Neutral Citation Number: [2023] EWHC 1115 (Ch)

Case No: BL-2021-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS SITTING IN BIRMINGHAM
BUSINESS LIST (Ch. D.)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 28 April 2023

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

- -

Between :

Rancom Security Limited

Claimant

- and –

Ms Helen Girling (1)
Mr Jay Rose (2)
Connect 4 Security Limited (3)

Defendants

- -
- -

Hugh Jory KC (instructed by UK Law Solicitors) for the Claimant
Tony Watkin (instructed by Lodders Solicitors) for the Defendants

Hearing dates: 28, 29, 30 November, 1, 2, 5, 6 December 2022

- -

HHJ Richard Williams:

Introduction

1. Rancom Security Limited ("***C***") is in the business of home security.

2. Ms Helen Girling ("***D1***") and Mr Jay Rose ("***D2***") are former employees of C and have set up in competition to C operating through Connect 4 Security Limited ("***D3***").

3. Business competition of and in itself is a good thing by driving improvements in products and services. However, C claims that it has lost customers to D3 as a result of the alleged wrongful actions of the defendants, who:

   i) Misused confidential information contained on C's database in order to target C's customers; and then

   ii) Sought to persuade those customers of C to transfer to D3 by making maliciously false statements that –

      a) C was not financially stable,

      b) C was going bankrupt,

      c) C would be out of business by the end of the year,

      d) C escorted its customers to cashpoint machines to take cash out to pay it,

      e) C's customer alarm system was not covered if it went off.

4. The defendants do not dispute that the majority of D3's customers are former customers of C, but it is the defendants' case that:

   i) D1 and D2 were not given access to and never did access C's database;

   ii) They identified and made contact with C's customers solely as a consequence of the defendants' own legitimate marketing activities, which included –

      a) legitimate data purchases from third parties such as telemarketing information,

      b) direct marketing by leaflet and doorstep marketing,

      c) advertising opportunities in consumer directories and magazines,

      d) online marketing,

      e) referrals from the Security Systems Alarm Inspection Board ("***the SSAIB***"); and

   iii) It is denied that the defendants made any of the alleged false statements. Rather the customers were motivated to transfer from C to D3 as a result of C

having ceased to be regulated such that C was no longer able to offer a police response as part of its service, whereas D3 was able to offer a police response.

5. This is my judgment following the trial of the preliminary issue of liability.

Background

6. C was incorporated in 2003. Its directors were Messrs Lee Hosking ("***LH***") and Ranjit Dhillon ("***RD***").

7. In 2006, D2 commenced working for C in sales before being promoted to area manager in 2008 and then national sales manager in 2011.

8. In 2011, D1 commenced working for C initially in telesales before being promoted to national marketing manager in 2013.

9. C was originally named Direct Response Security Systems Limited, although there was a change to its present name on 18 June 2014 following the reputational damage caused by the broadcast in 2010 of a BBC Watchdog programme that was heavily critical of the company's sales practices.

10. In 2015, the National Police Chiefs' Council issued Guidelines on Police Requirements & Response to Security Systems, which provided, inter alia,:

> "……..
>
> **1. PREFACE**
>
> …….
>
> 1.2 To enable a security system to be recognised within the Requirements for Security Systems it must comply with the Policy on Police Response to Security Systems and a recognised standard or code of practice controlling manufacture, installation, maintenance and operation. Such standards must be in the public domain and not be product based.
>
> 1.3 The installation and services provided by the installing company and an Alarm Receiving Centre (ARC) / monitoring / tracking centre (e.g. RVRC, SOC), shall be certified by a United Kingdom Accreditation Service (UKAS) accredited certification body in accordance with the provisions of the Requirements for Security Systems.
>
> ……
>
> **2. GUIDANCE, ADVICE AND PROCEDURES**
>
> **2.1 Type A - Remote Signalling Systems.**
>
> 2.1.1 Systems terminating at a recognised ARC, Remote Video Response Centre (RVRC) for CCTV and System Operating Centre (SOC) for vehicle tracking. All centres must conform to BS 5979 (Cat II) or BSEN 50518.

2.1.2 Unique reference numbers (URNs) will be issued to systems at these recognised centres. In the case of stolen vehicle tracking systems the URN will be issued by police forces to the operating company or monitoring centre, not to each vehicle.

…….

2.3. LIST OF COMPLIANT COMPANIES INSTALLING TYPE A SECURITY SYSTEMS

2.3.1 To identify companies conforming to this Policy it is necessary for each Police Force to hold a list of policy compliant companies. Inclusion on the list does not amount to confirmation that the company or its work has been inspected by the Police. Only companies so listed may install, maintain and/or monitor Type A Systems in the particular Police area. Where a company loses police recognition under this policy, its existing customers will have 90 days in which to make alternative maintenance/monitoring arrangements.

……..

3 OPERATIONAL TACTICS

3.1 POLICE ATTENDANCE - Type A Security Systems

3.1.1 For Type A security systems there are two levels of police response.

LEVEL 1 – Immediate

It should be noted that police response is ultimately determined by the nature of demand, priorities and resources which exist at the time a request for police response is received.

LEVEL 3 – Withdrawn

No Police attendance, keyholder response only.

3.1.2 The police service has adopted the use of confirmed alarm technology as part of the effort to reduce false calls.

3.1.3 All new Intruder and Hold up Alarms (HUA) applications will only qualify for a URN and police response if installed to the current required standards...

…….

3.2 INTRUDER ALARM SYSTEMS

3.2.1 Intruder alarm systems (IAS) issued with a URN will receive LEVEL 1 response until three false calls have been received in a rolling 12 month period.

3.2.2 Following two false calls in a rolling 12 month period the customer will be advised, in writing, with a copy being forwarded to the maintaining alarm

company informing them of the situation and recommending urgent remedial action.

3.2.3 Following three false calls in a rolling 12 month period LEVEL 3 will apply and police response will be withdrawn, not less than 14 days from the date of the Withdrawal letter. The customer will be advised in writing with a copy to the maintaining company, who will be required to instruct the ARC/RVRC not to pass alarm messages to the police.

……..”

11. C was approved and accredited by the SSAIB to provide security systems with monitoring and maintenance services.

12. C offered its customers fixed term contracts for:

i) The installation and maintenance of domestic security alarm systems, which included an alarm box control, a bell box and passive infrared sensors;

ii) The 24-hour monitoring of the system through an ARC;

iii) Registration of the system with the Police to obtain a URN such that, on activation of the alarm, the ARC would notify the Police for a “LEVEL 1 – Immediate” response.

13. C also provided optional (i) add-on products such as fire, smoke, carbon monoxide, flood and/or perimeter detectors and (ii) warranty cover in respect of the installed equipment.

14. C acquired/licensed an industry wide generic software package to enable C to record on a database (“***the Alarm Master Database***”) customer information, which included:

i) The names and contact details of each customer;

ii) The password for the customer’s home security system; and

iii) The dates when the contract commenced and was due for renewal. Renewals were a vitally important source of revenue, since they did not attract the associated cost of supplying/installing equipment.

15. As a result of the sensitive nature of the customer information stored on the Alarm Master Database, only a limited number of employees, who needed that information to perform their duties, were given their own unique log in details to access the database.

16. It was the evidence of LH that:

i) D1 had access to the Alarm Master Database because she was in charge of the marketing team and needed such access to allow her and her team to contact (a) existing customers for various marketing opportunities including in relation

to add-on products and upgrades, and (b) previous customers to attempt to win back their custom; and

ii) D2 had access to the Alarm Master Database because it was part of his job to ensure that the sales team entered the details of all new customers onto the database.

17. It was the evidence of D1 and D2 that:

i) It was the role of D1 and her team to generate new leads, which were then passed to the sales team;

ii) It was the role of D2 and his team to convert those leads into new sales;

iii) When a sales representative sold a contract, the new customer details would be emailed to the admin & accounts team for them to enter those details on the Alarm Master Database;

iv) As neither D1 nor D2 were involved in renewals (only in generating new leads/sales), they had no reason and were not given access to the Alarm Master Database. Without a password, it was not possible for them to access and extract the customer information contained upon the Alarm Master Database; and

v) When D3 subsequently acquired/licensed its own Alarm Master Database package, D1 and D2 had to request and undergo basic training from the supplier, since they had no prior experience or knowledge of how to use the software.

18. In 2016, C's accountants gave advice about the tax advantages of staff providing their services to C through a limited company. A number of staff then established personal services companies including, for example, Caroline Caveill ("***CC***"), who worked in telemarketing and who, on 23 May 2016, incorporated SecurewithCaz Limited.

19. On 17 May 2016, D1 and D2 incorporated D3. D1 and D2 are co-directors of D3. According to the filings at Companies House, D2 resigned as a director on 3 October 2016, but was re-appointed on 16 March 2020.

20. From January 2017, D3 submitted weekly invoices to C in respect of the services of D1 and D2.

21. On 9 May 2017, D1 applied for D3 to be approved and accredited by the SSAIB.

22. On 27 June 2017 and 4 July 2017, LH and RD met with D2 and sought to persuade him to agree to a cut in his basic pay, since the business was performing badly and losing money. D1 was also in attendance at those meetings and in support of D2. D2 covertly recorded those meetings.

23. D1 and D2 alleged that, during the course of the meeting on 4 July 2017, RD made a threat to kill D2 by way of a cut-throat gesture, which caused D1 and D2 immediately to resign their positions.

24. In October 2017, D1 and D2 issued claims against C in the Employment Tribunal for compensation for alleged constructive dismissal. C initially contested the claims on the ground that D1 and D2 had not been employed by C, but rather had been engaged as self-employed contractors.

25. On 10 August 2018, the Employment Tribunal determined, as a preliminary issue, that D1 and D2 had indeed been employees of C.

26. By letter dated 30 October 2018, the SSAIB gave 21 days' notice that C's registration would be withdrawn.

27. C's solicitors sent a letter before action dated 1 November 2018 seeking to challenge the SSAIB's decision. The SSAIB's solicitors responded by letter dated 13 November 2018 (a) confirming that C's registration would still be terminated and (b) detailing the alleged activities of C that formed the basis of that termination decision. In summary, the activities complained of were:

    i) C's customers being persuaded to transfer their custom to other service providers (Secure Home Systems Limited, Smart Home Protection Limited, and Protect and Serve Home Security Limited), which were (a) affiliated with C, but (b) not SSAIB registered, such that those customers would no longer be eligible for an automatic police response; and

    ii) Those customers being told that the resulting loss of automatic police response was not material, since the police no longer responded to alarm activations in any event.

28. By letter dated 19 November 2018, C "resigned from the SSAIB accreditation". It was the evidence of LH that the decision to resign was taken because:

    i) C had become increasingly frustrated with the approach of the SSAIB, which was based upon information that was factually incorrect; and

    ii) The conduct of the SSAIB had merely brought forward a plan already being considered for at least 2 years to provide, at no additional cost to the customer, private guarded services through G4S in place of the police response because –

        a) "of the problems that were caused by the police striking off customer URNs…… for customers who had three false alarms…",

        b) "of an increasing call out time to activations by local police forces", and

        c) it was the "way all leading alarm companies were going".

29. C wrote to its customers advising them of the switch, which was described as an "enhancement to your existing service", and inviting the customer to sign and return an attached consent form to "activate your security guarded response." The local police forces also wrote to C's customers advising them of the loss of police response and the need to contract with another approved /regulated company, if they wished to continue to receive a police response.

30. On 7 June 2019, the Employment Tribunal dismissed the claims of D1 and D2. In dismissing those claims, Employment Judge Lloyd held that:

> "…..
>
> The claimants conduct has been marred by duplicity, at the time of their employment and to a degree it has to be said in the way they have given their evidence at this hearing…..
>
> ….. I hesitate to do so, but I conclude that at times the claimants have not been completely honest in the way that they've engaged with this tribunal…. there has not been complete honesty and integrity in the way that they have presented their cases at the tribunal hearing.
>
> …..
>
> The claimants claims of constructive dismissal I conclude, regretfully but I do, are contrived from a series of events largely, if not manufactured, certainly manipulated by the claimants [f]or their own commercial or financial advantage. They are indeed, and again no criticism [is made of] them, they are indeed unsentimental entrepreneurs…. But unsentimentally in business is no concession to contrive a dismissal for their own commercial and entrepreneurial advantage, and that, I regret, is what has occurred.
>
> Again, to repeat, I am not so naïve as to think either side in this highly competitive, highly emotional toil, are free of criticism on any level…. But also, and more particularly, whatever the conduct of the respondent, the claimants did not respond with their resignations in that context. They responded now I'll find, a little late, as part of an overall plan to part ways with the respondent, for whom they had worked for some time. The claimants, I conclude resigned their long standing posts with the respondent as a critical step in them developing their own business, [D3], in competition with the respondent. I conclude therefore that the claimants willing severed their relationship with the respondent in circumstances which if not wholly contrived were opportunistic to pursue their fledgling business model and at the same time create an opportunity of the claim we now find before us.
>
> The claimants' response is not credible, measured against the real circumstances of their employment environment. That is to say the history of their relationship with the respondent amongst it that juxtaposition of basic requirements of their employment, and more particularly the claimants' manipulation of their own company, [D3], to maximise their financial and business future opportunities. Those I find, were the very personalised bones

and for the claimants' own benefit rather than any accommodation of the respondent's business.

