person’s private life, and yet is known to (say) a section of the public. And it is also possible that something may be both private *and* confidential. When the judge said that emails in the enquiries account which did not relate to the business carried on by the third defendant would be private, he meant that they would relate to someone’s private life, rather than to the business. I therefore deal with these two heads of claim separately.

### **Other points**

225. The second point to note is that, although the claimants appear to rely separately on Art 8 of the European Convention on Human Rights, and its domestic equivalents in English law by virtue of the Human Rights Act 1998, in this context it adds nothing to the tort of breach of privacy, which is indeed derived (at least in part) from that article.
226. The third point is that references were made to *criminal* liability under the Computer Misuse Act 1990, ss 1 and 2, and the Data Protection Act 2018, s 170. But no suggestion is made that these provisions create civil liability as well, and therefore, in the context of these civil proceedings, these references add nothing. They also refer to Art 82 of the (EU) General Data Protection Regulation, both in the claim form and in the amended particulars of claim. This expressly creates a right to compensation. However, in the claimants’ opening submissions, they refer to the earlier provisions and the GDPR as “bolstering” their expectation of privacy. In their closing submissions, they say that they “serve to underline the importance of preserving privacy and private data and the seriousness with which the law regards abuse”. Ultimately, they do not make any separate claim in respect of them, and I therefore do not consider them separately.
227. Fourthly, there are references to the Protection from Harassment Act 1997, including a claim in the prayer of the amended particulars of claim for damages under that Act. But there is no such reference in the claim form itself, which has never been amended. I do not understand this. In any event, it was accepted in opening that the factual matrix for the tort of harassment in this case was the same as the tort of breach of privacy, and there could be only one award of damages. So I do not think I need to consider it separately.

### **Breach of confidence**

228. I begin my consideration of the claim therefore with the equitable wrong of breach of confidence. The elements of this claim were explained by Megarry J in the well-known and often-cited case of *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, at 419:

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the *Saltman* case on page 215, must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

229. The first element means that information in the public domain, or information that is useless or trivial, is not protected by this doctrine (*AG v The Observer Ltd* [1990] 1 AC 109, 268, per Lord Griffiths, and 282, per Lord Goff). The second element will include cases where the imparting is accidental as well as where it is deliberate (*AG v The Observer Ltd* [1990] 1 AC 109, 281, per Lord Goff). Moreover, because breach of confidence is an equitable doctrine resting on *conscience*, the question is not whether the claimant subjectively intended to impose confidentiality on the defendant, but whether a reasonable person in the shoes of *the defendant* would have appreciated this (*Vestergaard Frandsen v Bestnet Europe* [2013] 1 WLR 1556, [23], where Lord Neuberger, sitting in the Supreme Court, corrected an obvious slip in *Imerman*). Lastly, the public interest in preserving the confidentiality of confidential information can be outweighed by public interest considerations (*AG v The Observer Ltd* [1990] 1 AC 109, 282-83, per Lord Goff). In particular, as it is sometimes put, there is “no confidence in iniquity”. In this part of the trial, I am dealing only with the first two points. The third is to be dealt with, if necessary, in the later trial of the ‘iniquity defence’.

#### *Necessary quality of confidence*

230. So the first question is whether the information sought to be protected has the necessary quality of confidence. I know that Mr Jarvis QC held that the account was confidential as against Mrs Brake, but that was his interim conclusion for the purposes of granting interim relief. Unlike him, I have now heard the evidence in detail, and after reviews of the account of being carried out by each side. I have therefore reached my own findings on this question. I dealt with the factual aspects of the documents the subject of the claim above. I concluded as follows. Leaving on one side the 33,258 emails agreed to be business emails, and the 5,511 emails accepted (subject to reasonable expectation of privacy) to be private to Mrs Brake, I held that the 11,197 emails in the third category were not private or confidential as against the defendants, and as to the 7,798 emails in the residual category, the first subcategory (3,149) were not private to Mrs Brake. That leaves only the second (4,849) as potentially having the necessary quality of confidence. But even that subcategory has holes in it. As I have said, the 311 emails concerning property enquiries contain publicly available information and cannot have the necessary quality of confidence. The cause of action in breach of confidence is not complete until it is clear that none of the limiting principles referred to in *Attorney General v The Observer Ltd* applies: *Metropolitan Police Commissioner v Times Newspapers Ltd* [2014] EMLR 1, [121].

#### *Obligation of confidence*

231. The second stage is whether these documents were subjected to an obligation of confidence in the defendants’ hands. The question here is not whether the claimants intended to impose such an obligation, but rather whether a reasonable person in the

shoes of the defendants would have appreciated this. I have already held that the 2015 enquiries account belonged to Sarafina, that the defendants were not told, directly or indirectly, that it was being retained by Mrs Brake, and that Dr Guy believed (correctly) that in purchasing Sarafina he had acquired the account as part of the business and its assets. There was no suggestion by the claimants until well after their dismissal (and indeed, just before these proceedings were issued) that they claimed otherwise. By 9 November 2018, Dr Guy was aware of the non-disclosure agreement between Mr Allen and Mrs Brake, but he took the view (correctly in my judgment) that, at least in this respect, it could not affect the purchaser of Sarafina and its business. He also knew that Simon Windus had unrestricted access to the account.

232. So at the time that the defendants looked at the contents of the account, from November 2018 onwards, for their own business purposes, there was nothing to put them on notice of any imparting of information in circumstances of confidence. Mrs Brake chose to put her own emails into the company's business email account, instead of using her own private email accounts (of which she had several). Dr Guy accepted in evidence that he would have expected some private use to be made by staff of a work email account, but that is not the same as accepting an obligation to keep any information thereby stored confidential. Consequently, even to the extent that any documents claimed by Mrs Brake to be confidential to her (but not so accepted by the defendants) were in fact confidential to her, they were not imparted to the defendants in circumstances imposing a duty of confidence. Accordingly, the claim in breach of confidence must fail.

#### *Misuse of information*

233. It is not necessary for me to address the third stage enquiry as to whether there has been any misuse of information amounting to breach of confidence. Nevertheless, in case this matter goes further, I will say a few words about this later, together with the similar question arising in relation to breach of privacy.

#### **Breach of privacy**

234. Turning now to the elements of the action for breach of privacy, in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, Eady J summarised the relevant law in this way:

“7. ... The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence. That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of ‘unaccountable’ judges running amok. Parliament enacted the 1998 statute which requires these values to be acknowledged and enforced. ...

8. The relevant values are expressed in Arts 8 and 10 of the Convention ...

[ ... ]

10. If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, it is now clear that the court is required to carry out the



next step of weighing the relevant competing Convention rights in the light of an ‘intense focus’ upon the individual facts of the case. ...”

*Reasonable expectation of privacy*

235. So the first question is whether the claimants had a reasonable expectation of privacy. In this connection, in *Murray v Express Newspapers plc* [2009] Ch 481, the Court of Appeal said:

“38. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.”

236. Unlike with the claim for breach of confidence, the expectation of privacy is seen from the point of view of the *claimant*, not the defendant. On the other hand, it has to be reasonable, so there is nevertheless a degree of objectivity involved. But this creates a difficulty in a case where, like this one, the first and second stages have been split. Whether there is a *subjectively* appreciated expectation of privacy can be determined at the first stage, on the evidence presented to me. But whether, if a subjectively appreciated expectation of privacy *is* so found, it is *reasonable*, will potentially be affected by (for example) whether the information concerned was known by the claimant to be relevant to the question of commission of wrongdoing by the claimant.

