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Case Nos: BL-2019-BRS-00028
21 of 2019
166 and 167 of 2015

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 November 2019

Before :

Mr John Jarvis QC
(sitting as a Judge of the High Court)

- -

Between :

(1) Nihal Mohammed Kamal Brake
(2) Andrew Young Brake

Applicants

- and -

(1) Geoffrey William Guy
(2) The Chedington Court Estate Limited
(3) Axnoller Events Limited

Respondents

- and -

The Chedington Court Estate Limited

Applicant

- and -

(1) Nihal Mohammed Kamal Brake
(2) Andrew Young Brake

Respondents

- -

Stephen Davies QC and Daisy Brown (instructed by **Seddons LLP**) for the **Applicants / Respondents**
Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law**) for the **Respondents / Applicants**

Hearing dates: 18, 19, 20, 21, 25, 26 and 28 November 2019

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JUDGMENT

MR JOHN JARVIS QC:

Introduction

1. These applications raise issues of legal professional privilege, confidentiality and privacy. Although there are well-established principles of law in these areas, every case is fact-sensitive.

2. At the outset of this hearing, I was asked by Mr Stephen Davies QC, counsel for Mrs Nihal Brake and Mr Andrew Brake ("the Brakes"), to make an order directing that the hearing of this matter should be heard in private under part 39.23 of the CPR. Mr Andrew Sutcliffe QC, counsel for Dr Geoffrey Guy ("Dr Guy"), The Chedington Court Estate Ltd ("Chedington") and Axnoller Events Ltd, ("AEL") (together, the "Guy Parties"), opposed the making of such an order, reminding me that the general rule is that a hearing is to be in public. I ruled that the hearing would be in public, save insofar as there were legal professional privileged documents or private documents which were in issue. The court sat in private when reference was made to those documents. However, it transpired during the course of argument that there were no documents to which legal professional privilege needed to be applied.

3. Although there is no reason for this judgment to be anonymised or otherwise managed to avoid publicity of confidential matters, I shall nevertheless in this judgment endeavour to avoid detailed references to documents which are private and will summarise issues.

4. There were a multitude of issues raised in this case during the course of argument and it would be wrong to burden this judgment with an analysis of each and every one. I have, however, considered and taken into account all the matters which were argued in front of me.

5. There are two applications before the court. First, there is the Brakes' application for an injunction restraining the Guy Parties from using information obtained from emails within the account entitled enquiries@axnoller.co.uk ("the enquiries account"), on the basis that the account had been wrongfully accessed by the Guy Parties without the consent of the Brakes and for delivery up of the documents and other related relief ("the documents application").

6. Second, there is the application of the Guy Parties for a declaration that the Brakes are not entitled to assert LPP in respect of various of those documents, insofar as they were in furtherance of an unlawful scheme ("the LPP application").

7. The Guy Parties have sought to amend the LPP application by revising the second order sought in relation to the definition of the unlawful scheme. It is to be noted that this application was first raised in the afternoon of the fourth day of this hearing without notice to the Brakes. It has been strenuously opposed by the Brakes, and it was agreed that I would rule on that application in my judgment. Before I reach that point, it is convenient that I deal with other issues, and I shall deal with this later under issue F.

The Background

8. Both the documents application and the LPP application are part of a wider set of proceedings concerned with West Axnoller Farm, Beaminster, Dorset ("the farm") and West Axnoller Cottage ("the cottage"). The Brakes were in occupation of the cottage and there are serious issues in insolvency proceedings relating to the title to the cottage.

9. Prior to 2010, the Brakes had carried on a business at and lived at the farm. In February 2010, the Brakes, trading as Stay in Style, entered into a partnership with Patley Wood Farm LLP ("PWF"), which was controlled by a Ms Lorraine Brehme ("Ms Brehme") ("the partnership"). The partnership and both the farm and possibly the cottage, although this is contested by the Brakes, were owned by PWF.

10. The partners fell out and there was an arbitration before Mr Michael Lee, in which in 2013 he found that the Brakes had breached their fiduciary duties and he ordered the dissolution of the partnership. PWF then sought to enforce the award against the Brakes and obtained a number of injunctions against them, including an order preventing the Brakes from acquiring the farm from the partnership directly or through a nominee without the arbitrator's consent. I shall have to refer to some of the orders later in this judgment.

11. On 12 May 2015, a bankruptcy order was made against the Brakes on the basis of the unpaid costs of the arbitration. Trustees in bankruptcy were subsequently appointed over Stay in Style.