Whatever the genesis of [D3] as to whether they were asked to set it up or whether it was a mutual decision, I think the claimants knew full well that there were huge advantages for them, sometimes not entirely legal or straightforward. In setting up the company and funnelling their funds and income and resources through it, and also as a platform for development of their own future business goals, namely as an accredited installer of [home] security…..

……..

……. That overall was their strategy, they basically looked for and ultimately gained an opportunity to offer their resignation in circumstances where dare I call it "The Grand Plan" had already been laid. The grand plan which had already been made, and I think had been made some time before either 27th or the 4th July, was a plan to leave more or less imminently and to compete directly with the respondent with the advantage of not simply their experience with the respondent's company, but the knowledge of the respondent's operations in exactly the same field and also their knowledge of the customer base which of course they had.

That plan I think had been formulated and set in motion well in advance of the final meeting to which I've referred, and by the time of Lee Hoskin's and Ranjit Dhillon's pressure on the second claimant, I think there was an element of pressure in the context of negotiation, Mr Ranjit Dhillon unashamedly described himself as a hard negotiator, well he's a businessman, and that would be part of his stock in trade.

……

…….. The actions and their actions on the 4th July although I accept not wholly scripted, of course there's an element of preplanning. It was nevertheless in essence of role-play on their part which I think was well rehearsed in their minds at least, and it wasn't a genuine response to a fundamental breach of their contract of employment.

…….

I concluded that any perception of threats to life or limb or to general safety from Ranjit Dhillon was imagined rather than real, and think at times deliberately hyped and imagined….

……

…….[RD] was certainly not making death threats or threats of harm to either claimants and there was no basis for the claimants to reasonably perceive that there was any threat to their personal safety or indeed that certain words or actions had been used to convey such a threat. I think they have used

that phrase and overall perhaps quite hard-nosed demeanour of Mr Dhillon to conjure up a threat that never really existed at all.

…….

The claimants I think had certainly made a decision well before the final meeting of the 4th July, to depart the company and to pursue their own business interests….. their resignations were already well calculated I think as part of the joint venture that they now proposed to embark upon, and there was evidence which I have no reason to doubt that the claimants had cleared their desks, there was certain evidence that boxes had been removed by them from the premises……

……

However, in the context of their relationship with the respondent, over the last couple of years at least they were duplicitous in their conduct. Their self seeking and unashamedly ambitious goals were themselves [a] breach of the good faith which they owe to the respondent as employees…..

……"

31. The present claim was issued on 18 March 2020.

32. The case management order dated 1 July 2021, inter alia, disapplied the provisions of Practice Direction 51U and directed that the parties provide Standard Disclosure of documents, rather than Extended Disclosure.

Assessment of the witnesses

Indicators of unsatisfactory witness evidence

33. In ***Painter v Hutchinson*** [2007] EWHC 758 (Ch) at [3], Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:

i) Evasive and argumentative answers;

ii) Tangential speeches avoiding the questions;

iii) Blaming legal advisers for documentation (statements of case and witness statements);

iv) Disclosure and evidence shortcomings;

v) Self-contradiction;

vi) Internal inconsistency;

vii) Shifting case;

viii) New evidence; and

ix) Selective disclosure.

Interference with memories

34. In ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the interference with human memory introduced by the court process itself:

> "[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> [20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

Primary witnesses of fact

35. The primary witnesses of fact were LH, for C, and D1 and D2. They were cross examined at length. I found them all to be respectful, polite and indeed charming, which are no doubt valuable attributes for the particular service industry in which they operate.

LH

36. I did not find that LH's evidence was tainted to any meaningful extent by indicators of unreliable witness evidence. Indeed, I was struck by the fact that LH readily made

concessions in cross examination that did not necessarily support C's case. For examples, he readily conceded that:

i) At times C experienced resourcing issues with engineers that adversely impacted upon customer service;

ii) In 2017, C was in significant financial trouble;

iii) He "did not like the fact" and was "not happy" that one of C's customers, Mrs Mellor, was charged so much (£9,702) over such a short period of time (18 April 2019 to 1 July 2020) for service renewals/extended warranty running to 2033;

iv) He did not deal with the administration side of the business, and so he

a) never dealt with Alarm Master, the licensing of users or the authorisation of access to the database. They were matters dealt with by his co-director, RD,

b) consequently, he could not say precisely how many of C's staff had access to the Alarm Master Database,

c) but he could say, consistent with the evidence of D1 and D2, that the marketing and sales staff did not have access to the Alarm Master Database, since they were not involved with existing customers only in generating news leads, which were then passed to the sales team to convert into new sales,

v) In 2018, and as a result of the increasing numbers of customer cancellations, C commenced an investigation, which involved taking statements from former customers to establish their reasons for changing alarm provider. C seeks to rely in part upon those statements as evidencing the alleged malicious falsehoods told by D3's representatives to C's customers. A significant number of the statements were taken by Karen Armstrong during the period 2018 to 2020. In response, the defendants rely upon the witness statements of Messrs Trueman and Wilby, who were also spoken to by Karen Armstrong, and the covert recordings taken by them of their conversations with Karen Armstrong. The transcripts of those recordings evidence Karen Armstrong seeking to persuade the former customers to return to C and in doing so telling them variously that - D3 had stolen their data; D3 had lost the first court case and its future was uncertain in light of the subsequent ongoing court case; D3 couldn't even afford lawyers to defend them at the moment; D3 was financially in a lot of trouble; D3 had broken data protection law and was now in trouble with trading standards as well as with the courts; D3 had committed fraud. When taken to those transcripts, LH immediately acknowledged and accepted that the contents were "terrible"; Karen Armstrong had been "misleading customers"; she was "wrong"; and he had "no defence for" her actions; and

vi) It might be said that, faced with such compelling evidence, it was perhaps inevitable that LH would make the concessions that he did regarding Karen

Armstrong's wrongdoing. However, by contrast, C relied upon the live witness evidence of customers of C, who described in troubling and equally compelling detail the pressure selling techniques employed by D3's representatives. In particular, Trevor Gibson ("***TG***"), aged 85, described how D3's sales representative, Mr Martyn Wright, arrived at his home at 6pm and did not leave until after 10pm, and only when TG had eventually signed the contract and paid up £1,619 on his bank card. D1, having insisted that D3 does not employ pressurised selling techniques and engages only in ethical marketing, reluctantly accepted that she was shocked by TG's evidence, although still expressing some scepticism that D3's representative would have been at TG's home until 10pm. Ultimately, she said that it was a matter for D2 to address. D2 was somewhat dismissive in his evidence by saying only that he had spoken to D3's representative shortly after receiving TG's witness statement.

37. That all said, LH has a financial interest in the outcome of the proceedings such that he cannot be regarded as a truly detached or objective witness free of motivating forces or biases. In the circumstances, whilst I have no reason to doubt that LH was an honest witness, I have nevertheless treated his evidence with a degree of caution.

D1 and D2

38. I did not find D1 and D2 to be reliable or at times credible witnesses. The evidence of D1 and D2 was characterised and tainted by repeated and significant indicators of unreliable evidence. By way of examples,:

Shifting case/new evidence

39. The written evidence of D1 and D2 was expressed in very similar terms. The agreed list of issues for trial includes "Did D3 approach customers of C using data from C's Alarm Master database… or by other legitimate marketing activity.." No doubt recognising the importance of this issue, D1 and D2 each addressed it in some detail in their witness statements as follows under the sub-heading "**How the Third Defendant has Obtained its Customers**" :

D1

"[117] …… After 10 years of dealing with postcodes and individuals and marketing and selling [C's] products, I had an innate knowledge of the postcode areas of England and Wales and their demographics…

Personal Knowledge Gained in the Industry

[118] Accordingly, with this knowledge of the various postcode areas and their demographics of which areas were the most likely to contain more customers than others, I was able to instruct our canvassers on areas that I knew were more profitable than others."

D2

"[90] ……. I had worked in the industry for many years and had an intimate knowledge of the demographics of many areas in the UK.

Personal Knowledge Gained in the Industry

[91] Accordingly, with this knowledge of the various postcode areas and their demographics and my knowledge of which areas were most likely to contain more customers than others, I was able to instruct our marketing efforts on areas that I knew were more profitable than others."

D1

"**TPS Compliant Databases**

[120] In addition to the knowledge which was in my head, I also purchase[d] TPS compliant databases from various agencies specifically requesting those postcodes that were the most promising.

[121] in order for the database companies to provide the information that was required, we had to give them parameters. The parameters which I set for the production of these databases were as follows:

i) Private home owners;

ii) Aged 55 or over;

iii) Home telephone numbers only (rather than simply mobiles);

iv) Has an existing alarm.

[122] It is not therefore surprising that many of the areas that we concentrated on were similar areas to [C], as these were the areas that I worked on during my time with [C]. I knew which areas were the most successful."

D2

"**TPS Compliant Databases**

[92] In addition to the knowledge which was in my head, [C] also purchased TPS compliant databases from various agencies specifically requesting those postcodes that were the most promising.

[93] It is not therefore surprising that many of the areas that we concentrated on were similar areas to [C], as these were the areas that I worked on during my time with [C]. I knew which areas were the most successful."

D1

"**Advertising**

[123] In addition, [D3] advertised in magazines, online, had an online presence and used social media to obtain customers.

D2

"**Advertising**

[94] In addition, [D3] advertised in magazines, had an online presence, used Checkatrade, and conducted door to door leaflet delivery. We also had recommendations and referrals from satisfied customers."

D1

"**Leaflet Drops**

[124] I knew where the most profitable areas were and so did [D2]. As I was busy trying [to] establish the business, I asked [D2] to facilitate a leaflet campaign promoting [D3]. Leaflets were then delivered to the geographical areas that both myself and [D2] had experience of being of most beneficial.

[125] The process of delivering leaflets was organised by [D2] and assisted by Shirley Maconnell…..

[126] When I began a marketing campaign I knew from my knowledge and experience which areas to concentrate on and would select an area. [D2] and Shirley would concentrate on those areas, look out for monitored alarm boxes. Some may have been [C's] customers, but this was only because [C] had customers in the areas that I chose. I did not specifically target [C's] customers. [RD] had already admitted that [C] had not serviced 3000 customers, which was one third of their total customers. So I knew that the service provided by [C] was very poor and that many of the customers would be willing to move to a new provider, but already had police response. Accordingly, [D2] arranged to have leaflets delivered to properties with a monitored alarm bell box within the selected area, together with a number of houses either side of that property."

D2

"**Leaflet Drops**

[95] I knew where the most profitable areas were, and so did [D2]. When the business began trading, I organised a leaflet campaign promoting [D3]. Leaflets were then delivered to the geographical areas that both me and [D1] had experience of being the best areas to sell in.

[96] The process of delivering leaflets was organised by [D2] and assisted by Shirley Maconnell.

[97] When I began a marketing campaign, I knew from my knowledge and experience which areas to concentrate on and would select an area. Together with Shirley we would concentrate on those areas and look out for monitored alarm boxes. Some may have been [C's] customers, but this was only because [C] had customers in the areas that I chose. I did not specifically target [C's] customers. I knew that the services provided by [C] was very poor and that many of the customers would be willing to move to a new provider, but already had police response. Accordingly, the I arranged to have leaflets delivered to properties with a monitored alarm bell box within the selected area, together with a number of houses either side of that property."