237. In other words, if you know you are doing something wrong, it may not be reasonable for you to have an expectation that information about that wrongdoing will be kept private. But the court cannot decide that without first examining whether there *is* any evidence about wrongdoing for the claimant to know about. Yet (in this case) the facts needed to try the ‘iniquity defence’ have not been found at the first stage: they are reserved for the second, should that be needed. In my judgment, if the court decides that the claimants otherwise have a reasonable expectation of privacy in relation to the account, it cannot yet make a final decision in relation to these documents, said to be relevant to wrongdoing. It can decide only *provisionally*, subject to the further decision at stage 2 on the facts, if that proves necessary.

238. In this case, the claimants rely on the following factors as demonstrating a reasonable expectation of privacy:

1. Mrs Brake set up the axnoller domain. The email accounts dependent on that domain therefore belong to her.
2. The enquiries account was password-protected from before the incorporation of Sarafina, and, until the passwords were changed on 9 November 2018, only Mrs Brake and Andrew Allen had access to them, and the defendants (from the purchase of Sarafina) had none.

3. Only Rebecca Holt and Simon Windus were given access to the (post-August 2015) enquiries account, and then only with the consent of Mrs Brake; she therefore in practice controlled the account.
  4. That account was used not only for business purposes, but also for Mrs Brake's personal emails.
  5. From 2014 Mrs Brake had a non-disclosure agreement with Andrew Allen which required him for five years not to disclose any business information of Mrs Brake.
  6. Mrs Brake continued to use the enquiries account for her personal emails after Chedington bought Sarafina, and Dr Guy knew or expected this to be the case.
  7. The way in which the enquiries account had been set up, protected and operated gave Mrs Brake a reasonable expectation of privacy and confidence.
239. Factual point 1 is correct. Mrs Brake commissioned the registration of the axnoller domain, initially for a two year period. But the legal conclusion about the ownership of the 2015 accounts is wrong, as I have already said. In particular the claimants' submission ignores (i) the entry by the Brakes into partnership with PWF in February 2010, (ii) the Brakes' bankruptcies in May 2015, (iii) the carrying on by Sarafina of the business formerly carried on by Mrs Brake, and (iv) the sale of Sarafina and its business to Chedington in February 2017. Any reasonable person would understand and accept that the email accounts for a particular business would ordinarily pass with that business, and not remain with the person who originally set it up. In any event, the 2015 Exchange email accounts were new, and replaced the old Google mail accounts. The only thing that stayed the same was the address used to point to the new accounts. But, as I have already said, the address is not the account. And the enquiries account was used as the main business account for the business carried on by Sarafina. Mrs Brake told no-one that she worked with, or even Mrs Foster's solicitor on sale, that *she* owned it.
240. Factual points 2 to 6 are also correct. But in my judgment the conclusion at 7 does not follow from them, as a matter of either logic or law. Password protection is not the test. I have already accepted that "Confidentiality is not dependent upon locks and keys or their electronic equivalents". And the converse is true. Once Chedington became the proprietor of Sarafina and its business, those who held the keys to the company's secrets were bound to cede them to the new owners on request. The new (Microsoft Exchange) enquiries account was created *and paid for* by Sarafina, and Sarafina was entitled to the keys to that account from the outset, at a time when Mrs Brake was prohibited from taking any part in the company's business. The facts that Mrs Foster did not ask for those keys, and neither did Dr Guy when he first bought Sarafina, are irrelevant. The fact that the PWF partnership (*not* Mrs Brake) *formerly* owned or controlled a (Google) email account with the same address is equally irrelevant. No expectation of privacy that may have been induced by any use of the old account that there may have been (though almost none has been proved) can create a reasonable expectation of privacy in relation to the new account. Mrs Brake must, as an intelligent and experienced businesswoman, have understood this.
241. She also knew that the enquiries account was used by others, Rebecca Holt and Simon Windus, who were not her employees, but her colleagues. She agreed in her 2017

contract of employment (by clause 16) to give up to her employer on termination assets belonging to the business containing confidential information. And she never once said to the defendants that she owned the email accounts, which by itself must weaken any claim to an expectation of privacy. If she then chose to use this new email account for her personal emails, rather than one of her personal email accounts, she knew that she did this in an account belonging to someone else that was used by others she worked with. That does not deprive her of all rights in relation to them, but it does change the context in which the reasonableness of any expectation she may have had must be assessed.

242. My assessment of all this is as follows. The enquiries account with which I am concerned was set up only in 2015, although there had been a Google email account with the same address before that. At that stage the new account belonged to Sarafina, rather than to Mrs Brake or the claimants. Whether Mrs Brake had an expectation of privacy (and if so whether reasonable or not) in relation to emails in the Google email account *before* August 2015 is irrelevant. That is neither the relevant account nor the relevant time. In relation to the new 2015 Microsoft Exchange account, the fact that Mrs Brake had the password and Sarafina did not cuts no ice. Sarafina was not a licensee, but was the beneficial owner, in my judgment from the time that the new account was set up, but at the latest from the time that Chedington bought Sarafina. The fact that others were given access simply reduces the force of the argument that Mrs Brake had an expectation of privacy. If others have access to the same email account as you, how can you expect that its contents should remain private to you alone? And the claimants have accepted that 60% of the emails in the account were business emails. On any view, it was a predominantly business account.
243. In closing submissions, the claimants say that the defendants “have no defence to the reliance by the Brakes on the confidentiality agreement with Allen Computer Services,” and refer to the judgment of Mr Jarvis QC, where he says:
- “34. The only confidentiality contract between ACS and any of the parties was that between Mrs Brake and ACS dated 23 June 2014. The agreement imposed confidentiality obligations on ACS towards Mrs Brake. None of the exceptions from confidentiality would be relevant in the events which took place. There was no confidentiality agreement in place between AEL and ACS.”
244. But, in my judgment, the non-disclosure agreement with Andrew Allen adds nothing. No-one can reasonably believe that, if I sell a business to you containing locked assets, you cannot approach the administrator of the business to obtain access to those assets, merely because I previously procured the administrator to promise not to give the keys to anyone except me. That would be a breach of the well-known principle of non-derogation from grant. This is not confined to grants of interests in land. In *Molton Builders Ltd v City of Westminster* (1975) 30 P & CR 182, at 186, Lord Denning MR stated the broad principle in this way:

“... if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other.”

245. In any event, the proper scope of the agreement with Mr Allen was confined to the retainer by Mrs Brake, and could not affect retainers of his company by others, such as Sarafina. And, even in relation to the retainer by Mrs Brake, the ‘Confidential Information’ which Mr Allen was to keep confidential was “the data and information relating to the business and management of” *Mrs Brake*. This cannot bind Mr Allen in relation to the business and management of *Sarafina/AEL*. As I have already said, Mrs Brake is an astute and experienced businesswoman. She cannot reasonably have thought that her 2014 agreement with Mr Allen trumped the rights of Sarafina to its 2015 business email account.