12. On 23 July 2015, the partnership bankers, Adam & Co, took enforcement action and sold the farm through LPA Receivers to Sarafina Properties Ltd ("SPL"). SPL was owned by the Hon Saffron Foster ("Mrs Foster"), who is part of the well-known Vestey family.

13. It is submitted by the Guy Parties that the acquisition by SPL was in reality a nominee purchase for the Brakes which was bought at an undervalue, and that it was then used as a front to hide the Brakes' activities from the trustee in bankruptcy. In summary, this is what the Guy Parties describe as the unlawful scheme.

14. On 22 July 2016, administrators were appointed over the partnership and, on 30 May 2017, the administration was converted into a liquidation and liquidators were appointed.

15. On 17 February 2017, Chedington acquired SPL, which was then renamed AEL. Chedington and AEL employed Mr and Mrs Brake respectively.

16. On 9 November 2018, the Brakes' employment with AEL was terminated. This has led to four sets of proceedings, all of which are highly contentious:

    (1) Claims brought by the Brakes in an Employment Tribunal (Claim numbers 1400598/2019 and 1400597/2019) ("the employment proceedings").

    (2) Possession proceedings brought by AEL against the Brakes in relation to the farm ("the farm proceedings").

    (3) A claim brought by the Brakes against AEL in relation to alleged unlawful eviction from the cottage ("the eviction proceedings").

(4) Applications by the Brakes seeking to unwind transactions relating to the sale of the cottage between the liquidators, trustee in bankruptcy and Chedington ("the insolvency proceedings").

17. Whilst the Brakes were employed by Chedington and AEL, they operated three email accounts. There were two obviously personal accounts: alo@axnoller.co.uk and andy@axnoller.co.uk. There was also an account entitled enquiries@axnoller.co.uk, which I am describing as the "enquiries account".

18. An issue which I have to consider is whether the enquiries account remained a private account of the Brakes', or whether it was a business account to which the Guy Parties had access. The decision on this issue will be pivotal in deciding many of the issues raised in this case.

The issues to be decided

19. On the fourth day of the hearing, at my request, the Guy Parties produced a list of issues, which I reproduce here:

"*Guy Parties' LIST OF ISSUES*

General issues regarding enquiries@axnoller.co.uk

1. Is enquiries@axnoller.co.uk confidential (as opposed to private) to the Brakes?

2. Is enquiries@axnoller.co.uk private (as opposed to confidential) to the Brakes?

NB these are questions going to enquiries@axnoller.co.uk as a whole.

Specific relief

3. Should the Guy Parties give an affidavit setting out full details of all disclosures made to third parties in respect of all emails on enquiries@axnoller.co.uk save for 'booking emails'? (Documents Application notice, para (1))

4. Should the Guy Parties permit the Brakes' expert to inspect their database / computer system to verify the date, manner and method of deletion of the alo@axnoller.co.uk and andy@axnoller.co.uk accounts on 12 November 2018 (Documents Application notice, para (2))

NB it is assumed that the relief sought at para (3), (4) and (5) of the notice for the Documents Applications is no longer maintained.

5. Are the 12 documents listed at appendix 2 to the draft order subject to legal professional privilege? (see paras 6, 8 and appendix 2 of the Guy Parties' draft order)

Iniquity issues

6. Have the Guy Parties established a prima facie case of iniquity in respect of the following matters:

(1) The acquisition of West Axnoller Farm by Saffron Foster and/or SPL;

(2) Valuations of West Axnoller Farm up to and including its acquisition by SPL on 23 July 2015, including communications between the Brakes and those valuing West Axnoller Farm;

(3) The engagement of the Brakes in any capacity on behalf of SPL or any business pursued by SPL from 23 July 2015 until 23 January 2016;

(4) Receipt of monies and benefits in kind by the Brakes from Saffron Foster and/or SPL from 23 July 2015 to 9 September 2016, including all statements for bank accounts held by, or on behalf of, the Brakes (including account number 43955214); and/or

(5) The sale of SPL, its assets and/or its business."

20. On the fifth day of the hearing, the Brakes produced what is described as a list of issues, but which, in fact, was much more than that, since it contained substantial argument. I hope the Brakes will understand that I do not reproduce that in this judgment but will deal with the points as argument. In the circumstances, there is no agreed list of issues.

21. During the course of the hearing and after considerable argument, the parties have found it possible to agree some matters.