40. I do not consider that these striking similarities in the written evidence of D1 and D2 are in themselves an indicator of unreliable witness evidence, since, if true, it would potentially reflect a shared work experience. In addition, it would be wholly unrealistic to expect D1 and D2 not at least at some time to have discussed their recollection of events before committing them to writing. However, having apparently so carefully considered their written evidence, and on such a critical issue, it is in my judgment then even more remarkable that D1 and D2 sought to depart significantly from that written evidence when being cross examined. By way of examples,:

i) In their oral evidence D1 and D2 claimed for the first time that D3 had been gifted data by a friend of D3. D1 initially said in her oral evidence regarding this omission that unfortunately not everything was in her witness statement. However, later in her oral evidence, D1 sought somewhat unconvincingly to claim that the earlier reference in her witness statement to having "had meetings with suppliers" under the sub-heading "**The Setting up of The New Business**" somehow also meant meeting with her friend, who supplied the data. I note that the defendants' defence also makes no express reference to having been gifted/loaned data, but only refers to "[26] … legitimate data purchases from third parties such as telemarketing information";

ii) In their written evidence D1 and D2 stated that they decided to target those geographical areas across the country that they knew from working with C were likely to be the most beneficial. However, in her oral evidence, D1 said that initially D3 had only employed one engineer. When asked how that engineer could have covered the whole of the country, D3 said for the first time in her oral evidence that D3 initially (for a couple of months at least) only concentrated on the local market;

iii) In their oral evidence, D1 and D2 admitted for the first time that they had indeed targeted C's customers, albeit only from late 2018 and after they learnt that C had lost its police response; and

iv) In their oral evidence, D1 and D2 claimed for the first time that they were able successfully to target C's customers from late 2018 onwards, and despite a large proportion of those customers being TPS registered, by revisiting lead sheets that had been generated by the leaflet campaign in 2017.

41. My distinct impression was that D1 and D2 were making up this evidence as they went along in an attempt to answer the questions put to them in cross examination in a manner consistent with their overall case.

Disclosure shortcomings/blaming legal advisers

42. According to the oral evidence of D1 and D2, the lead sheets were a vitally important component of the defendants' case, highly relevant and clearly disclosable. However, they were not disclosed into these proceedings because D1 explained that they were deliberately destroyed as and when the leads were converted into sales. There are a number of serious problems arising from that explanation:

i) Prior to being disapplied by the case management order dated 1 July 2021, paragraph 3 of the Practice Direction 51U imposed duties upon the defendants from the time that they knew that they may become parties to the proceedings "to take reasonable steps to preserve documents in [their] control that may be relevant to any issue in the proceedings." Further, paragraph 4 of the Practice Direction provided that the documents "to be preserved…… include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business." The letter of claim was sent in March 2019 and yet from that time and even during the course of the proceedings, the defendants have apparently continued with a policy of destroying the lead sheets;

ii) Even if the lead sheets had been destroyed automatically on the signing of contracts with D3 such that they were no longer in the defendants' control they should still have appeared in their list of documents dated 23 September 2021. In that part of the list marked "List and number here, the documents you once had in your control, but which you no longer have. For each document listed, say when it was last in your control and where it is now.", it was stated –

> "Information and documents contained on the laptop of Mr James Carr (former employee of the 3rd Defendant" ("Mr Carr") and documents contained in a box that was in the control of Mr Carr. Mr Carr stole the laptop and the box and we are unable to recover them."

It was the evidence of D1 and D2 that James Carr stole the laptop and the box in 2017. It was the evidence of D2 that the lead sheets generated by the 2017 leaflet campaign were, however, kept in another box that was not stolen by James Carr, which was why D3 was then able to use those lead sheets to target C's customers from late 2018 onwards; and

iii) No explanation was given as to why those lead sheets that had not yet resulted in a sale, and so were not automatically destroyed, had not been disclosed. Indeed, D2 said in evidence that those particular lead sheets were still held back in the office.

43. No documents relevant to D3's alleged advertising campaign have been disclosed by the defendants. In her oral evidence, D1 said for the first time that such documents existed, since she had passed copies of the advertisements/invoices to her solicitor. However, she did not know what had happened to those documents and had not made any enquiries as to their current whereabouts.

44. D1 stated in her written evidence that the data purchases had been highly focused by reference to parameters including that the consumer "Has an existing alarm." During D1's oral evidence, she was taken to the small number of invoices that had been disclosed in relation to the data purchases. None of them referred to consumers having an existing alarm. D1 then claimed that there were "lots more invoices" available, but the defendants had only been asked by the solicitor "to produce so many" and "give me a few".

<u>Other witnesses on behalf of C</u>

CC

45. In her witness statement, CC stated that:

i) She was employed by C for about 10 – 11 years as a telephone canvasser during which time D1 printed data off the Alarm Mater Database to be used for marketing campaigns. The printed data was stored in boxes, 90% of which were removed from the office prior to D1 leaving. In the weeks prior to their departures, and on a daily basis, she saw D1 and D2 putting boxes of papers in their cars, although she did not know precisely what was in the boxes;

ii) In July 2017, CC joined D3. She left C because she did not like the people, who were put in charge of the marketing team after D1 resigned. Also, she did not like or trust LH and RD;

iii) On joining D3, D1 handed out to the telesales team (comprising between 8 to 10 people including CC) sheets of printed paper with the names, addresses and telephone numbers of current and former customers of C. It was then that CC realised that the boxes of paperwork that had been removed from C's offices by D1 and D2 contained C's customer data;

iv) The sales team called all the names on the printed sheets, whether or not they were registered with the Telephone Preference Service ("TPS"), but concentrated primarily on those customers of C, who were coming to the end of their contracts; and

v) CC eventually resigned from D3 because she became fed up with the way that D1 treated staff. CC had even lent D1 £8,500, but D1 delayed repaying the money and even now still owes the sum of £2,500.

46. Sadly, since making that witness statement, CC has died. Therefore, C served notice to rely on CC's witness statement as hearsay evidence pursuant to s.2 of the Civil Evidence Act 1995.

47. In order to challenge the credibility of CC's otherwise damning evidence, the defendants rely upon the evidence of Hayley Kemp ("***HK***"), who claims that Michael Vry ("***MV***") suborned false evidence from CC.

48. C was given permission to rely upon evidence from MV responding to the allegations made against him by HK. It was MV's evidence that he:

i) had no involvement with C before he began working with C in about March 2020 following the resignation of RD as a director of C;

ii) was appointed a director of C on 30 March 2021;

iii) jointly owns Oncall Group Security Limited, which, in 2021, became the holding company of several alarm companies that have been acquired, including C; and

iv) denies paying anyone, including CC, to provide false evidence. Exhibited to the witness statement of MV are the text messages exchanged between HK

and MV and a transcript of the recording of a subsequent telephone conversation between them, all of which took place in October 2021.

49. I did not find HK to be a reliable witness for the following primary reasons:

i) In her written evidence, she stated that when working for MV at Secure Home she was told by a work colleague, Gareth Evans, that he had been paid £2,000 to provide a witness statement. When she saw CC come to the office and give a statement over the phone to the solicitor whilst sitting at the same desk where Gareth Evans had earlier sat when giving his own statement, she realised that CC had also been paid by MV;

ii) In the text messages, HK stated in response to MV's claims that he had not paid anyone that "I know what I witnessed" and "I DID WITNESS THAT";

iii) In her oral evidence, she said that she had not seen any cash changing hands, since the money had been paid by bank transfer;

iv) Again in her oral evidence, and when asked why she had said in the telephone conversation with MV that "I met [D2] and he's trying to fucking put words in my fucking mouth", HK answered that when going over her draft witness statement she had edited a couple of things, although she could not now remember what they were.

In my assessment, HK's evidence was riddled with unexplained inconsistencies. I have no reason to doubt MV's evidence that he did not suborn CC, or indeed anyone else, to provide false evidence in this case.

50. Of course, in light of CC's death, the defendants were unable to challenge CC's evidence directly by way of cross examination. CC had given an earlier witness statement, whilst still employed by D3, in support of D1 and D2 in the Employment Tribunal. In that earlier witness statement, CC stated (with my emphasis added) that "I could not have stayed with [C]…. as I could not have worked for Ariar Millwood, and I was concerned about some of the practices of [C] in the poaching of other firms' data." I have no doubt that CC's decision effectively to change sides would have been at the forefront of any cross examination of CC at this trial. In all the circumstances, I do not attach conclusive weight to the evidence of CC. Rather, I evaluate and assess that evidence against and in the context of all the other evidence.

Lisa Smith

51. Lisa Smith ("***LS***") began working for C in October 2019 initially as a customer care operative, although now employed by C as Head of Customer Services. It was LS's evidence that:

i) When investigating the switch of C's customers to D3, Karen Armstrong entered the details into a spreadsheet ("***the Tracker***"), which included any customer comments;

ii) At least 90% of the 350 customers recorded on the Tracker were TPS registered;

iii) In late 2020/early 2021, LS telephoned every single customer on the Tracker to find out why they had moved and what had been said to them. Nearly everyone LS spoke to relayed a conversation with D3 during which D3 told them that C was going out of business, had gone out of business or was not financially stable.

52. I found LS to be an honest witness doing her best to assist the Court. However, the accuracy of her evidence was in large part dependent upon the accuracy of the information recorded upon the Tracker. As already noted, it was Karen Armstrong, rather than LS, who was primarily responsible for carrying out the initial investigation and entering the relevant information onto the Tracker. By LH's own admission, Karen Armstrong's method of investigation was seriously flawed such that the information contained on the Tracker was tainted. In those circumstances, I am unable to attach significant weight to the evidence of LS.

C's customers

53. I read and heard evidence from Brenda Morphet ("***BM***"), Ian Kirkwood ("***IK***"), TG and John Wolfindale ("***JW***"). They all confirmed that they received unsolicited marketing calls on behalf of D3 and notwithstanding that they had been TPS registered for many years.

54. It was the evidence of BM, IK and JW that it was clear from those initial or subsequent conversations that D3's representatives knew individual terms of their contracts with C such as the date of renewal or the amount paid.

55. It was the evidence of IK, TG and JW that during those conversations D3's representatives told them that C was in severe financial trouble.

56. I have no reason to doubt that BM, IK, TG and JW were honest and largely reliable witnesses.

<u>Other witnesses on behalf of the defendants</u>

Derek Whitehouse

57. Derek Whitehouse ("***DW***") was contracted on a self-employed basis by C from February 2016 to monitor regulatory compliance and investigate customer complaints. In May 2019, he joined D3 performing the same role. It was DW's evidence that:

i) After D1 and D2 left C, the volume of customer cancellations began to rise;

ii) The rise in customer cancellations was attributable to dissatisfaction with C's poor customer service and being continually hounded by C to renew/upgrade contracts, rather than those customers being poached by D3; and

iii) Since joining D3, he has not discovered anything within D3's operating procedures that gives him cause for concern.

58. I did not find DW to be a reliable witness. He was not a detached or objective observer. His evidence was heavily influenced by his strong ties of loyalty towards D1 and D2 as shown by:

i) In his written evidence, he stated that "Having read the statements submitted by [D1 and D2 to the Employment Tribunal] I am incensed at the way they were treated and I have had little hesitation in making this statement in support of their case.";

ii) In his oral evidence, DW was taken to the extracts of the judgment of Employment Judge Lloyd and the adverse findings there made against D1 and D2. DW was either unwilling to accept the findings or sought somewhat bizarrely to argue that the findings had a different meaning to the clear and unambiguous language used by Employment Judge Lloyd; and

iii) DW accepted in his oral evidence that, whilst working for D3, he had been tasked with assisting C's former customers to make complaints to Trading Standards regarding C.

HK

59. I have already addressed HK's evidence above.

Defendants' customers

60. The defendants intended to call to give oral evidence Jane Betts, Kenneth Trueman, Melville Wilby, John Winterbottom and Celia Lester. There was not enough time available for these witnesses to be cross-examined by C, and so their written statements were admitted unchallenged.

61. They all broadly stated that:

i) They were former customers of C, who felt that in 2018 they were misled by C into signing new contracts, which had the effect of replacing the police response that they had previously enjoyed with a private guarded response; and

ii) When subsequently they realised that the change to a private guarded response was not an enhancement, they entered into a contract with D3 in order to regain their police response.

I have already referred earlier to the transcripts exhibited to the witness statements of Messrs Trueman and Wilby.

62. The defendants also served Civil Evidence Act notices to rely as hearsay evidence upon witness statements from Beryl Beavis, Sybil Chapman, Werner Eisele, Jennifer Hodder, Anthony Lingham, Ruth Mellor, Mary Sainsbury, Edna Silburn, Charles Whitby and Brian Williams. Broadly that evidence was (i) critical of the business practices of C and (ii) confirmed that the switch to D3 was motivated by a desire to regain a police response.

63. I have no reason to doubt that all these witnesses were honest and largely reliable in the written evidence that they provided.

Lucas direction

64. I remind myself that witnesses, who lie, do so for different reasons. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie.