*Caselaw*

246. As to the private use made by employees of a business email account of the employer, the claimants relied on a number of cases, including three from the European Court of Human Rights, and one from the High Court. The earliest ECtHR case was that of *Foxley v United Kingdom* (2001) 31 EHRR 25. In this case the trustee in bankruptcy of a bankrupt obtained an order under the Insolvency Act 1986 for his post to be diverted from his home address to the trustee. The bankrupt complained of a violation of Art 8. The court held that a violation had been proved in respect of (i) diversion in the period after the order expired (because then no longer in accordance with law), and (ii) diversion during the currency of the order, but in respect only of legally privileged communications (because it was “not necessary in a democratic society” for the trustee to access such communications). This decision does not assist me, first because the facts of the case are so far removed from the facts of the present case, and second because the court did not discuss the concept of reasonable expectation of privacy at all.

247. The second ECtHR case was *Copland v United Kingdom* (2007) 45 EHRR 37. In this case an employer monitored the telephone, email and internet usage at work of the personal assistant of a college principal without any warning. The court held that there had been a violation of Art 8 of the ECHR. Specifically on the question of reasonable expectation, the court said;

“42. The applicant in the present case had been given no warning that her calls would be liable to monitoring, therefore she had a reasonable expectation as to the privacy of calls made from her work telephone (see Halford, § 45). The same expectation should apply in relation to the applicant’s e-mail and Internet usage.”

248. The report does not set out the facts in any detail. But it is instructive to consider the case of ‘Halford’, referred to by the court as justifying the proposition in the text. The reference is to the decision of the ECtHR in *Halford v United Kingdom* [1997] IRLR 471. In that case, a senior police officer’s office telephone was intercepted without any warning, and information obtained used to discredit her in relation to a sex discrimination claim that she was pursuing before the Industrial (now Employment) Tribunal.

249. The court said:

“16. As Assistant Chief Constable, Ms Halford was provided with her own office and two telephones, one of which was for private use. These telephones

were part of the Merseyside police internal telephone network, a telecommunications system outside the public network. No restrictions were placed on the use of these telephones and no guidance was given to her, save for an assurance which she sought and received from the Chief Constable shortly after she instituted the proceedings in the Industrial Tribunal that she had authorisation to attend to the case while on duty, including by telephone...

[ ... ]

45. There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case (see paragraph 16 above).”

250. The facts were therefore particularly strong in favour of a reasonable expectation of privacy for Ms Halford. She was a very senior police officer, with her own private office, two telephones, of which one was expressly for her private use, and the benefit of an assurance that she could deal with a matter that was both private and confidential – her sex discrimination claim – from her office (thereby implying that communications would be private). There is nothing to show what were the working arrangements of the personal assistant Ms Copland, or if they were in any way comparable with those of Ms Halford. But in the present case Mrs Brake was certainly not in the same position as Ms Halford was in her case. In these circumstances I cannot regard *Copland's* case as of any great assistance in resolving the present case.
251. The third ECtHR case was *Barbulescu v Romania*, Application no. 61496/08). In that case the applicant had created a Yahoo Messenger account at work on his employer's instructions to answer customers' enquiries and was the only person who knew the password, although the employer had access to it, and indeed did access it. Despite a ban on personal use of the internet at work, he then used it for personal purposes. The employee was dismissed. He complained of a breach of Art 8.
252. The majority of the court held:
- “72. ... Furthermore, [the court] has held that telephone conversations are covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Article 8 (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 173, ECHR 2015). In principle, this is also true where telephone calls are made from or received on business premises (see *Halford*, cited above, § 44, and *Amann v. Switzerland* [GC], no. 27798/95, § 44, ECHR 2000-II). The same applies to emails sent from the workplace, which enjoy similar protection under Article 8, as does information derived from the monitoring of a person's internet use (see *Copland*, cited above, § 41 *in fine*).

73. It is clear from the Court’s case-law that communications from business premises as well as from the home may be covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Article 8 of the Convention (see *Halford*, cited above, § 44; and *Copland*, cited above, § 41). In order to ascertain whether the notions of ‘private life’ and ‘correspondence’ are applicable, the Court has on several occasions examined whether individuals had a reasonable expectation that their privacy would be respected and protected (*ibid.*; and as regards ‘private life’, see also *Köpke v. Germany* (dec.), no. 420/07, 5 October 2010). In that context, it has stated that a reasonable expectation of privacy is a significant though not necessarily conclusive factor (see *Köpke*, cited above).”

253. Applying those principles, the court noted that instant messaging services were just one kind of communication enabling individuals to lead a private social life, and was ‘correspondence’ within Art 8, even when sent from an employer’s computer. Here the applicant’s employer imposed a ban on using company resources for personal purposes, and there was also a system for monitoring employees’ internet use. Despite knowing of this ban (though not necessarily of the monitoring system, its extent or nature) the applicant used the employer’s system to exchange messages of a personal nature with family, some of an intimate nature.

254. The court continued:

“80. It is open to question whether – and if so, to what extent – the employer’s restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, an employer’s instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.

81. In the light of all the above considerations, the Court concludes that the applicant’s communications in the workplace were covered by the concepts of ‘private life’ and ‘correspondence’. Accordingly, in the circumstances of the present case, Article 8 of the Convention is applicable.”

255. Accordingly, this was *not* a case where the court’s application of Art 8 depended on any reasonable expectation of privacy, because the court expressly did not decide that any such expectation existed. That does not help me in the application of the domestic English tort of breach of privacy, which, by virtue of the decisions already referred to, including *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, and *Racing Partnership v Sports Information Services* [2020] EWCA Civ 1300, *does* depend in the first instance on establishing that very concept.

256. Lastly, the High Court decision relied on by the claimants was made in the case of *Shepherd v Fox-Williams* [2014] EWHC 1224 (QB). There, the claimant’s girlfriend was dismissed by her employer, and she brought employment proceedings against it. In those proceedings, the employer disclosed certain documents (described by the judge as “highly personal to the claimant and obviously confidential”), which had been prepared by the claimant and his solicitors in relation to his own divorce proceedings. On the evidence the judge held that the claimant had sent those documents to his girlfriend on her personal email account, for comment, and she had

forwarded them to her work email account, so that she could open them at work. She had not appreciated that doing this would result in a copy being stored on her employer's server. This was how the documents came to be in the defendants' possession, and thereafter disclosed in the dismissal proceedings.

257. In separate High Court proceedings brought by the claimant against the employer and the employers' solicitors for delivery up and destruction of these documents, the defendants accepted that (subject to loss of confidentiality in the information) the documents were privileged, and destroyed them. The claimant did not need to and did not thereafter pursue the application, except to obtain their costs. This was resisted by the defendants, on the basis that the substantive application had not been pursued, and in any event would have failed, because confidentiality had been lost when the documents were automatically copied onto the employer's server.
258. Simler J, as she then was, said:

“58. ... The Privileged Documents were generated in the course of a solicitor/client relationship. They are presumed confidential and the privilege that attaches to them is a fundamental substantive right. As a matter of law, Mr Jones' proposition that by sending these documents to Ms Liebling's personal email address, the claimant is to be treated as having waived his privilege in relation to her employer, goes too far. ... It would be contrary to the interests of the administration of justice if privilege is regarded as waived in these circumstances or treated as waived generally because a privileged document is disclosed for a limited purpose by a party who plainly would not contemplate doing anything which might cause his privilege to be lost. The fact that the claimant might not be able to assert privilege against Ms Liebling does not mean that he is taken to have waived privilege more generally, or in relation to the defendants specifically.