(1) The first order which the Guy Parties had sought in their application notice was "that legal professional privilege does not apply to the documents listed in appendix 1 to the draft order". It became clear that only five or possibly six other documents in the appendix could possibly be capable of being legally professionally privileged and, in relation to those, the Brakes agreed to waive privilege.

(2) Although there were 70,000 documents in the enquiries account, only 40,000 of those documents have been supplied by the Guy Parties to the Brakes. It was not in dispute that some of those documents would be purely business documents which belonged to AEL and that they should be retained by AEL. It was also not in dispute that some would be confidential, private emails belonging to the Brakes. Where that line should be drawn could only be decided by examination of the particular documents, a course which could not practically be carried out by the court. The parties have agreed a mechanism for dealing with these documents and which is set out in paragraphs 1 to 5 of the Guy Parties' revised draft order, which I set out below:

"*1. By 4pm on Monday 25 November 2019, the Guy Parties will provide the Brakes with a copy of the enquiries@axnoller.co.uk account as archived by Labyrinth Computers Limited (the Account).*

2. By 4pm on Thursday 9 January 2020, the Brakes will provide the Guy Parties with a list of documents from enquiries@axnoller.co.uk claimed to be private and

confirm that they have destroyed the copy of the Account referred to in paragraph 1 above save in respect of the documents identified pursuant to this paragraph 2.

3. By 4pm on Thursday 6 February 2020, the Guy Parties will conduct a review and confirm to the Brakes in respect of each document identified at paragraph By 4pm on Thursday 9 January 2020, the Brakes will provide the Guy Parties with a list of documents from enquiries@axnoller.co.uk claimed to be private and confirm that they have destroyed the copy of the Account referred to in paragraph 1 above save in respect of the documents identified pursuant to this paragraph 2 above whether they:

(1) agree that their copies of the document should be destroyed; or

(2) do not agree that their copies of the document should be destroyed.

4. By 4pm on Monday 10 February 2020, the Guy Parties will destroy all copies in their possession of documents identified at paragraph 3 agree that their copies of the document should be destroyed above.

5. The Brakes are at liberty from Friday 7 February 2020 to apply the Court for an order for the Guy Parties to destroy all copies of documents falling into paragraph 3 do not agree that their copies of the document should be destroyed. above. Such application shall be:

(1) made no later than Friday 21 February 2019; and

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

(3) The second order sought by the Brakes in their application was an order permitting "*the inspection by the claimants' expert of the defendants' relevant database and/or computer system to verify the date, manner and method of deletion of the alo@ and andy@ accounts on 12 November 2018, as alleged by the defendants*". The parties have resolved that issue by agreeing on the appointment of a joint expert, and they have undertaken to provide the written terms which will be incorporated into the order of the court.

22. I propose to deal with the issues in this way:

(a) Is the enquiries account confidential (as opposed to private) to the Brakes?

(b) What is the consequence of the Guy Parties gaining access to the enquiries account?

(c) Does the iniquity principle apply at that stage?

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

(e) Was there an unlawful scheme?

(f) Should the Guy Parties be given permission to amend their application?

(g) To what extent does the iniquity defence override a claim for breach of confidence?

(h) To what extent does the iniquity defence override a claim under article 8 of the European Convention on Human Rights?

(a) Is the enquiries account confidential as opposed to private to the Brakes?

23. There is a dispute between the parties as to how the enquiries account came to be set up. Mrs Brake, in her first witness statement dated 2 September 2019, says that in October 2009 she set up a domain name for Stay in Style. When the partnership was dissolved in June 2013, she then says that she used the Axnoller domain name and set up an email account, the enquiries account.

24. The Guy Parties challenged this by reference to the evidence of Mr Allen in his witness statement dated 2 August 2019. Mr Allen is a director of Allen Computer Services Ltd ("ACS"), which is a computer support company. He says that in 2015, ACS was instructed by AEL to administer email accounts and provide information technology advice and support. His instructions until November 2018 came from Mrs Brake. He says that the domain name had been obtained by a different internet service provider before ACS was engaged. He says that the email addresses were created, including the enquiries account.

25. On this basis, Mr Sutcliffe QC, on behalf of the Guy Parties, submitted that the enquiries account was therefore an account owned by AEL. He reinforced that submission by pointing to the fact that it was AEL who paid for the costs of administering not only the enquiries account but also the two named accounts. It is the Guy Parties' case that the confidentiality in the enquiries account belongs to AEL, since the services for that account were provided to it. Mr Sutcliffe QC also relies on the terms of an employment contract which was never, in fact, signed.