Burden and standard of proof

65. C's primary pleaded claim is that "[7] The Defendants embarked on a plan to take and misuse confidential information belonging to [C] and/or to infringe its database in order to contact its customers ….. in order to persuade them [to] contract with [D3] instead either before or from the date that the customer's contract with [C] came up for renewal." That is a serious allegation, which is tantamount to an allegation of civil fraud/dishonesty.

66. The burden of proving the allegation rests upon C. The standard of proof is the balance of probabilities. In other words, C must establish that more likely than not the allegation is true. There is no legal requirement that the more serious the allegation, the more cogent the evidence needed to prove it. The civil standard of proof (balance of probabilities) does not vary with the gravity of the alleged misconduct. As Lord Justice Males said ***Bank St Petersburg PJSC & Anor v Arkhangelsky*** [2020] EWCA Civ 408

> "[117] In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty…, was more probable than not."

67. In the very well-known passage from his judgment in ***The Ocean Frost*** [1985] 1 Lloyd's Rep 1 (which was described as "salutary" by Lord Mance in ***Central bank of Ecuador v Conticorp SA*** [215] UKPC 11 at [164]), Robert Goff LJ observed:

> [57] "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

68. Direct evidence of fraud is relatively rare and is often a matter of inference from circumstantial evidence, although the court should generally take great care when assessing whether or not inferences can properly be drawn in any particular circumstances. The essence of a successful case of circumstantial evidence is that the whole is stronger than the individual parts. The court should necessarily avoid a piecemeal consideration of circumstantial evidence – per Rix LJ in ***JSC BTA Bank v Mukhtar Ablyazov & Others*** [2012] EWCA Civ 1411 at [52], albeit there dealing with a committal application to which the criminal standard of proof applied.

69. In ***British Railways Board v Herrington*** [1972] A.C. 877, at 930, Lord Diplock observed that:

> "The [defendant] …….. elected to call no witnesses, thus depriving the court of any positive evidence ……. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

70. It would have been a "legitimate tactical move" for the defendants to decline to put in witness evidence and simply require C to prove its case, whilst running the risk that the court might draw adverse inferences. However, the defendants have elected to assert a positive case as to the legitimate marketing activities used to target C's customers. Therefore, the burden is upon the defendants to prove that positive case to the Civil standard of proof.

71. In preparation of this judgment, I read and heard submissions from counsel for both sides. The trial bundle extended to 14 lever arch files. I am unable in the course of this judgment to refer to all the evidence/argument relied upon by the parties, but I have taken it all into account in reaching my decisions.

Adverse Inferences

72. The court may draw adverse inferences from the failure of a party (i) to produce contemporaneous documents that would have otherwise existed, if that party's oral evidence is correct, and/or (ii) to call as a witness at trial a person who might be expected to give important evidence.

<u>Absence of contemporaneous documentary evidence</u>

73. In ***Re: Mumtaz Properties Ltd*** [2011] EWCA Civ 610, Arden LJ said:

> "[14] In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."

Failure to call a witness of fact to give evidence

74. In **Wisniewski v Central Manchester Health Authority** [1998] PIQR P323 at P340, Brooke LJ said:

> "From this line of authority I derive the following principles……
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

75. However, in ***Royal Mail Group Ltd (Respondent) v Efobi (Appellant)*** [2021] UKSC 33, Lord Leggatt said:

> "[41.] The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in ***Wisniewski v Central Manchester Health Authority***….is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

Alleged unscrupulous business practices of C

76. A significant amount of time was spent by the defendants' counsel cross examining LH about C's alleged unscrupulous business practices including:

i) C being involved in "churning", which was described by D1 and D2 as C having conspired with connected or associated companies (e.g. Storm Security Systems Limited) so that those other companies deliberately lost their accreditation and consequently their ability to provide a police response. C would then contact the other companies' customers to sell them new contracts with a police response;

ii) Misrepresenting to C's customers that the switch to a private guarded response was a service enhancement as a result of increasingly poor police response times when in reality it was the result of the SSAIB terminating C's registration because of their own concerns over C's business practices;

iii) Encouraging staff at a training meeting held on 28 June 2017 to post fake reviews; and

iv) Unlawfully obtaining confidential customer data from competitor companies e.g. LH paying £5,000 to an employee of Defence Security Systems Limited to enable LH to access their database.

In support of the allegations, the defendants relied in particular upon the evidence from the defendants' customers (Jane Betts, Kenneth Trueman, Melville Wily, John Winterbottom and Celia Lester). The defendants understandably expressed concern that, because of C's decision not to challenge that evidence, I was deprived of the opportunity of hearing directly from those witnesses and from seeing for myself how vulnerable those witnesses were.

77. LH denied the allegations made against him and C. There was some independent corroborating evidence available in relation to LH's version of events:

i) As to why C switched to a private guarded response, in his oral evidence, IK, a former police officer, said that in his experience a private guard would respond quicker to an alarm activation than the police, who are so stretched. JW, in his oral evidence, said that he had previously had a police response through another provider, but had switched to a bell only system because he had been fined twice when the alarm went off and could not be switched off. On both occasions, the police did not attend until the next day. At trial, MV produced certificates confirming that Secure Homes Systems Limited was accredited at the time the SSAIB was claiming that it was not; and

ii) The training meeting on 28 June 2017 was also covertly recorded by D2. There is no reference in the transcript to staff being encouraged/advised to post fake reviews. Indeed, when the trainer, David Mitchell, warns of the reputational risks arising from posting fake reviews, LH says "No, I don't want to…… We've got enough customers…. When you do your customer service call [say], "…… Are you happy? Oh yeah great. Do me a favour, just pop on Google and do us a review.""

78. Further it was argued by C that it was D3, which was guilty of "churning" by persuading C's customers to sign up with D3 and despite there being unexpired terms on their existing contracts with C.

79. Ultimately, I do not consider that I need make findings in relation to these specific allegations against C, since:

i) I am otherwise satisfied that, at times, the sales staff of both C and D3 have been guilty of sharp practices and with striking similarities. It is not disputed that customers for domestic alarm systems tend to be older clientele, who are potentially vulnerable –

a) By email dated 26 September 2018, Wiltshire Police notified the SSAIB that they had suspended C because "Trading Standards have contacted Wiltshire Police regarding a complaint from a gentleman whose elderly mother had taken out a contract with [C] …….. This customer has vulnerabilities due to her deteriorating mental health and her age, which has resulted in her being targeted to purchase many services and to be contracted to various firms…. all contracts [have] been cancelled with the exception of [C's] contract……. I have been advised that [C's] customer's son, who has power of attorney, … [has been] advised [by C] that the contract could not be cancelled and would run until 2024.",

b) By letter dated 4 August 2019, Maria de Domingo complained to D3 that her "mother is unable to make decisions such as the installation of a new house alarm; I have Power of attorney for her…… [D 3's] salesman [, Mr Martyn Wright,] abused his position to hard sell to my mother who is almost 83 years old. She already had a contract with [C] which you dismissed…. I am completely unhappy with her being taken advantage of and have reported your tactics to the police which they have put an intelligence report on: Police re CAD 1705/4 Aug",

c) I find on the available evidence that Martyn Wright on behalf of D3 and Karen Armstrong on behalf of C sought respectively to persuade customers to switch and then switch back contracts by falsely claiming that the other company was in severe financial difficulties. It is perhaps unsurprising, therefore, that Lisa Smith described:

> "[33] During the last two years and my involvement with customers who have been contacted or coerced over to [D3], I have been struck by how many have been left either very hurt and anxious over the fact that they are now paying for two alarm systems.
>
> [34] Others have been left very confused and say they don't know who to trust now……..";

ii) In any event, this case is not about the ethical standards of C. For the reasons given below, and in accordance with the agreed list of issues at trial, I am entirely satisfied that the central factual dispute in this case is how did D3

manage to make contact with so many of C's customers and whether by legitimate or illegitimate means? I am not assisted in making that determination by consideration of the wider unscrupulous business practices allegedly adopted by C.

How did D3 make contact with C's customers?

80. D1 and D2 admitted in their written evidence and from an analysis of D3's customers that:

Year	Total number of D3's customers	Total number of D3's customers, who were formerly C's customers
2017	58	1
2018	182	1
2019	592	362
2020	818	538
2021	972	644

81. Those figures are not accepted as accurate by C, but on the defendants' own case over 2/3rds of their customers had previously been C's customers.

82. D1 and D2 further admitted in their oral evidence that D3 had deliberately and successfully targeted C's customers nationwide from late 2018 after they learnt that C had lost its police response, which explains the significant increase in the numbers of C's customers switching to D3 from 2019 onwards.

83. Therefore, I repeat that the central factual issue to be determined in the present case is how was D3 able to make contact with so many of C's customers, a proportion of whom were TPS?

Access to C's Alarm Master Database

84. It is not disputed that C's marketing and sales staff generally did not have access to the Alarm Master Database. However, it was the evidence of LH that both D1 and D2 were given access to the Alarm Master Database to enable them to perform fully their specific roles. D1 needed access so that her team could market to existing customers additional products/upgrades. D2 needed access so that he could see what equipment was ultimately installed in order to calculate the sales' commissions.

85. It was the oral evidence of D1 that she did not insist, as LH claimed, that she be given access to C's Alarm Master Database when appointed National Marketing Manager. She stated that she was only ever dealing with prospective customers, and so she did not need access to the Alarm Master Database to perform even her new role. However, in her written evidence, D1 had stated that, when appointed National Marketing Manager, her role expanded considerably in that her duties were not simply confined to generating new leads but:

> "included but weren't limited to, the reporting of the daily figures to the National Manager and Directors including late night sales results, daily staff meetings,

training, appraisals, customer telephone confirmations, customer complaints, data management, staff recruitment, department payroll, resolving declined customer card payments, record keeping, marketing strategy, liaising with other departmental managers, reporting to the National Sales Manager, referencing for ex-employees, disciplinary action, liaising with courts when required and many other duties as and when they arose."

86. When asked by counsel for C how D1 could have, for example, dealt with customer complaints, if she did not have access to customer information via the Alarm Master Database, D1 sought to row back on her written evidence by saying for the first time that she only ever dealt with complaints from prospective customers, who had been contacted despite being TPS registered. She also claimed that it was in fact D2, who dealt ultimately with customer complaints/cancellations.

87. So far as her dealing with (i) declined customer card payments or (ii) selling additional products to new customers prior to the installation of equipment, D1 described an overly cumbersome process of paperwork either being left in a tray for collection or being brought up to her.

88. Having initially said in evidence that he had no reason to access the Alarm Master Database because in his role with C he was only ever dealing with new customers, he then admitted that he would, at least from time to time, need to deal with complaints from existing customers in which case the administration teams would pass the call to him such that he still did not require access to the Alarm Master Database to deal with any such complaint.

89. It was submitted on behalf of the defendants that I ought to draw an adverse inference from that the fact that C has failed to disclose any documentary evidence relating to which of C's employees were licensed to use the Alarm Master Database. However, D1 stated in evidence that D3 only has 2 licenses for its own Alarm Master Database, which are in the names of D1 and David Shutkever, the Technical Manager. Nevertheless, D3's administration staff are still able to access the Alarm Master Database and print off information, although an alternative system has now been designed internally to enable staff to process the data more efficiently. In those circumstances, I do not consider it appropriate to draw any adverse inference from C's failure to disclose documents relating to which of C's employees were licensed to use the Alarm Master Database.

90. D3 acquired its own Alarm Master Database systems package from pcdata, who also provided as part of that package one day of free training. The defendants have disclosed copies of an exchange of emails between D2 and pcdata arranging a training meeting at D3's offices on 24 August 2017 with D1, D2 and David Shutkever in attendance. As part of those email exchanges, D2 asked "Do drop me a reply as to how long you think it will take for complete novices to learn, so I can plan the day around your training programme." It was further submitted on behalf of the defendants that D2 would not have been asking for training for him and D1 as complete novices, if they were already familiar with the system as a result of having routinely accessed it whilst employed by C.

91. On balance, I find that that D1 and D2 whilst employed by C did have access to the Alarm Master Database for the following primary reasons:

i) It contained customer information that was integral to the successful operation of the business including (i) recording new sales, and (ii) providing a customer base to market and sell additional products/services, renewals and extended warranties, which were a vitally important revenue stream;

ii) D1 and D2 were not simply employed in marketing and sales, they were C's most senior employees, who themselves played an integral part in the overall success of the business. They were rewarded for that success by being paid very high levels of commission, and so they had strong personal and vested interests in maintaining the financial health of the business;

iii) It is difficult to see how D1 and D2 could have performed their senior and extended roles properly, or indeed at all, without access to the up to date and detailed information contained on the Alarm Master Database; and

iv) D1 and D2 need and have access to D3's own Alarm Mater Database in order to perform similar roles to those that they performed at C.