[ ... ]

61. Nor am I persuaded that FJI's electronic information policy helps in this regard. There is no evidence that the claimant had notice or knowledge of the policy relied on by FJI. He is not and has never been employed by FJI. Given the terms of the policy, it is not sufficient for the purposes of this argument for the defendants to assert that the policy is an industry standard and that everyone knows that employers have electronic information policies of this kind. The terms of the policy make clear that its purpose is to preserve privacy and confidentiality whilst enabling the employer to carry out legitimate monitoring and accessing of electronically stored material for appropriate business purposes. It is not obvious to me that a fair reading of the policy would have led the claimant to conclude that privilege and confidentiality in documents, sent to his girlfriend's personal email but forwarded to her work email address for a limited purpose, would be invaded and jeopardised as a consequence. The fact that Ms Liebling personally might not be able to assert rights of privacy against FJI does not mean that the claimant cannot assert rights to confidentiality and privilege in respect of the Privileged Documents against FJI. Confidentiality is not lost simply because Ms Liebling forwarded the documents to her work email.”

259. If I may respectfully say so, this decision seems to me to be entirely orthodox. Where privileged (and therefore necessarily confidential) communications are shown or sent by the holder of the privilege to another person in confidence for a limited purpose without any intention to waive privilege, then normally it is not waived: see *eg Nationwide Building Society v Various Solicitors* [1999] PNLR 52, 72. The employee had no intention of placing the documents on the employer's server or otherwise of disclosing them to the employer, and did not realise that this would be the consequence of opening them on her work email account. Neither the claimant nor the employee ever thought that the employer's IT policy would mean that the claimant's privilege would be at risk.
260. Moreover, that case was not about the claimant's expectation of privacy. Instead it was about whether the employee's actions in opening the documents in the employer's mail account caused a loss of that confidentiality necessary for privilege to subsist. That depended on her intention. But she never even thought about the possibility that the documents would be copied to the employer's server, so the fact that they ended up there could not demonstrate on her part an intention to give up that confidentiality. It was an accident that the employer obtained sight of the documents.
261. In the present case Mrs Brake was in a very different position. She was an employee, and knew that the enquiries account (to which she knew others had unrestricted access) was saved to a server, and that all her emails, whether public or private, would be stored on it. Despite this, she deliberately used the account for non-business communications, rather than the [alo@axnoller.co.uk](mailto:alo@axnoller.co.uk) account, which had been provided for personal emails (or any other of her personal email accounts).
262. The defendants, on the other hand, relied on the decision of Garnham J in *Simpkin v The Berkeley Group Holdings plc* [2017] 4 WLR 116. In that case, an employee sent an email from his work email account to his private email account, attaching to the email a copy of a document prepared on his work computer, which he proposed to send to his solicitor in connection with his ongoing divorce. The employer subsequently dismissed the employee, and there were employment proceedings between them thereafter. In those proceedings, the employer adduced this document in evidence, and the employee sought to strike out this part of the evidence as privileged. Garnham J held that the application failed, because *as against the employer* the employee had no reasonable expectation of privacy, and therefore the documents could not be confidential as against the employer. And, without confidentiality, there could be no privilege.
263. The judge gave four reasons for reaching this conclusion:
- “31. It is common ground that it is a pre-condition to a claim of privilege that the document in question is confidential as against the person against whom the privilege is claimed (see *Three Rivers* at paragraph 24 and *BBGP v Babcock and Brown* [2010] EWHC 2176 (Ch) at paragraphs 45-50). As Mr Malek contends, the touchstone of confidentiality is a reasonable expectation of privacy (*Campbell v MGN Ltd* [2004] UKHL 22 at paragraph 21 and 85). In my judgment, the Synopsis was not confidential as against the defendant.
32. First, the claimant signed a copy of the company's IT policy which made clear that emails sent and received on its IT system were the property of



Berkeley. Berkeley's IT department had access to all the company's computers and email accounts and did not need authorisation before accessing their computers or accounts. The claimant's employment contract makes clear that his emails were subject to monitoring by Berkeley without his consent.

33. Second, I accept Mr Malek's arguments that the Synopsis was created in the course of the claimant's employment. The Synopsis contained an analysis of the defendant's financial performance by its group finance director, created on, and transmitted via, its IT system whilst the claimant was at its office. He prepared it using the defendant's financial information. It appears he prepared it over the course of almost an hour whilst working at the defendant's offices in the early morning of 11 August 2014. He prepared it using the defendant's IT system and used the defendant's email account to email it to his personal account.

34. Third, it is impossible to maintain that the claimant had any reasonable expectation of privacy as regards the preparation of this document. The claimant saved the Synopsis to his folder on one drive of Berkeley's central servers. As Mr Malek contends, the claimant was, or should have been, aware that documents in that file were stored centrally. The Synopsis was not password protected and was not segregated from the claimant's work related documents.

35. As the claimant would have been well aware, the contents of his email account would also have appeared in his personal assistant's email account and she had direct access to his email folder where this email and the Synopsis were stored. Even if she did not in fact have occasion to look at those emails, the fact that she had access to them undermines the suggestion that the claimant had a reasonable expectation of privacy as against the defendant.

36. It is acknowledged by the claimant's solicitors that neither the Synopsis, nor the email under cover of which it was sent to his own account, indicated on their face that they were prepared for the purpose of seeking legal advice. In my judgment, the fact that the computer used by the claimant automatically produced a standard Berkeley footer does not assist the claimant. The purpose of that footer was to protect Berkeley's confidentiality not to protect the confidentiality of Berkeley's employees against their employer.

37. Fourth, in my view, Mr Malek is right when he points to the third statement of Mr Simpkin as suggesting that the claimant was well aware that he was not entitled to privacy in using the defendant's IT systems. In that third statement the claimant asserts that he sent an email on 6 August 2014 from his personal email address to the same email address 'because although I required a copy to be stored the content was confidential and for my lawyer and I did not want to save a copy on my work computer'.

38. In those circumstances I fail to see how it can possibly be said that the claimant had any reasonable expectation of privacy in the document produced on Berkeley's IT system."

264. It will be seen that that case differs factually from the present one in certain ways. First, the employee there signed an IT policy making clear that emails on the employer's system belonged to it, and his employment contract expressly allowed for monitoring his emails without consent. Neither of those things is the case here. Second, the documents in *Simpkin* were prepared in the course of the employee's employment. But the argument here is not about documents prepared or sent or received on behalf of the employer, but those *not* so prepared, sent or received. Third, there was clear evidence in *Simpkin* that the employee himself recognised that he was not entitled to privacy in relation to his employer's email account.
265. On the other hand, there are important elements here that *are* the same as in *Simpkin*. First, the emails claimed to be private to Mrs Brake were stored on the same server as the business emails, and were not segregated or differentiated in any way from them. In particular they were not *themselves* passworded. Second, others had access to the enquiries account, in particular Rebecca Holt and Simon Windus. The fact that Mrs Brake agreed to this does not change the fact that she was not the only person to have access. Third, Mrs Brake's claimed private emails did not bear any label or other indication to show that they were, or were claimed to be, private.
266. The judge relied on these three features in *Simpkin* for his third proposition, that "it is impossible to maintain that the claimant had any reasonable expectation of privacy as regards the preparation of this document." In my judgment the position in the present case is analogous. In addition to this, Mrs Brake had the opportunity to use her own private email accounts based on other domains, or her "alo@" email account based on the axnoller domain. Before I leave the *Simpkin* case, I will note that the judge was specifically referred to the decision in *Shepherd v Fox Williams*, considered it in some detail, and concluded that it did not assist the claimant in *Simpkin*.