26. A curious position developed in the course of argument in relation to this document. Mr Sutcliffe QC asserted the contract had been accepted by the conduct of the parties. Mr Davies QC pointed out that that submission was not open to Mr Sutcliffe, because, in paragraph 9 of the Guy Parties' reply in the possession proceedings, they had specifically pleaded that there was no written contract which had been approved or agreed in writing.

27. Mr Sutcliffe QC told me the Guy Parties were going to apply to amend that pleading. This is not a good starting point for the Guy Parties in seeking to rely upon such a document. However, when asked for copies of the employment contract by Dr Guy in an email dated 26 October 2018, Mrs Brake responded the same day, attaching a contract of employment for her and Mrs Brake. Obviously I cannot resolve that issue in this judgment. At most I can say it is highly contentious.

28. Clause 20 of both contracts of employment contained a clause dealing with data processing. Clause 20 provides:

"*20.1 Your personal data will be held by the Employer in its manual and automated filing systems. By signing this agreement you consent to the processing and disclosure of such*

data in order for this agreement of an (sic) to be performed, and for all matters relating to your employment and the business of the Employer.

20.2 You consent to the Employer processing sensitive data including medical information for the purpose of the performance fulfilment of this agreement and determining your fitness to carry out duties on behalf of the Employer.

20.3 You further consent to the Employer processing data regarding sex, status, race, ethnic origin or disability for the purpose of monitoring to ensure equality of opportunity within the Employer.

20.4 You will use all reasonable endeavours to keep the Employer informed of any changes to your personal data."

29. It will be noted that clause 20.1 is dependent upon the signing of the agreement. It is common ground that this agreement was never signed. Although Mr Sutcliffe QC did not argue this, he could have argued that if there were sufficient evidence of conduct to consent to the variation of that clause by conduct so as to not require writing, that requirement could have been waived or varied. Quite rightly, Mr Sutcliffe QC did not argue that because there was no evidence to support it. On this basis, clause 20.1 is not engaged.

30. As to clause 20.2, it seems to me that this clause is aimed at seeing whether an employee is fit to carry on its duties. It is not a wholesale right to invade the privacy of an employee.

31. Clauses 20.3 and 20.4 have no relevance to the issues.

32. For the sake of completeness, I mention the point raised by Mr Davies QC that a provision in the draft agreement relating to access to personal emails was deleted from a draft of the employment contract and it was never sought to be reinserted. Technically, this evidence is inadmissible as a matter of construction. However, Mr Davies relies upon it to demonstrate the kind of clause that would be necessary to provide the Guy Parties with the access which they now claim. As far as it goes, that seems to me a sound submission.

33. The most crucial part of Mr Allen's witness statement is to be found in paragraphs 10 and 11:

"*10. ACS had never had control over who had access to the email accounts. Access was determined by the user of them, who could share the unique passwords as they chose.*

11. It would not have been possible for anyone to access the email accounts without the necessary passwords."

34. The only confidentiality contract between ACS and any of the parties was that between Mrs Brake and ACS dated 23 June 2014. The agreement imposed confidentiality obligations on ACS towards Mrs Brake. None of the exceptions from confidentiality would be relevant in the events which took place. There was no confidentiality agreement in place between AEL and ACS.

35. I must remind myself at this stage that I am dealing with an interim application, and that it is inappropriate for me at this stage to make findings of fact. My interim conclusion is that the enquiries account was confidential to Mrs Brake. In short, she totally controlled it. No one else could or should have had access to it without her consent. Most importantly, it was password-protected, and only she could allow someone else to have access to that password. That is the evidence of Mr Allen.

36. The Guy Parties never had access to that password. They had never requested it until the dismissal of the Brakes. The password is like the key to the front door. If you break into someone's house without the key, you do not know whether you will see papers that are private, confidential or public documents. It is something you should never have done. The owner of the house is entitled to expect that anyone would realise that private papers in the house are as likely as not to be confidential. If you break into an email account, you know you are taking the risk that there will be confidential or private information in the account. The password or the key is the apparent block to the access to such information and renders it confidential.

(b) What is the consequence of the Guy Parties gaining access of the enquiries account?