<u>The "Grand Plan"</u>

92. The Employment Tribunal determined that D1 and D2 resigned from C as part of an established plan to set up in competition with C and in doing so to secure a competitive advantage by seeking to exploit their knowledge of C's operations/customer base. It was submitted on behalf of the defendants that, whilst they do not seek to go behind the findings of dishonesty made by the Employment Judge against D1 and D2, it is not an abuse of process for the defendants now to seek to relitigate the particular issue of whether or not there was any "Grand Plan" as previously determined by the Employment Judge and having regard in particular to the facts that:

i) LH has in the meantime changed his evidence. After the Employment Tribunal had determined as a preliminary issue that D1 and D2 were employees of C, LH provided a witness statement in which he stated that –

> "[2] …….. [D1 and D2] acted illegally in setting up their financial affairs so that they appear to have deliberately not intended to pay tax on the income that they received from [C]……..
>
> [3] …… [D1 and D2] set up [D3] in May 2016….
>
> ……..
>
> [9] From 31st May 2016, [D1 and D2] invoiced [C] on a weekly basis for "sales and marketing Services". The invoice set out the services that had been provided by the Company through [D1 and D2].

> [10] I believe that neither of these individuals intended paying tax on their income and have always planned to hide behind the company that they set up in order not to pay tax to HMRC on their income."

However, in the witness statement provided for the present proceedings, LH states that "[45] …..I have now become aware that there was some form of advice issued by [C's] accountants about employees setting up a company. However, I was not involved in this aspect of the business which was overseen by the then Finance Director [RD]."

ii) RD is not a witness in the present proceedings, but he provided a witness statement to the Employment Tribunal in relation to the preliminary issue which he stated on behalf of C that –

> "[14] Both [D1 and D2] were running their own businesses and had set up [D3] in order to pursue some of those business interests.
>
> …….
>
> [35] It is very clear that [D1 and D2] were in business on their own account.
>
> …….
>
> [37] I also confirm that when they were at the trade show [in June 2017] they applied for a special licence for [D3] (an SSAIB licence) which allowed them to sell police monitored alarms. This was in direct competition to [C].
>
> [38] However, as I knew that they were working through [D3], this did not trouble me and they were free to run their company and promote it however they thought that they should."

C is seeking to argue in the present proceedings a wholly contradictory case that, when employed by C, D1 and D2 owed fiduciary duties of good faith and fidelity, including not to place themselves in a position of conflict of interests;

iii) In the present proceedings, C seeks to place reliance upon D1 and D2 having claimed for discrimination in the Employment Tribunal. C argues that they did so because they wanted to ensure that, if the claims were successful, D1 and D2 would then be entitled to receive awards for constructive dismissal not subject to the statutory cap that would otherwise have applied. However, the claim forms filed with the Employment Tribunal make clear that the boxes claiming discrimination were not ticked by D1 or D2.

93. In my judgment, it would bring the administration of justice into disrepute, if I were now asked to make a contrary finding to that arrived at by Employment Judge Lloyd, who heard the contested evidence of D1, D2 and LH on this particular issue at length and after it had already been determined, as a preliminary issue, that D1 and D2 were employed by C. In my view it is irrelevant in determining this issue whether or not the claim before the Employment Tribunal included discrimination.

94. Further, I am not persuaded that any new evidence was placed before me, that if it had been placed before the Employment Tribunal, would have potentially caused Employment Judge Lloyd to have made a different finding.

95. Firstly, whilst LH now accepts that C's employees, including D1 and D2, received accountancy advice upon establishing personal service companies, Employment Judge Lloyd acknowledged and accepted D3's dual purpose by finding that;

> "Whatever was the genesis of [D3] as to whether they were asked to set it up or whether it was a mutual decision, I think [D1 and D2] knew full well that were huge advantages for them, sometimes not entirely legal or straightforward. In setting up the company and funnelling their funds and income and resources through it, and also as a platform for the development of their own future business goals, namely as an accredited installer of [home] security…."

96. Secondly, in her evidence to me, D1 admitted that:

i) D3 was incorporated with a name, "Connect 4 Security Limited", and a logo, which were ideal for trading in home security. In contrast, CC adopted the name "SecurewithCaz Limited" for her personal service company;

ii) On 16 January 2017, D3 paid printers £5,829 for company headed paper;

iii) In early May 2017, D3 applied for accreditation with the SSAIB and created a trading website for the business;

iv) In June 2017, D1 attended for the first time the annual trade show to familiarise herself with new products available on the market. LH was angry about D3's application for SSAIB accreditation when told about it by David Profit of the SSAIB at the time of the annual trade show;

v) This was all done in anticipation of D1 and D2 going into business together in competition with C; and

vi) D3 was fully operational by 1 August 2017, within a month of D1 and D2 leaving C, and selling very well with 2 or 3 sales in the first week of business.

D1 claimed that all this admitted preparatory work was done merely as a back-up plan, a "Plan B", in the event that D2 was sacked by C. However, D1 was not sacked by C, but was found to have left of his own accord. Remarkably, D1 said in evidence, and having conceded that he was bound by the finding of the Employment Judge that no threats had been made against him by DS, that he had no choice but to leave immediately. He was simply unable to accept a pay cut, which would have reduced his earnings from £250,000 to some £200,000 per annum, and notwithstanding that his wife was pregnant at the time with their 4th child and he had a mortgage to pay. D1 later said in evidence that she would have remained working for C had it not been for the fact that C had sought to reduce D1's salary by £500 per week. In any event, I note that all the above preparatory steps for the new business were in fact taken prior

to D1 and D2 attending the meetings on 27 June 2017, when D2 was first asked to take a pay cut, and 4 July 2017, when the alleged threat was made.

D3's claimed legitimate marketing activities

97. D1 and D2 must have been confident that they would be able to grow the business relatively quickly, since:

i) Prior to leaving C, D1 was earning a total of £130,000 per annum and D2 was earning a total of £250,000 making a combined total of £380,000 per annum. D1 said that D2 was asked to take a pay cut of £500 per week, whereas D2 said it was £750. Even adopting the higher figure, D1 and D2 were, by walking away from C, effectively giving up combined total future earnings of some £340,000 per annum; and

ii) D1 did not dispute CC's written evidence that when she began working for D3 towards the end of July 2017, D3 already employed some 10 members of staff in the telemarketing team alone, and ignoring the sales team (security advisers) x 2 and the engineer.

98. D1 and D2 are highly intelligent and hugely experienced in the home security sector. It is reasonable to expect that, in light of the financial risks involved and after months of pre-planning (whether as part of a "Grand Plan" or "Plan B"), the defendants would have designed and implemented a robust marketing/sales strategy targeted at generating over the short term sufficient cash flow at least to meet the payroll.

99. I found the oral evidence of D1 and D2 regarding D3's marketing strategy to be variously confused, confusing, inconsistent, contradictory and lacking in credibility.

"advertising opportunities in consumer directories and magazines"

100. D1 said in evidence that:

i) Only one paid advertisement was placed in a magazine in Solihull;

ii) Only two fee advertisements were placed in directories covering the West Midlands; and

iii) The advertising campaign was not rolled out nationally because the local response had been quite poor generating only 1 or 2 sales, none of which were to C's customers.

"online marketing/referrals from the SSAIB"

101. The defendants provided no evidence of any or any substantial sales, whether to C's customers or more generally, having been generated by either such method.

"*legitimate data purchases from third parties such as telemarketing information*"

102. In her oral evidence, D1 said that, due to the high turnover of staff, the only remaining member of D3's original telesales team was Jackie Owen, who had only recently returned to work after a long period of absence due to ill-health. Nevertheless, Jackie Owen had been able to make 155 calls the day before D1 gave her evidence. Multiplying that number of calls by the number of telesales staff employed at the outset means that D3 needed initially at least 7,750 contact telephone numbers a week to keep the team busy. Indeed, in an email dated 9 January 2018 to D1 and D2 from a prospective data supplier, it is recorded that "My notes from our meeting….you have a team of 10 agents, each manually dialling and achieving approx.. 350 calls per day….. Estimated volume requirement per month equates to around 15 – 20k records…." As to how D3 initially sourced the required volume of data, it was D1's oral evidence that:

i) From the outset D3 purchased the data;

ii) When it was pointed out that the defendants had not disclosed any invoices for any data purchases before 18 January 2018, D1 changed her evidence to say that she had not purchased data from the outset, but rather D3 had initially used 2nd party data shared with another organisation;

iii) D1 had stated in her written evidence that the data used by D3 had been both (a) TPS compliant and (b) highly targeted by reference only to private home owners, aged 55 or over and having an existing alarm. However, in her oral evidence, D1 then further explained that by sharing data with another organisation she had in fact meant asking her good friend, Steve, who was involved in a holiday business, to lend her his data. D1 accepted that it would not have been possible to identify who, if anyone, had an existing alarm from what was ultimately holiday marketing data. Whilst consumers, who were TPS registered, were told that the data had been screened by D3, it was Steve, who had cleansed the data to make sure it was TPS compliant before handing it over to D1. There was no written agreement relating to this sharing of personal data and contrary to the ICO's Code of Practice, which provided that:

> "It is good practice to have a data sharing agreement.
>
> Data sharing agreements set out the purpose of the data sharing, cover what happens to the data at each stage, set standards and help all the parties involved in sharing to be clear about their roles and responsibilities.
>
> Having a data sharing agreement in place helps you to demonstrate you are meeting your accountability obligations under the UK GDPR.";

iv) As part of gifting the data, Steve handed over to D1 hard copy sheets each including the name, address and telephone number of 60 contacts. When D3 moved premises some 6 months after it started trading, D1 decided not to retain copies of the data sheets, although no reference to them is made in the list of documents as having once existed but no longer being in the defendants' control;

v) Any leads generated from the gifted data were not recorded separately, since there was no need to do so. The security advisers, Martyn Wright and Charlie Flint, were simply notified by text of the name and address of the prospective customer and of the time of the arranged appointment. The security advisers did not apparently need also to know in advance why they were attending the appointment and what the identified/expressed needs of the prospective customers actually were e.g. the installation of a new system or the transfer of an existing system from another provider. To do otherwise, D1 claimed, ran the risk that the security adviser would potentially pre-judge the particular sales opportunity; and

vi) In the event that a sale was then secured by the security adviser from any such lead, D1 would text the engineer a list of what work needed to be done. Whilst D1 accepted that it would perhaps have been easier if a standard form work sheet had been completed by the security adviser to be forwarded to the engineer, she preferred texting the engineer herself, who would then source the necessary equipment from a trading warehouse in Birmingham.

"direct marketing by leaflet and doorstep marketing"

103. As the narrative evolved during the course of the oral evidence of D1 and D2, it became apparent that this was the main method by which the defendants claimed that they were able to make contact with C's customers and as a result of the leads allegedly generated by the 2017 leaflet campaign.