#### *Conclusion on reasonable expectation*

267. Overall, taking into account all the circumstances of this case, my conclusion is that Mrs Brake did not have a reasonable expectation of privacy in emails that she received on and sent from the enquiries account. That means that the claim in breach of privacy must fail in any event, even without recourse to the other defences put forward (some of which I have upheld).
268. However, even if I were wrong about the reasonable expectation of privacy generally, on the facts that I have found, the only documents which would be private would be the 5511 already agreed to be destroyed, and the 4849 which (if there were a reasonable expectation of privacy) would still be potentially subject to the iniquity defence, and therefore not liable at this stage to be the subject of an order for destruction. In relation to those documents, there would have to be a trial of the iniquity defence. In relation to other documents, there would need to be the second stage of the enquiry into the cause of action in privacy, namely, the balancing exercise, which must focus intensely on the facts. I assume (as do the defendants) that that also would be carried out in the trial of the iniquity defence. All I can say now is that, given that I have not seen the documents in question (with very few exceptions), I am not in a position to conduct that exercise at present.

#### **Misuse of information**

*Tests to apply*

269. Given my findings on the necessary quality of confidence and the absence of circumstances importing an obligation of confidence (in relation to breach of confidence), and on the reasonable expectation of privacy (in relation to breach of privacy), it is not necessary for me to address the question of *misuse* of any private or confidential information. However, in case the matter should go further, I should say this. The claimants in their closing submissions said that for

“claims of a misuse of private information, the test has been described as ‘whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive’.”

270. This is said to be derived from the opinion of Lord Sumption in *Campbell v MGN* [2004] 2 AC 457. But Lord Sumption was not a judge at the time of *Campbell*, and he did not take part in the proceedings, even as counsel. I think that this must be a reference to the judgment of Lord Sumption (with whom the majority of the court agreed) in the case of *Khuja v Times Newspapers Ltd* [2019] AC 161, where he said:

“21. In *Campbell v MGN Ltd* [2004] 2 AC 457, the House of Lords expanded the scope of the equitable action for breach of confidence by absorbing into it the values underlying articles 8 and 10 of the European Convention on Human Rights, thus effectively recognising a qualified common law right of privacy. The Appellate Committee was divided on the availability of the right in the circumstances of that case, but was agreed that the right was in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test was whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive. The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true.”

271. In the decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, there was some discussion of the judgment of Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, [42], where the judge used some of the same words as are above suggested. But in fact the quotation is different, and (importantly) the word “offensive” is qualified by the adjective “highly”. Even more importantly, the House of Lords in that case did *not* lay down that the test was whether or not a reasonable person would find the disclosure offensive. As Lady Hale said:

“135. An objective reasonable expectation test is much simpler and clearer than the test sometimes quoted from the judgment of Gleeson CJ ...”

272. So, with very great respect, I do not think that Lord Sumption’s summary of the decision in *Campbell* does justice to the House of Lords. But, nevertheless, the majority of the Supreme Court, after citation and consideration of *Campbell*, has

spoken. As Lord Reid said in *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1967] 1 AC 853, 924, admittedly in a different context,

“the law of England is what the House of Lords has said it is ...”

It is therefore my duty to apply that.

273. As for the test in relation to a claim for breach of confidence, in *Imerman* the Court of Appeal said:

“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.”

#### *Application to facts*

274. The defendants have either destroyed, or agreed to destroy, documents accepted to be private to the claimants. In these circumstances it is difficult to see that there is any appreciable damage suffered by the claimants in relation to these documents: *cf* Sedley LJ in *White v Withers LLP* [2009] 3 FCR 435, [72]. The defendants retained the 4849 documents potentially subject to the iniquity defence. I cannot decide now that that was wrong. That would need to be tried.
275. As to transmission to lawyers and staff, this was done for the purposes of being advised in relation to actual or contemplated proceedings. No onward distribution beyond lawyers and their staff under similar duties of confidentiality has been shown (for the avoidance of doubt, I include Mrs Palmer in the latter category). In my judgment that is not wrong. If you cannot tell your lawyer, in confidence, what has happened, you cannot be properly advised. No reasonable person of ordinary sensibilities would be caused offence by this. Indeed, in my judgment, it would cause offence if you could *not* ask your lawyers to advise you.
276. In *White v Withers LLP* [2009] 1 FLR 383, a wife who launched matrimonial proceedings but feared that her husband would hide his assets from her took and passed his private and confidential documents to her solicitors. The husband sued the wife and her solicitors for breach of confidence and breach of privacy, and also in the

tort of conversion, because some of the documents were originals. The husband subsequently discontinued the claim against the wife. The solicitors applied to strike out the claims. The judge did so. Eady J said:

“8. Mr Sherborne submits 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. Nor could the fact that such documents had been read and noted in connection with the litigation. While it is true that there has become recognised over the last few years a wrong actionable in English law described as “misuse of private information”, following from the consideration of relevant principles by their Lordships in *Campbell v MGN Ltd* [2004] AC 457, it would not be possible by any stretch of the imagination to characterise the solicitors’ receipt and retention of the documents from Mrs White in that way.”

277. The husband appealed against the strike out. In the Court of Appeal, Ward LJ said:

“23. If Mr Michael Crystal Q.C. did not concede that the claim for damages for breach of confidence and privacy could never succeed, he was quite clear that he need not trouble’ us with that element of the claim. In my judgment he was clearly right to take that course: Mrs White’s communication of that confidential/private information to her solicitors for their use in the litigation could never be characterised as misuse of it.

[ ... ]

*The claim for infringement of the claimant’s rights in confidence and privacy and for misuse of his private information*

40. Mr Michael Crystal, correctly in my view, does not pursue this claim any longer and I say no more about it.”

278. It is right however that I should say that, in *Imerman v Tchenguiz*, the Court of Appeal said:

“71. ... 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.”

279. I am troubled by this characterisation of the comment of Ward LJ in *White v Withers* as referring to “the suggestion of misuse by the solicitors”. What Ward LJ actually said was:

“Mrs White’s communication of that confidential/private information to her solicitors for their use in the litigation could never be characterised as misuse of it”.

As I read it, this comment clearly relates on its face to *Mrs White’s communication*, and *not* to what the solicitors did with it. I do wonder whether the Court of Appeal

may have misread what Ward LJ actually said. He clearly thought that the communication by Mrs White to her solicitors of confidential information for their advice was not a wrong, even though at first instance Eady J *had* been concentrating on the receipt by the solicitors. In any event, the point is clear. It is not wrong *in itself* for parties to share confidential information belonging to another person with their legal advisers for the purposes of being advised.

280. The same is true in principle for the press agent Mr Hawker. The only difference is that there will no legal privilege attaching to the defendants' own communications with him (it may be different if it is the lawyers' communications with him: there was no evidence as to exactly how this happened). In my judgment it is not misuse of confidential information or breach of privacy to pass private or confidential information, in confidence, and not to be disclosed further, to a professional adviser where there is a reasonable need for such advice. I find that the defendants did have such a need in the circumstances.
281. Transmission of information to the trustee in bankruptcy, Mr Swift, the liquidators of the PWF partnership, and to Mrs Brehme, stands on a different footing. Information was not being passed to them in order for the defendants to be advised on their own positions. It was being passed to these third parties potentially for their own purposes. However, there are two distinct aspects to the position of Mr Swift and what the defendants did. First of all, they told him that there were boxes of documents apparently belong to the Brakes to be found in the cottage. As a result, Mr Swift arranged for them to be collected and taken away. In my judgment, merely informing the trustee in bankruptcy that boxes of material apparently belonging to the claimants were to be found in the cottage does not amount to the transmission of information, confidential or otherwise, of the claimants to the trustee. It is therefore neither a breach of privacy nor a breach of confidence by the defendants.
282. The second aspect concerns information which the defendants actually passed to Mr Swift in response to requests from him to do so. In relation to these requests, reliance is placed on section 366 of the Insolvency Act 1986. This relevantly reads as follows:

“366.— Inquiry into bankrupt's dealings and property.

(1) At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt's estate, summon to appear before it—

[ ... ]

(c) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property.

The court may require any such person as is mentioned in paragraph (b) or (c) to submit [a witness statement verified by a statement of truth] to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property.”

283. It will be seen that this section does not confer a power on the trustee in bankruptcy directly to require third parties to produce information in their possession. Instead, it empowers the court on the application of the trustee to require third parties to produce such information. However, typically, trustees in bankruptcy have limited resources for making court applications, and prefer to operate where possible by agreement. Moreover, an informal and friendly approach is often more productive than a formal and antagonistic one. So it is hardly surprising that in this case Mr Swift made informal requests to the defendants by reference to section 366, without actually making formal applications to the court. If the trustee had made an application to the court, and the court had made an order under the section, the claimants could not complain at the defendants' compliance with it. (I should say that it is not an objection that the claimants have been discharged from bankruptcy. The word 'bankrupt' in the section includes a bankrupt once discharged, and so the jurisdiction continues to exist: *Oakes v Simms* [1997] BPIR 499, CA. Nor is it an objection that the information concerned came into existence after the discharge: the section requires only that it concerns "the bankrupt or the bankrupt's dealings, affairs or property". The bankrupt is now a discharged rather than an undischarged bankrupt, but *Oakes* shows that the section applies to discharged as to undischarged bankrupts.)
284. On the other hand, it does not follow from this that a failure to obtain an order means that compliance with a request properly made must be a breach of privacy or confidence. The claimants say in closing that a failure to obtain an order means that, if the court does not make an order, the exception in article 8(2) cannot apply. However, for this purpose "the law" includes the common law, and not just the statute law. Consistently with the policy behind section 366, that trustees in bankruptcy should have the maximum available information about the bankrupt's estate, in order to protect the interests of creditors in the bankruptcy, and taking a realistic view of the resources available to trustees in bankruptcy, I hold that it is not a breach of privacy or confidence for third parties on request from a trustee in bankruptcy to supply that information which the court would have ordered to be supplied if an application had been made (I am not now dealing with *privileged* information, to which different considerations may apply).
285. On the information available to me in this case, and taking into account the detailed submissions made to me on behalf of the claimants, I have no doubt that the information supplied in relation to the requests made would have been ordered to be supplied. The fact that some emails were sent to Mr Swift's office after his removal from office does not change matters. They were not sent to Mr Swift personally, for his own amusement. They were sent for the benefit of the bankrupt estate, to be passed on to the new trustees.
286. The claimants make an argument in closing submissions (at [30]) that the defendants should not have had these documents in the first place, and refer to a passage in *Toulson & Phipps, Confidentiality*, [5-053], who in turn rely on a dictum in *Hilton v Barker Booth and Eastwood* [2005] 1 WLR 567. This is a dictum of Lord Walker of Gestinghorpe (at [35]) in the context of a vendor entering into two irreconcilable contracts of sale. Lord Walker said:

"35. If a house owner contracts to sell his house to one purchaser for £240,000 and then a week later contracts to sell it to another purchaser for £250,000, he assumes two contractual duties which are on the face of it irreconcilable,

unless the seller has grounds for rescinding either contract, or can persuade one or other purchaser to release him from his obligation. That is so whether he enters into the second contract with his eyes open, in the hopes of making a larger profit, or whether (rather improbably) he does so inadvertently. It is no answer for him to say to either purchaser: I am sorry, I am obligated to another. His dilemma is his own fault (the phrase used by Lord Cozens-Hardy MR in *Moody v Cox* [1917] 2 Ch 71, 81, a case to which I shall return).”

287. This is a different context from our case, and in my judgment the analogy is inexact. Nevertheless, if applied to the present case, it would mean that the defendants cannot excuse an *initial* wrong of breach of privacy or confidence by saying that they *subsequently* acquired an obligation to pass the emails to the relevant insolvency office holder, or (as here) are otherwise justified in responding positively to a request from such an office holder. But that does not mean that the defendants commit a *further* wrong in passing the emails to the insolvency office holder. The office holder can ask whoever has the information to supply it.
288. In principle, I consider that the same result should obtain in relation to information supplied to the liquidators of the PWF partnership, and for the same policy reasons. Given that Mrs Brehme was the largest creditor in the liquidation and that any benefit to her would benefit all the creditors of the partnership, I consider that the supply of information relevant to her claim in the liquidation falls into the same category, and cannot be complained of by the claimants. It has not been shown that any information supplied by the defendants to Mrs Brehme falls outside the category of that which it would be appropriate to pass on request to the liquidators of the PWF partnership. Any claim based on disclosure to the liquidators or to Mrs Brehme must equally fail.

#### *Conclusion on misuse*

289. In the present case, therefore there was neither breach of confidence nor breach of privacy. As I have already said, I do not consider that the use/disclosure by the defendants of information from the enquiries account, in the contexts in which they occurred, would have caused offence to a reasonable person of ordinary sensibilities.

#### *Damages*

290. If however I were wrong on misuse, and what was done amounted to a breach of confidence or breach of privacy, it would have been necessary to assess damages. I would have taken into account the guidance given in *Richard v BBC* [2019] Ch 169, where Mann J said:

“350. The following factors should be taken into account in assessing general damages in this case:

(a) Damages can and should be awarded for distress, damage to health, invasion of Sir Cliff’s privacy (or depriving him of the right to control the use of his private information), and damage to his dignity, status and reputation. (*Gulati’s* case in the Court of Appeal [2017] QB 149, para 45; *Gulati’s* case [2016] FSR 12 at first instance; and the discussion above about reputation.)



(b) The general adverse effect on his lifestyle (which will be a function of the matters in (a)).