104. It was D1's evidence that:

i) The 2017 leaflet was drafted by D2, who then obtained printed copies from a supplier somewhere in Solihull;

ii) Not many people phoned D3 in direct response to the 2017 leaflet campaign;

iii) However, as part of that campaign, D2's good friend, Shirley, had been tasked with looking out for monitored alarm boxes. By going door-to-door, Shirley was able to harvest invaluable information including the identity of the existing provider from the name displayed on the alarm box. Shirley was also able to obtain from consumers, who were TPS registered, opt-ins to receive marketing calls in relation to D3's services/products;

iv) Shirley passed her returns to D3's former employee, James Carr, who inputted the information onto D2's personal laptop. At some point the consumers' contact details were printed off the laptop and passed to the telesales team to make the calls;

v) The 2017 leaflet campaign ceased in November 2017 because, as a result of D3 then securing Checkatrade accreditation, D3 was prohibited from continuing with its door-to-door marketing strategy;

vi) In September 2017, James Carr told D1 that he had been given a memory stick by an IT contractor for C, Adam Horton, which contained C's customer information. D1 believed that this was an attempt by C to entrap the defendants. D1 sent a text message to Adam Horton on 13 September 2017, a copy of which has been disclosed, stating "I'm using clean data only and don't want to touch or be associated with that lot. all of them dishonest. Thank you kindly anyway for good intentions." In addition, James Carr was issued with a final warning regarding his conduct;

vii) Notwithstanding D1's stated belief that Adam Horton was part of an attempt by C to entrap the defendants, D1 acknowledged in her oral evidence, and by reference to other disclosed text messages sent in July 2017, that Adam Horton was helping D3 to locate offices. He even messaged D1 that "I have more than enough space at mine in Coventry to let you use till u sort something more permanent. Have internet phones computers and setup an sep netword and phone system for u";

viii) On 2 November 2017, D3 wrote to James Carr inviting him to attend a disciplinary meeting on 6 November 2017 –

> "…
>
> to establish the reasons for your impromptu departure from the office on Monday 30th October 2017, without notice and abandoning your position and job responsibilities. To date, we have not seen you return to your duties and you have not had the courtesy to contact us to inform us of your situation.
>
> We would also take the opportunity at the meeting to understand the circumstances surrounding the recorded footage taken whilst you were at home, in what can be described as a "drug induced state"…. [whilst] you were wearing a [D3] branded polo shirt at the time of the recording…….
>
> The above incidences are following a series of events regarding your conduct during your time working on behalf of [D3] [which]….. required verbal warnings….
>
> ……."

ix) On 6 November 2017, D3 sent a further letter to James Carr after he failed to attend the disciplinary meeting on 6 November 2017. The letter terminated James Carr's employment with D3 on the grounds of his "erratic behaviour, aggressiveness and overall poor professional conduct". The letter over the course of 4 pages sets out in detail the alleged misconduct relied upon and including –

a) Exhibiting, whilst previously employed by C, "low moods" and "aggressive behaviour" "following bouts of substance usage",

b) "Despite an initial positive start" in his new role with D3 from August 2017 "unseemly incidences quickly occurred" during the "3 month probationary period",

c) "verbally abused" and "involved in … harassment" of former work colleagues,

d) Meeting with Adam Horton "who offered you a memory stick containing commercial data from your previous Employer.",

e) "your own admittance to drug/substance dependency and the on-going fears (and actual harm) caused to you by someone you described as whom you "owed money to". This physical confrontation had resulted in you being late into work, suffering from obvious blows to your body, including facial bruising."

f) "your requests to regularly borrow money, from other members of staff" and "Worryingly, you made it explicitly clear to the Senior Management team that you would do "whatever it took to get money somehow… not caring what bad things (you) had to do to get it…". This caused much consternation with the leadership of [D3] and we considered that statement to be a sign of your absolute desperation and you would indeed use any means necessary to obtain money urgently and by whatever method most expedient.",

g) "During mid-October…. You accused another member of staff… of ".. looking at you strangely.." It was clear that you were experiencing a heightened sense of paranoia";

x) On 9 November 2017, D3 wrote a final letter to James Carr requesting that he return company property in his possession, including "the three [D3] polo shirts previously issued and worn by you."

xi) D1 was asked in oral evidence, why the defendants had not disclosed any spare copies of the 2017 leaflet, Shirley's returns, D2's laptop, and the printed customer lists. She claimed that they had all been stored in a box, which had been entrusted to James Carr. Further, during the course of a false fire alarm at D3's then office premises, James Carr was seen stealing the box;

xii) In my judgment it is extraordinary, if true, that D3 decided to entrust the safekeeping of a box containing the personal data of elderly and potentially vulnerable consumers to a known long term drug user, who was exhibiting such erratic, troubling and desperate behaviour. However, even putting that to one side, D1 was simply unable to explain why, if true, there was absolutely no mention in any of the disciplinary letters sent to James Carr of the alleged theft of company property/the box. The only specific reference to company property was the request that James Carr return the 3 polo shirts that he had been issued with;

xiii) Notwithstanding the alleged theft of company property by James Carr in 2017, including all the data harvested by Shirley, D3 was nevertheless able, from late 2018 onwards, to target and make contact with C's customers by revisiting the lead sheets that had been generated by the telecanvassers in 2017 when they first contacted the consumers as part of the leaflet campaign.

105. It was the evidence of D2 that:

i) He designed the 2017 leaflet on his laptop. He downloaded the design onto a memory stick, which he gave to Staples, who then tidied up the design before printing off the leaflets. He paid Staples £400 in cash for the job;

ii) The 2017 leaflet campaign worked brilliantly, since it was targeted by identifying alarm boxes from a Google Street view of key geographical areas, which had been identified from discussions held with the marketing and sales staff with combined experience of some 80 years working for C. When asked why he had not previously mentioned Google Street view being used to identify alarm boxes, D2 said that it was a deliberate decision in order to protect what he claimed was a commercially valuable and confidential marketing strategy;

iii) Hand written notes detailing this information were passed to Shirley on an ongoing basis to enable her to call at the identified properties and engage directly with the prospective customers;

iv) Shirley's main income was derived from selling second hand clothes all around the country. She did the leaflet campaign as part of travelling nationally with her own business. D2 paid Shirley cash every so often here and there, £100 at a time, making a total of £3,000;

v) The company bank statements do not record any payments to Staples or to Shirley in respect of the 2017 leaflet campaign, since they were not company expenses. D2 paid the money personally from cash he had at home and as a favour to D1, who he was then assisting in a purely advisory role as he was unable at that stage to commit to the business for family reasons;

vi) D2's laptop, the memory stick containing the design for the 2017 leaflet supplied to Staples, the spare 2017 leaflets, the information generated by the Google Street views handed to Shirley and the consumer returns/opt-ins that had been collected by Shirley were all stored in the box stolen by James Carr in 2017;

vii) Initially, D2 said that, in December 2018, after C lost its police response, it was C's customers, who began contacting D3 because it was accredited. Any such contact generated a lead sheet, but, from either January 2019 or February 2019, the decision was taken to destroy the lead sheet automatically upon a sale being generated and a take-over form being completed. At that point the lead sheet was no longer required and notwithstanding that (a) the take-over form was prepared on legal advice for the purposes of this litigation and (b),

unlike the lead sheet, the take-over form failed to identify who contacted who, which D2 accepted was highly relevant to this litigation;

viii) D2 then said that it was D3 that called C's customers from 2018 onwards, rather than the other way round, by revisiting the leads identified by Shirley in 2017 as part of the leaflet campaign and notwithstanding that the box stolen by James Carr in November 2017 contained the returns/opt-ins collected by Shirley; and

ix) When asked again how D3 had been able to call C's customers from 2018 onwards, notwithstanding the theft of the box by James Carr, D2 further explained that D3 still possessed the relevant contact details because the information obtained by Shirley had prior to the theft been inputted into a spreadsheet. The details were then printed off and handed to the telecanvassers, who made contact with the prospective customer. If that contact generated any interest, that in turn led to the production of a lead sheet, which was kept in another box, separate to the box that was stolen by James Carr. Once the customer had again been contacted via the lead sheet and a sale secured then the lead sheet was automatically destroyed; and

x) D2 did not report the theft of his laptop to either the police or the ICO. He then claimed for the first time that the laptop in fact belonged to the company, rather than to him personally, and so he did not think it was worthwhile reporting the alleged theft to the police. However, even if that change of evidence was true, it failed to explain why the theft had not at least been reported by D3, the data controller, to the ICO. The ICO broadly defines a personal data breach, which requires reporting to the ICO, as a security incident that has affected the confidentiality, integrity or availability of personal data. It was of course the defendants' evidence that the laptop not only contained the personal data of potentially vulnerable consumers, but it had been stolen by someone, who was apparently willing to do whatever was needed to get money to fund his drug addiction. It is hard to imagine a more serious security incident affecting personal data.

The defendants' missing documents/witnesses

106. Although not mentioned in her witness statement, D1 said in her oral evidence that she had created excel spreadsheets for the years 2017 to 2021 ("***the Fit Books***"), in which she inputted on an ongoing basis the details of new customers of D3, who had formerly been customers of C. The Fit Books include a column recording how those customers say they were contacted by D3. The vast majority of such entries (some 75%) record that the customer was contacted as a result of "Leaflet 2017. CB. Opt in", where "CB" is shorthand for "call back". However, there are a number of problems arising with the evidential value of the Fit Books:

i) The letter before action was sent in March 2019, and D2 stated in evidence that the Take-Over Forms had been prepared in order to rebut C's allegations that the defendants "were acting in an unethical manner.";

ii) Whilst D1 said in her oral evidence that the Fit Books were not prepared for the purposes of the litigation, I note that the relevant columns in the 2019, 2020 and 2021 Fit Books (covering the period when the defendants claim that they were able successfully to target C's customers as a result of the loss of C's police response in late 2018) are expressly headed "Documents in Support of Contact completed by client on our Take-Over Form";

iii) Therefore, it appears that the relevant information inputted into the Fit Books was intended to be a summary of the information provided by the customer in the Take-Over Forms;

iv) However, the Fit Books do not even appear to be an accurate reflection of what is actually contained in the Take-Over Forms. Counsel for C helpfully prepared an analysis in tabular form, which shows that only 59 (out of a total of 709) of the Take-Over Forms actually refer to a leaflet;

v) Further, D2 admitted in evidence that he completed the majority of the relevant sections in those 59 Take-Over Forms. The relevant section is headed "In your own words, how would you describe the way [D3] has conducted itself during your initial and confirmation calls?". In his oral evidence, D2 was unable to explain properly why, in response to that specific question, any customer, never mind 59 customers, would have mentioned a leaflet; and

vi) The 59 Take-Over Forms only refer to a leaflet in generic terms such as "leaflet drop", "leaflet delivered" or simply "leaflet". If the customer did make reference to a leaflet, the Take-Over-Forms fail to distinguish between a leaflet provided in 2017 and the key facts document which they say was delivered to consumers in 2019.

In all the circumstances, I am unable to attach any weight to the Fit Books/Take-Over Forms, which, like C's Tracker, I consider to be self-serving and unreliable.

107. There was a complete absence of any contemporaneous documents relating to the 2017 leaflet campaign:

i) D1 and D2 claimed that the written instructions to Shirley, the spare leaflets, the returns/opt-ins collected by Shirley, the laptop upon which the harvested information was downloaded and the leaflet was designed, the consumer lists printed off the laptop and distributed to the telecanvassers, and the memory stick upon which the leaflet design was downloaded were all stored in a box. That box was entrusted to the care of James Carr, who then stole it; and

ii) D2 claimed that he paid cash out of his own money to Staples to print the 2017 leaflets and to Shirley to distribute the 2017 leaflets such that there were no corroborating bank statements available. There were also no receipts or invoices evidencing such payments.

108. Accepting for a moment the inherently unlikely explanation that such important company property, which would have included the consumers' personal data, was somehow ever entrusted to the care of James Carr and having regard to his apparent

very significant personal problems, the absence of any other contemporaneous documents thereby increased the importance to the defendants' positive case of the lead sheets. In particular, the defendants ultimately claimed that it was the lead sheets that evidenced that D3 was entitled from 2018 to call TPS registered consumers, including C's customers, who had opted-in as part of the 2017 leaflet campaign to receive such marketing calls from D3. It is, therefore, incomprehensible that the defendants not only failed to disclose the leads sheets, but also during the course of these proceedings continued with a policy of destroying them for no discernible good reason.

109. However, this is not merely a case about inferences to be drawn from the absence/destruction of disclosable documents. That conduct also has to be viewed in the context of missing witnesses. It was the defendants' evidence that:

i) Due to the high turnover of staff there were no telesales staff still employed by D3 from 2017 other than Jackie Owen;

ii) It was not fair to ask Jackie Owen to be a witness as she had only recently returned to work after a long period of illness;

iii) In light of the years that had now passed, it was not possible to get hold of the other telesales staff employed in 2017; and

iv) Shirley passed away in 2020.

110. However, neither D1 nor D2 had any answer as to why Martyn Wright and/or Charlie Flint, who have been employed by D3 as sales representatives/security advisers since the outset and continue to be so employed, were not called as witnesses. This omission was even more surprising in light of D2's oral evidence that Messrs Wright and Flint had been in attendance at the strategy meeting when the all-important 2017 leaflet campaign was allegedly brain stormed.

111. In addition, D1 said that in hindsight her friend, Steve, could and should have been called as a witness to confirm that he had gifted the data initially used by D3's telesales team.

112. The missing lead sheets and the missing witness evidence clearly would have been highly material going as they do to the very heart of the factual dispute in this case. For no good reasons, the defendants have chosen not to put in potentially very significant documents and witness evidence to (i) support their positive case and (ii) rebut the evidence of CC. In all the circumstances, I consider it appropriate to draw the following adverse inferences:

i) The alleged lead sheets and gifted data never existed; and

ii) The untested evidence of CC is correct in that D3's telesales staff were directed to work from printed sheets (whether originally printed off C's Alarm Master Database or subsequently via a USB stick) containing C's customer information.

113. I am reinforced in that view by the following.

114. Firstly, C's consumer witnesses all confirmed that they received unsolicited marketing calls on behalf of D3 and notwithstanding that they had been TPS registered for many years.