(c) The nature and content of the private information revealed. The more private and significant the information, the greater the effect on the subject will be (or will be likely to be). In this case it was extremely serious. It was not merely the fact that an allegation had been made. The fact that the police were investigating and even conducting a search gave significant emphasis to the underlying fact of that an allegation had been made.

(d) The scope of the publication. The wider the publication, the greater the likely invasion and the greater the effect on the individual.

(e) The presentation of the publication. Sensationalist treatment might have a greater effect, and amount to a more serious invasion, than a more measured publication.”

291. But, without a trial of the iniquity defence, it is impossible to assess damages in relation to the documents said to be subject to that defence. It is moreover not strictly necessary to consider damages in relation to the remainder. But, bearing in mind the factors set out by Mann J, I would have considered that this was a case for (at best) limited damages. It is not a phone hacking or celebrity exposure case. It is not a case of sensationalist (or indeed any) publication of private information in the media. Such review and use of the material as there may have been was in pursuit of otherwise legitimate objectives, namely the defence in good faith of legal rights, and was restricted to those (such as legal advisers) who had a need to know. This case seems to me to fall close to, if not within, the category adverted to by Sedley LJ in *White v Withers LLP* [2009] 3 FCR 435, where he said:

“72. ... What will matter is that, provided the document is not obviously off limits (as in my present view Letty's letter was) and provided that, whether or not copied, it is promptly returned (as the material documents were not), there will be no appreciable damage. ...”

292. I also bear in mind the comments of Lord Nicholls (dissenting in the result) in *Campbell v MGN* where he said:

“33. In reaching this overall conclusion I have well in mind the distress that publication of the article on 1 February 2001 must have caused Miss Campbell. Public exposure of this sort, especially for someone striving to cope with a serious medical condition, would almost inevitably be extremely painful. But it is right to recognise the source of this pain and distress. First, Miss Campbell realised she had been betrayed by an associate or fellow sufferer. Someone whom she trusted had told the newspaper she was attending Narcotics Anonymous meetings. This sense of betrayal, and consequential anxiety about continuing to attend Narcotics Anonymous meetings, flowed from her becoming aware she had been betrayed. The newspaper articles were only the *means* by which she became aware of her betrayal. Secondly, Miss Campbell realised her addiction was now public knowledge, as was the fact she was undergoing treatment. She realised also that it was now public knowledge that she had repeatedly lied. Thirdly, as already mentioned, Miss

Campbell would readily feel she was being harassed by the 'Mirror' employing a photographer to 'spy' on her.

34. That Miss Campbell should suffer real distress under all these heads is wholly understandable. But in respect of none of these causes of distress does she have reason for complaint against the newspaper for misuse of private information. Against this background I find it difficult to envisage Miss Campbell suffered any significant additional distress based on public disclosure that her chosen form of treatment was attendance at Narcotics Anonymous meetings.”

293. In my judgment, if contrary to what I have said the claimants *had* established a claim and compensable loss, the fact of having established publicly that the defendants had been wrong to deal with the emails in the way that they did, together with an award of £5,000 (in total), and an order that their costs be paid, would be an adequate response by the law to what had happened here.

### **PROCURING A BREACH OF CONTRACT**

294. There is also a claim against the defendants for procuring a breach of the contract (the non-disclosure agreement of 2014) between Mrs Brake and Allen Computing Services. The claimants rely on *OBG Ltd v Allan* [2008] 1 AC 1, HL. There the House approved the statement by Lord Watson in *Allen v Flood* [1898] AC 1, 107, that

“He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong he has procured.”

295. One question for the House of Lords in *OBG* was the degree of knowledge of the contract needed for the purpose of this tort. Lord Hoffmann said:

“40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, union officials threatened a building contractor with a strike unless he terminated a sub-contract for the supply of labour. The defendants obviously knew that there was a contract - they wanted it terminated - but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said (at pp 700-701)

‘Even if they did not know the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not’.”

296. Lord Nicholls of Birkenhead agreed. He said:

“192. The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind-eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort.”

297. The other members of the House also agreed. In the present case there is no doubt that Dr Guy knew of the non-disclosure agreement by the time he visited Mr Allen and pressed him to change the passwords on the accounts. As the authorities show, it does not matter whether he knew the exact details by then. But it *is* necessary to show that what Mr Allen did was a breach of his contract with Mrs Brake. I have already referred to this agreement in some detail (see at [60], [115]ff, [243]ff above). It is clear that Mr Allen did not breach his agreement with Mrs Brake by changing the passwords. He promised to keep confidential *Mrs Brake's* confidential information. But the accounts belonged to the company, by whom Mr Allen was also retained, and he was obliged to unlock them for his employer. The claim for procuring a breach of contract also fails.

## **THE POSITION OF MR BRAKE**

298. I should say something in relation to the position of Mr Brake in this litigation. He was an original claimant, but there is no claim (or evidence adduced in support of any claim) that he ever used the enquiries account. The claimants respond that this point has never previously been raised in correspondence or at any hearing. Moreover, Mr Brake was protected just as much as Mrs Brake by the interim injunction granted by Mr Jarvis QC. I accept all this. At the same time, I have to deal, not with a claim to interim relief on application, as Mr Jarvis QC had to, but with one to final relief at trial. And I have to deal with the claims as presented to me.
299. I have no doubt that it seemed sensible to join Mr Brake at the outset, when the facts were not fully known, and the claimants would have wanted to avoid any technical problems arising from a failure to join someone who might be a joint owner of relevant rights. But the fact is that no such problems have presented themselves, and the parties might well have agreed to a discontinuance of his separate claim. However, if a technical point is being taken by the defendants, then I also accept that a small number of documents in the bundle from the enquiries account do refer to Mr Brake, for example in relation to his bankruptcy, and that is sufficient in my judgment to justify his having been joined, even though the claim ultimately fails. At all events I am not prepared to dismiss his claim separately from that of Mrs Brake. I dismiss his claim on the basis that his claim can be no better than that of Mrs Brake, and stands or falls with hers.

## **OTHER MATTERS**

### **Remedies**

300. The defendants have agreed to destroy 5511 emails from the enquiries account, in accordance with the order of 28 November 2019 of Mr Jarvis QC, as varied by the

agreement of the parties. There is therefore no need for either an injunction or an order for destruction. The claimants are not entitled to any other remedy.

### List of issues

301. Earlier I set out the list of issues which was submitted to the court by the parties. Whilst I consider that the judgment I have given provides a sufficient answer to these issues, I will for the sake of convenience set out my answers to them here in summary form, together with appropriate paragraph numbers for ease of reference. But, to the extent that there is any conflict between the text of the judgment and the (summarised) responses below, the judgment prevails. The issues were as follows:

#### The context to the Enquiries Account

**1. When was the domain name ‘axnoller.co.uk’ set up and for whom?**

20 October 2009, for Mrs Brake. See [50].

**2. When was the Enquiries Account set up and when were the first emails sent to/from that Account?**

The *first* account using the address [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) was set up in April 2011 for the PWF partnership (see [55]), and the first (and only) email shown to have been sent to it was sent in February 2015 (see [61]). The *second* email account using that address was set up in August 2015 for Sarafina (see [75]), and the first email sent to it was on 15 August 2015.