115. Secondly, other than Ruth Mellor, none of the defendants' consumer witnesses make any reference in their written evidence to having received a leaflet from C in 2017. In his witness statement, Kenneth Trueman does state that he contacted D3 in response to a promotional leaflet, which he received in April 2019. It was the defendants' evidence that D3 ceased using the 2017 leaflet in November 2017, although, in 2019, D3 produced a key facts documents, which the security advisers/engineer were told to post to the properties either side of any property that they were attending. It is likely that this is the document that Mr Trueman is referring to in his witness statement.

116. Thirdly, as part of her complaint, Ms de Domingo wrote to D3 on 12 August 2019 stating that:

> "……There are also some things that are important for me to know:
>
> 1. You say that "following your Mother's interest in our Monitored Home Security Services". This is totally misleading. My mother did not contact your Company – she was the subject of a cold call. What "interest" in your Company's services led to someone calling at my mother's home?
>
> 2. My mother is TPS registered. Please provide to me urgently:
>
> (a) Evidence of where you obtained her number from;
> (b) A recording of the call that was made to my mother (and if there is not a recording, a transcript of the call);
> (c) An explanation of why she was called when she was in fact TPS registered;
> (d) If it is claimed that she called you previously – evidence of the date and time of that call so that I can check my mother's phone service provider."
>
> ……."

117. As in the present proceedings, Ms de Domingo was asking the relatively simple question where was the evidence that showed that her mother, who was TPS registered, had opted-in to receive marketing calls from D3? DW responded on behalf of D3 by way of a 7 ½ page letter dated 14 August 2019 in which he dismissed the complaint as being "without foundation." The letter also stated as follows:

> "1. Your Mother was originally spoken to in 2017 by our company, following a campaign promoting the services of [D3] to homeowners in various areas across the country. As part of our campaign, was a leaflet describing the benefits of our Monitored Alarms services for Home Security purposes. When the leaflets are delivered there was often an opportunity to speak to the occupier and explain the

content of the leaflet. If there was any interest shown by the occupier, as your Mother did at the time, they were encouraged to provide their name and telephone number in order for a pre-arranged Home Security consultation to take place. Your Mother said she was already in a contract with her existing alarm company with a couple of years remaining. Therefore, your Mother asked for us to make contact nearer the end of her contract. This is how we first obtained your Mother's telephone number. We subsequently first made contact with your Mother in 2019.

……..

2. You state your Mother is TPS registered, however her permission to contact her was given during the original discussion which took place in 2017.

a) We are unable to provide the requested "evidence" you seek as that promotion campaign commenced over 2 years ago and we no longer hold those details, due to a Head Office relocation.

b) We are unable to provide you with a recording of the call from our company to your Mother, as no such technology is used at [D3]. Therefore, no "transcript" of the call can be provided to you, because such a transcript must be an accurate account of an original conversation/dialogue that had been recorded.

c) Please refer to the earlier paragraph.

d) We have not stated at any time, in our telephone calls to you and/or our written correspondence, that your Mother had "called" our company. Again, we refer you to the earlier paragraph in this letter,

……."

118. The response letter refers to evidence no longer being available because of an office relocation. It makes no reference to the theft of personal data by James Carr. In his written evidence DW stated that "I have not discovered anything within [D3's] operating procedures that gives me cause for concern." His stated role included ensuring ICO compliance. Whilst DW was not employed by D3 at the time of the alleged theft, DW said in his oral evidence that he had liaised with D2 as part of his investigation of the complaint.

119. However, even more striking, is the fact that this very long and detailed letter makes absolutely no mention of the relevant lead sheet, which if it had ever existed ought still to have been then available for disclosure to Ms de Domingo, who had cancelled the contract 2 days after it was signed by her mother and within the 14 day statutory cancellation period. DW said in his oral evidence that again as part of his investigation he would have gone to the filing cabinet and taken out the relevant customer documentation.

Conclusion

120. In ***Bank St Petersburg PJSC & Anor v Arkhangelsky***, the then Chancellor of the High Court warned that a trial judge when determining disputed facts must be careful to avoid adopting a piecemeal and compartmentalised approach, but rather to stand

back and consider the effects and implications of the facts he has found taken in the round.

121. The primary facts are as follows:

i) It is admitted that, from at least 2018, the defendants specifically targeted C's customers by making telephone contact with them and despite a number of those customers being TPS registered;

ii) It is also admitted that, as a result of that strategy, the majority of D1's customers are former customers of C;

iii) I have found that the defendants had the opportunity to take C's customer information as a result of D1 and D2 having had access to the Alarm Master Database during the course of their employment with C; and

iv) The defendants had the motivation to take C's customer information. Employment Judge Lloyd found that they had a "Grand Plan", which was in place "some time before" D1 and D2 left their employment with C, "to compete directly with [C] with the advantage of not simply their experience with [C], but the knowledge of [C's] operations in exactly the same field and also their knowledge of the customer base which of course they had." I share that view as a result of my own findings that -

a) D1 and D2 made a very significant financial sacrifice by walking away from C and setting up in competition,

b) D3 from the outset employed a large number of staff,

c) These actions were entirely consistent with the defendants having had the confidence to be able to grow the business quickly,

d) The oral evidence of D1 and D2 that D3 initially sourced the required data by lending it from D1's friend, Steve, who was in the holiday business, was incredible.

122. There are only two possible explanations for the defendants having been able to contact C's customers in this way:

i) they took and used C's customer information, as claimed by C; or

ii) through the defendants' "own legitimate marketing activity", and in particular "direct marketing by leaflet and doorstep marketing", as claimed by the defendants.

123. For the following primary reasons, I have rejected the defendants' positive case that D3 was able to target and make contact with C's customers as a result of the leads generated by the alleged 2017 leaflet campaign:

i) D1's and D2's oral evidence on this issue was simply unbelievable;

ii) No satisfactory explanation was given by D1 or D2 for the missing lead sheets and/or witnesses, which/who ought otherwise have been available to corroborate D1's and D2's version of events, if true, and rebut the written evidence of CC; and

iii) The adverse inferences reasonably to be drawn from the resulting very significant evidential gaps allowed by the defendants on this issue.

124. In the absence of any other credible explanation, the only inference and the inescapable conclusion to be drawn from the primary facts is that the defendants executed a plan to take and use the customer information belonging to C in order successfully to target C's customers for the benefit of D3.

Causes of action

Legal framework

125. C elected at trial not to proceed with the claims for (i) breach of fiduciary duties and (ii) dishonest assistance in breach of trust.

Claims for breach of confidence, database right infringement, inducing/procuring breaches of contract

126. Such claims were considered by Bacon J in the recent case of ***Weiss Technik UK Ltd and other companies v Davies and others*** [2022] EWHC 2773. The background to the claim was summarised by Bacon J as follows:

> "[1.] …….. It is brought by three companies within the Weiss Technik group …… against four former employees (the individual defendants) and the company SJJ System Services Limited (SJJ), which was set up by one of those employees, Mr Jones, when he left Weiss.
>
> [2.] The claim is, essentially, that Mr Jones established SJJ by taking large swathes of confidential Weiss information and software, which he used to compete with Weiss. The claimants say that the other defendants, i.e. Mr Davies, Mrs Whitfield and Mr Oram, then continued to provide Mr Jones and SJJ with confidential information from Weiss either at Mr Jones' request or voluntarily, before they left Weiss at various different times to work for SJJ. They then (the claimants say) continued to use Weiss's confidential information after they had joined SJJ."

127. Having reviewed the authorities, Bacon J helpfully summarised the relevant legal principles as follows:

> "Breach of confidence
>
> Legal principles

[113.] It is well-established that an obligation of confidentiality may arise either under the express or implied terms of a contract, or as an equitable obligation.

…….

[115.] The seminal case of ***Faccenda Chicken v Fowler*** [1987] Ch 117 confirms that confidentiality obligations will also typically be implied in an employment relationship where necessary, in circumstances summarised at pp. 135–138:

> "(2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.
>
> (3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see ***Vokes Ltd v Heather***, 62 R.P.C. 135); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer …
>
> (4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae …, or designs or special methods of construction … and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only "confidential" in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith …
>
> (5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid:
>
> (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a high obligation

of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.

(b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine …

(c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret …

(d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose. In ***Printers & Finishers Ltd v Holloway*** [1965] R.P.C. 239, Cross J. considered the protection which might be afforded to information which had been memorised by an ex-employee. He put on one side the memorising of a formula or a list of customers or what had been said (obviously in confidence) at a particular meeting, and continued, at p. 256:

> 'The employee might well not realise that the feature or expedient in question was in fact peculiar to his late employer's process and factory; but even if he did, such knowledge is not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant, and I do not think that any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer.'

For our part we would not regard the separability of the information in question as being conclusive, but the fact that the alleged "confidential" information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret."

[116.] As for equitable confidentiality obligations, the classic statement is that of Megarry J in ***Coco v AN Clark (Engineers)*** [1968] FSR 415, p. 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 … 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."

[117.] The first of those conditions was pithily described by HHJ Waksman QC in ***McGill v The Sports and Entertainment Media Group*** [2014] EWHC 3000 (QB) at §148 as encompassing "information which is not generally available to others and which the possessor does not wish to be generally available".

[118.] The second of the ***Coco v AN Clark*** conditions will apply where the receiver of the confidential information knows or should know that the information is confidential. That may be the case not only where confidential information has been disclosed in breach of an obligation of confidence, but also where confidential information innocently comes into the hands of the receiver, who should nevertheless know that it is confidential: Lord Goff in ***AG Observer*** **(the *Spycatcher* case)** [1990] 1 AC 109, p. 281D–F.

[119.] The principle was expressed by the Supreme Court in ***Vestergaard v Bestnet*** [2013] UKSC 31, [2013] RPC 33 as follows:

> "The classic case of breach of confidence involves the claimant's confidential information, such as a trade secret, being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential".

[120.] As to the third requirement for a detriment arising from the use of the confidential information, use can be established in a wide variety of ways, including not only examining the material and making copies of it, but also deliberately setting out to obtain material known to be confidential.
In ***Tchenguiz v Imerman*** [2010] EWCA Civ 908, [2011] 2 WLR 592, Lord Neuberger MR said that:

> "68. If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. …
>
> 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."

[121.] The remaining question is whether such use must give rise to a detriment to the claimant in order for a breach of confidence to be established. Megarry J in ***Coco v AN Clark*** left open the question of whether this is required in all cases, as did Lord Goff in the ***Spycatcher*** case. Lord Keith, however, said in that case that:

> "as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself … So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure to him would not be harmful to him in any positive way."

[122.] The passage from ***Tchenguiz*** set out above is consistent with the approach of Lord Keith. ***Toulson & Phipps on Confidentiality*** (4th ed, 2020), §§5-021–022 draws a distinction between private and public confidences, suggesting that in the case of the former:

> "the confider may have an interest in the information being kept confidential, regardless of whether disclosure would be positively harmful to it, for reasons which may be perfectly understandable (and which would be understood by any reasonable person in the position of the confidant). If so, for the reasons suggested by Lord Keith in the ***Spycatcher*** case, that should be sufficient to found a cause of action; and the question whether unauthorised disclosure in such circumstances is considered to involve 'detriment' is an exercise in semantics."

[123.] On the basis of these authorities, if the defendants have deliberately and surreptitiously obtained, copied and stored the claimants' confidential information for the purposes of a competing business, in circumstances where the defendants knew or should have known the information to be confidential, that is sufficient to establish a breach of confidence as an equitable claim. It is not necessary to show that the defendants have specifically used the material in their business, or that the claimants have suffered loss and damage as a result.

……..

Procuring or inducing breaches of contract

……..

[188.] The ingredients of the tort of inducing or procuring a breach of contract were summarised by Morgan J in ***Aerostar Maintenance International v Wilson*** [2010] EWHC 2032 (Ch) at §163 (recently cited by Bryan J in ***Lakatamia Shipping v Nobu*** [2021] EWHC 1907 (Comm), §125) as follows:

> "first, there must be a contract, second, there must be a breach of that contract, thirdly, the conduct of the relevant defendant must have been such as to procure or induce that breach, fourthly, the relevant defendant must have known of the existence of the relevant term in the contract or turned a blind eye to the existence of such a term and, fifthly, the relevant defendant must have actually realised that the conduct, which was being induced or procured, would result in a breach of the term."

[189.] As Morgan J noted in that summary, the requirement of knowledge of the contractual term is satisfied by blind-eye knowledge, where the defendant is "knowingly, or recklessly, indifferent" to whether the conduct procured is a breach of contract or not: Lord Denning in ***Emerald Construction v Lowthian*** [1966] 1 WLR 691, pp 700–701, cited with approval in *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1, §§40–41.