**3. To whom do the domain name and/or the Enquiries Account belong (and to whom have they belonged since their creation)?**

The domain name belonged beneficially to Mrs Brake in 2009 (see [201]), to the PWF partnership from February 2010 (see [202]), otherwise to Mrs Brake’s trustee in bankruptcy from May 2015 (see [203]), and subject to that from August 2015 or at the latest February 2017 to Sarafina/AEL (see [204]-[208]). The registration in the name of Mrs Brake in 2019 made no difference to the beneficial ownership (see [209]).

The **first** enquiries account belonged to the PWF partnership from creation in April 2011 (see [211]). The **second** enquiries account belonged to Sarafina from creation in August 2015, or at least from February 2017 (see [212]).

**4. Was the Enquiries Account primarily used as SPL/AEL’s main business email address? Was it held out to the world as such?**

Yes, and yes (as to the second enquiries account) (see [78]).

**5. Did SPL/AEL pay all costs and expenses associated with the domain name and the Enquiries Account between the time they were set up and 8 November 2018?**

Yes, and yes (as to the second enquiries account) (see [75], [79]-[82]).

6. **Who had access to the Enquiries Account, for what purposes and to what extent did they use the Enquiries Account for personal rather than business purposes?**

As to the second enquiries account, Mrs Brake, Rebecca Holt (see [82]-[83], [110]), and Simon Windus (see [110]). Mrs Brake used the account for personal purposes (see [78], [110]). I have found that about a sixth of the emails in the second account were not business emails (see [190]). There is no evidence that Ms Holt or Mr Windus used the account for personal purposes (see [110]).

7. **What was the purpose of the passwords to the Enquiries Account, the Personal Accounts and the Fasthosts Account, who held those passwords, and was SPL/AEL entitled to instruct (i) ACS to change the passwords to the Enquiries Account and/or (ii) employees (including Mrs Brake) to provide it (SPL/AEL) with the passwords?**

Mrs Brake held the passwords to the Enquiries Account, the Personal Accounts and the Fasthosts Account, and gave them to Mr Allen. The passwords were intended to protect the information in them for the benefit of those entitled to the relevant account. SPL/AEL was entitled to instruct (i) ACS to change the passwords, and to instruct (ii) employees to provide it with the passwords (see [240]).

8. **Did the Guy Parties invite the Brakes' trustee in bankruptcy or the liquidators of the Partnership to sell to AEL the website [www.axnoller.co.uk](http://www.axnoller.co.uk), the associated domains and the email accounts including the Enquiries Account?**

No (see [141]).

#### **Confidentiality and privacy**

9. **Was there a reasonable expectation of confidentiality in respect of the Enquiries Account as a whole, save for Booking Emails (as defined in the APoC)?**

No (see [232]).

10. **Was there a reasonable expectation of privacy in respect of the Enquiries Account as a whole, save for Booking Emails (as defined in the APoC)?**

No (see [267]).

11. **In answering issues 9 and 10 above, what effect do the following contracts have:**

- (1) **The terms of the Brakes' employment by SPL/AEL and/or Chedington.**

Clause 16 is a factor (see [241]).

- (2) **The warranties in the SPA. In particular, did Mrs Foster warrant that the Enquiries Account belonged to SPL/AEL in the SPA?**

Yes. See [101]-[108].

- (3) **The ACS Confidentiality Agreement. In particular, is the Enquiries Account within the scope of the ACS Confidentiality Agreement? If so, was it breached?**

None, no and no (see [244]-[245], [297]).

- 12. Are any of the documents in the Enquiries Account private and confidential to the Brakes?**

No (see [232], [267]), but the defendants have agreed to delete 5511 as private, subject to reasonable expectation of privacy (see [190]).

#### **Guy Parties' use of material from the Enquiries Account**

- 13. What were the Guy Parties' reasons for seeking access to, copying and denying the Brakes access to the Enquiries Account?**

The defendants wanted to access their own business information and move on, removing the claimants' personal information from the account: see [125], [137]-[138].

- 14. What use have the Guy Parties made of information in the Enquiries Account and with whom have they shared that information?**

See [135]-[138], [142], [149]-[157].

- 15. Was any of the information found to have been used at issue 14 above, confidential or private to the Brakes?**

See [190], [232], [267].

- 16. What offers did the Guy Parties make to the Brakes (and on what terms) for them to remove any personal emails in the Enquiries Account? Were those offers reasonable and was the withdrawal of those offers reasonable?**

See [122]-[125].

**17. Did the Guy Parties retain any emails or copies of emails from the Personal Accounts?**

No (see [140]).

**Miscellaneous**

**18. For the purpose of a claim in confidentiality or privacy are any of the following provisions relevant in law and/or actionable:**

- (1) **Sections 1 and 2 of the Computer Misuse Act 1990;**  
No, see [226].
- (2) **The General Data Protection Regulation 2016;**  
No, see [226].
- (3) **The Protection from Harassment Act 1997;**  
No, see [227]. and
- (4) **Articles 8 and 6 of the European Convention on Human Rights?**  
No, see [225].

**19. If so, have the Guy Parties breached those provisions?**

Not applicable.

**Preliminary Issue on Iniquity/Public Interest Defence**

**20. On the facts and matters pleaded by the Guy Parties at paragraphs 16-17, 19-47 and 75 of the Defence, is an iniquity or public interest defence available to them in law?**

Yes (see separate judgment).

**Remedies**

**21. Are the Brakes entitled to damages and, if so, in what amount?**

No (see [289]), but *cf* [293].

**22. Are the Brakes entitled to a final injunction and, if so, in respect of what documents?**

No (see [289], [300]).

**23. Are the Brakes entitled to an order for destruction and, if so, in respect of what documents?**

No (see [289], [300]).

## CONCLUSION

302. In the result, I dismiss the claim. It is therefore not necessary to go on to try the ‘iniquity defence’. I am very grateful to all counsel and solicitors for their hard work in preparing for and running this complex and difficult trial. I should be grateful to receive a draft minute of order giving effect to this judgment for approval.

## POSTSCRIPT

303. After I had circulated a draft of this judgment to the parties, I was sent a copy of the letter from solicitors acting for the defendants addressed to the claimants concerning certain of the claimants’ horses, referred to at [151] above, which had not been in the bundle. The defendants invited me to record their position on this matter. The claimants objected, on the basis that it was an attempt to put in further documentation after the trial, and was inappropriate. I agree with the claimants that there is no need for me to alter the substance of my draft judgment at [151].

304. However, I consider that, in light of the vivid terms of the entry in the chronology, and the undoubted media interest in sensational news stories, it would be sensible for me formally to note that the letter, dated 3 December 2018, and from a firm called Equine Law, makes a claim under the Animals Act 1971, section 7C (inserted by section 3 of the Control of Horses Act 2015) to detain the claimants’ horses, which are said to be in their possession, and gives notice that the claimants should remove them within 96 hours (a period stipulated by the Act itself).

305. It then points out, in accordance with section 7C, that, if the horses are not removed within that period, they will become the defendants’ property and the defendants will be entitled to dispose of them. The Act itself specifically refers to disposing of a horse “by selling it, arranging for it to be destroyed or in any other way”. The solicitors’ letter simply tracks the statutory language, by referring to “sale, destruction or in any other way”, but does not otherwise refer to disposal. In particular, it does not contain any such words as “shoot the horses” (or analogues), as alleged in the chronology.