……

Database rights

Legal principles

[221.] The Copyright and Rights in Databases Regulations 1997 implemented, in the UK, Directive 96/9/EC on the legal protection of databases [1996] OJ 77/20. The Regulations provides, in Regulation 13(1), that a database right subsists if there has been a substantial investment in obtaining, verifying or presenting the contents of the database. A database is defined in s. 3A of the CDPA (as inserted by Regulation 6 of the 1997 Regulations) as a collection of independent works, data or other materials, which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means.

[222.] In Case C-203/02 ***British Horseracing Board v William Hill*** EU:C:2004:695, §31, the CJEU said that the concept of an investment in obtaining the contents of a database must be understood to refer to:

> "… the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment

> of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database."

[223.] The *sui generis* database right therefore protects the collection and processing of data in a database, rather than the creation of the data in the first place. As the CJEU went on to explain, the same person can both create the original data and rely on the database right in respect of the processing of those data, provided that there is an independent substantial investment in the latter:

> "35. … the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the *sui generis* right, provided that he establishes that the obtaining of those materials, their verification or their presentation … required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.
>
> 36. Thus, although the search for data and the verification of their accuracy at the time a database is created do not require the maker of that database to use particular resources because the data are those he created and are available to him, the fact remains that the collection of those data, their systematic or methodical arrangement in the database, the organisation of their individual accessibility and the verification of their accuracy throughout the operation of the database may require substantial investment in quantitative or qualitative terms …"

[224.] Under Regulation 16 a person infringes the database right in a database if, without the consent of the owner of the right, they extract or reutilise all or a substantial part of the contents of the database. "Extraction" is defined in Regulation 12(1) as the permanent or temporary transfer of any of the contents of the database to another medium by any means or in any form.

[225.] The concept of extraction from a database was considered by the CJEU in Case C-304/07 ***Directmedia Publishing v Albert-Ludwigs-Universität Freiburg*** EU:C:2008:552, from which the following principles in particular can be derived:

i) The decisive criterion is the existence of an act of "transfer" of all or part of the contents of the database to another medium, whether of the same nature as the medium of the database or a different nature (§36).

ii) It is immaterial whether the transfer is effected through a technical process (e.g. electronic means) or by manual means (§37).

iii) It is also immaterial that the contents of the database are rearranged or adapted during the process of transfer (§§39–40).

> [226.] As the Court of Appeal confirmed in ***Football Dataco v Sportradar*** [2013] EWCA Civ 27, §73, there can be an act of extraction of data where those data are uploaded onto and stored on a computer, even if the user of the computer has not read or accessed the relevant data."

Malicious falsehood

128. The ingredients of the common law tort were identified in ***Ratcliffe v Evans*** [1892] 2 QB 524 by Bowen LJ as follows:

> "written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage."

129. Section 3(1) of the Defamation Act 1952 provides:

> "Slander of title, etc.
>
> (1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

130. In ***George v Cannell and another*** [2022] EWCA Civ 1067, Warby LJ held

> "[65.] I have already given most of my reasons for concluding that the Judge was wrong to adopt the historic approach. In summary his decision, that a claimant relying on section 3 must plead and prove a specific mechanism by which the offending statement did on the balance of probabilities cause actual financial loss, flowed from a fallacy that fails to give the statutory language its natural meaning and effect. The authorities, properly understood, do not support this. I add that I think it is also a fallacy to reason from the proposition that malicious falsehood is an economic tort to the conclusion that only proof of actual financial loss will do. "Economic tort" is a label to indicate the nature of the interest protected by the cause of action. On its natural interpretation section 3 is aimed at the protection of financial or economic interests. Parliament provided for a claimant to establish liability on proof that the acts complained of had a natural tendency to cause loss of the type protected by the tort. I can see nothing heterodox in that. Nor do I see force in the supposed paradox that the claimant might establish liability on the basis of an inherent probability of financial loss, even though the defendant has proved as a fact that there was none in the event. This is not an "absurdity" as the defendants have submitted. In my view it is consistent with Parliament's intention and simply an extreme illustration of the occasional side-effect I have described at para 47 above."

Conspiracy to injure by unlawful means

131. In ***Libyan Investment Authority and other companies v King and others*** [2023] EWHC 265 (Ch), Miles J set out the principles applicable to the cause of action as follows:

> "[761.] The basic elements of the cause of action in the tort conspiring to injure by unlawful means are set out in ***Kuwait Oil Tanker Co SAK v Al Bader (No. 3)*** [2002] 2 All ER (Comm) 271 (CA), per Nourse LJ at [108]:
>
> > "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."
>
> [762.] In addition, the following principles apply:
>
> i) A claimant must establish on the available evidence that there was an agreement or combination with the common design to cause injury to them. This is a question of fact.
>
> ii) Formal agreement is not required and it is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end: (***Kuwait Oil Tanker*** at [111])
>
> iii) In most cases it will be necessary to scrutinise the facts to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy. In many contexts it will be necessary in order to prove intention to ask the court to infer the relevant intention from the primary facts: ***Kuwait Oil Tanker*** at [112] and [120].
>
> iv) Nevertheless, it must be shown that the alleged conspirators were sufficiently aware of the relevant circumstances, and had a sufficiently similar objective, before it can be inferred that they were acting in combination: (***Kuwait Oil Tanker*** at [111]).
>
> [763.] As to the requirement of intention to harm the parties agreed that the principles are set out **in** ***OBG Ltd v Allan*** [2008] 1 AC 1 at [164]-[167]:
>
> i) A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end.
>
> ii) Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort, even if the defendant does not wish to harm the claimant in the sense that he would prefer that the claimant were not standing in his way.

iii) Lesser states of mind do not suffice: to establish liability, a high degree of blameworthiness is called for because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant, and the defendant's conduct must be deliberate.

iv) Foresight that conduct may or will probably result in damage to the claimant cannot be equated with intention and this intent must be a cause of the defendant's conduct. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct.

v) If a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant (i.e. the loss to the claimant is the obverse side of the coin from gain to the defendants and the two are, to the defendant's knowledge, inseparably linked and the defendant cannot obtain the one without bringing about the other).

[764.] As to unlawful means and knowledge:

i) The claimant must establish that: (a) the alleged acts were "unlawful" and (b) that they were in fact the means by which injury was inflicted upon them ***Digicel (St Lucia) Ltd v Cable & Wireless Plc*** [2010] EWHC 774 (Ch) at Annex I [3]).

ii) The defendant must have knowledge of all of the facts which make the means unlawful: ***The Racing Partnership Ltd v Sports Information Services Ltd*** [2020] EWCA Civ 1300; [2021] Ch 233 at [141].

iii) By a majority decision it has been accepted that knowledge of the unlawfulness of the means employed is not required: see ***The Racing Partnership Ltd*** at [139] and [171].

iv) The requirement of knowledge is satisfied where the defendant has "blind-eye" knowledge: ***The Racing Partnership Ltd*** at [159]. That requires a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence.

v) As to blind eye knowledge see ***Group Seven & Ors v Nasir*** [2019] EWCA Civ 614: [2020] Ch 129, [59]-[60]:

> a) it is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries;
>
> b) the suspicion must be firmly grounded and targeted on specific facts;
>
> c) the existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person; and

d) the beliefs of the relevant person, and the decision to avoid obtaining confirmation must be deliberate.

vi) To be "unlawful", the actions need not themselves be actionable civil wrongs: ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174.

vii) Deceit may constitute the necessary unlawful action (***ERED*** at [381]), as may a breach of fiduciary duty (***Fiona Trust & Holding Corp v Privalov*** [2010] EWHC 3199 (Comm) at [69])**.**

viii) It may be a defence for the defendant to prove that he believed that the means in question were lawful: obiter, in ***The Racing Partnership***, Arnold LJ at [146].

Conclusion

132. The information contained on C's Alarm Master Database was not simply the names, addresses and telephone numbers of customers, but also included details of individual contracts such as:

i) The basic equipment installed;

ii) Optional add-on products;

iii) Optional warranty cover;

iv) The prices paid;

v) When the contract was due for renewal; and

vi) The password for the customer's home security system.

133. In my judgment, this information, which cannot properly be separated out and must be taken as a whole, was clearly highly commercially sensitive and confidential. CC stated in her evidence that D3's telesales team called all the names on the printed sheets, but concentrated primarily on those customers of C, who were coming to the end of their contracts. In addition, C's consumer witnesses (BM, IK and JW) gave evidence that it was clear to them that D3's sales representatives knew individual terms of their contracts with C, such as price and renewal date.

134. Indeed, the information was treated as highly confidential by C. Only a limited number of C's employees were given their own unique log in details to access C's Alarm Master Database. D1 and D2 themselves knew that the information was treated by C as confidential, since the marketing and sales teams, for whom D1 and D2 were directly responsible, were generally prohibited from accessing the database.

135. D1 and D2 agreed and implemented a plan to take C's confidential information and to use that confidential information successfully to target C's customers for the financial benefit of D3 and to the financial detriment of C. In doing so, D1 and D2, as senior employees, must have known that such actions were in breach of the confidentiality

terms implied into their own and each other's employment contracts, or turned a blind eye to the existence of such terms. At the material time, D1 was the sole director of D3 and as such was its controlling mind.

136. As part of the agreed plan, C's confidential information was extracted from the Alarm Master Database by either manual or electronic means. C had spent money acquiring the Alarm Master Database and the associated operating licenses. Significant time and resource was spent in storing and processing the customer data via the Alarm Master Database.

137. Further as part of the agreed plan, printed sheets of the data (whether printed directly from C's Alarm Master Database or later via a USB stick) were distributed to D3's telesales team to call C's customers.

138. In conclusion, by doing all this, I find that:

i) D1 and D2 breached their contractual obligations of confidentiality;

ii) The breaches by D1 and D2 of their contractual obligations were induced or procured by D3 and (by way of inducing/procuring the contractual breaches of the other) D1 and D2;

iii) The defendants infringed C's database rights; and

iv) The defendants conspired to injure C by unlawful means. It has been held that a criminal conspiracy between a "one man" company and its sole controller is an impossibility because it is not possible to find an agreement between two minds – ***R v McDonnell*** [1966] 1 Q.B. 253 The position in relation to an alleged civil conspiracy is not so clear cut. In the recent case of ***Raja v McMillan*** [2021] EWCA Civ 1103*,* Nugee LJ noted at [59] that the point remained *"one of some difficulty"*. Ultimately, I do not need to decide this particular point, and nor would it be proper to do so without having heard argument upon it. Whilst D1 was the sole director of D3 at the material time, I have found that D1 conspired with D2, and D2 conspired with D3.

139. I dismiss the claim for malicious falsehood for the following primary reasons:

i) I have found that D3's staff, and in particular Martyn Wright, falsely told C's customers that D was financially in trouble in order to encourage those customers to switch to D3;

ii) It is not claimed that D3 is vicariously liable for the acts of its employees. Rather it is claimed that these maliciously false statements were a deliberate ploy calculated by the defendants to cause pecuniary damage to C;

iii) However, the defendants claim that the maliciously false statements, if made, were not made with their knowledge and approval. The defendants have disclosed a copy of the "Training Record & Code of Conduct Re Previous Provider System Takeover" signed by staff. The sample copy is signed by Martyn Wright and dated 1 May 2019. Martyn Wright inter alia confirms that:

"[18] I will NOT disparage, in any form, the performance failures and/or reputation of another alarm provider."; and

iv) I have found that C's employee, Karen Armstrong, adopted a similar tactic of making maliciously false statements about D3 in order to seek to persuade customers to switch back to C. LH sought to distance himself from that conduct by claiming that Karen Armstrong "had gone off script". Having accepted LH's evidence on that point, it would be unfair and perverse not then to accept the defendants' evidence that Martyn Wright also went off script.

Overall Conclusion

140. I find that the defendants agreed and executed a plan to extract knowingly confidential information from C's database and to use that confidential information in order successfully to target C's customers for the financial benefit of D3 and to the financial detriment of C.

141. C has established the claims that:

i) D1 and D2 breached their contractual obligations of confidentiality;

i) The breaches by D1 and D2 of their contractual obligations were induced or procured by D3 and (by way of inducing/procuring the contractual breaches of the other) D1 and D2;

ii) The defendants infringed C's database rights; and

iii) The defendants conspired to injure C by unlawful means.

142. The claims for (i) breach of fiduciary duties, (ii) dishonest assistance in breach of trust and (iii) malicious falsehood are dismissed.