37. For the reasons which I have set out above, the Guy Parties should have realised that the enquiries account was confidential to Mrs Brake. The Guy Parties knew that they could not access the enquiries account without the password being changed. The correct course would have been to seek the consent of Mrs Brake. They did not do that. Instead, they persuaded Mr Allen to give them a new password and cancelled the old password. Rightly, they realised that the named accounts were obviously private and directed Mr Allen to make copies of those documents and send them to the Brakes. However, as to the enquiries account, the Guy Parties have retained the copies of the enquiries account emails and have had and used access to them. They have deployed them in other proceedings and in this application. They have not done so pursuant to any court order.

38. Procuring Mr Allen to provide them with a password cannot be regarded as the right way to gain access to the enquiries account. If Mrs Brake had not given her consent to access the enquiries account to the Guy Parties, then there were other remedies available to them. They could have sought relief from the court. They were not entitled to embark upon a course of self-help, and then to use the information which they found to advance their case.

39. *Imerman v Tchenguiz* [2011] Fam 116 is an example of a case where the Court of Appeal ordered the return of information wrongly obtained by a wife in egregious circumstances. As Lord Neuberger MR said at paragraph 72:

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

40. Lord Neuberger MR made it clear at paragraph 146 that self-help would not be tolerated by the courts. Lord Neuberger MR stated:

"*146. Mrs Imerman should not be entitled to benefit in any way from the wholesale, wrongful, and possibly criminal, accessing and copying of Mr Imerman's confidential documents, particularly as she could have been expected to apply for a peremptory order (given that the expense of applying for and enforcing such an order would appear to be proportionate in this case, at least on the information we have seen). It would be unrealistic to make too much of this latter point in this case, as the notion that a wife should seek peremptory relief in this sort of case appears, for some reason, to have been thought to be inappropriate as a matter of general practice. Having said that, we should emphasise that, in future, this should not be seen as a good reason for not having sought peremptory relief*."

41. Lord Neuberger MR emphasised at paragraph 149 that there was obvious justice in seeking to eliminate or at least minimise the benefit to Mrs Imerman and the disadvantage to Mr Imerman of being able to use his confidential documents, which she should not have seen and which were accessed and copied unlawfully. The Court of Appeal ordered the return of the documents to Mr Imerman's solicitors on terms that they were preserved and remained in the possession of Mr Imerman's solicitors.

42. In the present application, it seems to me that a similar result should follow. All the documents in the enquiries account should be returned to the Brakes' solicitors, who should preserve them. However, Mr Sutcliffe QC then makes a submission that what is revealed in these documents in the enquiries account is an unlawful scheme and that the so-called iniquity principle applies.

(c) Does the iniquity principle apply at this stage?

43. In *Imerman*, the documents obtained improperly had not been deployed. Lord Neuberger MRpointed out that the problem in the Family Division had been dealt with when the dishonesty on the part of one spouse had already been revealed. As Lord Neuberger MR stated at paragraph 107 of his judgment:

"*107. Are the courts to condone the illegality of self-help consisting of breach of confidence (or tort), because it is feared that the other side will itself behave unlawfully and conceal that which should be disclosed? The answer, in our judgment, can only be: No*."

44. The Court of Appeal drew a distinction between those cases where disclosure had already taken place and those such as *Imerman*, where it had not.

45. At paragraph 109 of his judgment, Lord Neuberger MR said:

"*109. But this case concerns the logically prior question of the appropriate remedy for unlawful activity and breach of confidence before any question arises as to the use to which the information or documents might be put. So it is to that issue that we now turn. We shall deal later with the question of the use (if any) to which such unlawfully obtained information and documents can be put in evidence*."

46. It was in those circumstances that the Court of Appeal in Imerman made the interlocutory orders which I have indicated. It is plain that the Court of Appeal considered that whatever unlawful activity may have been carried out by Mr Imerman in the way he conducted his affairs, there was no right or entitlement which the court would uphold in Mrs Imerman to make use of those documents. The proper place for disclosure of those documents was in the procedural rules in the appropriate proceedings. As Mr Davies QC submitted, it will be a matter for disclosure of relevant documents in relevant proceedings.

47. My conclusion on the use of the information issue is sufficient to dispose of most of the applications. But in deference to submissions made by both counsel on the other issues, I will shortly deal with them.

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

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

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

49. Other than the documents which relate to the business carried on by AEL, the emails in the enquiries account will be private. The means of determining the dividing line has now been agreed in the mechanism set out in paragraphs 1 to 5 of the revised draft order provided by the Guy Parties.

(f) Was there an unlawful scheme?

50. By their application notice dated 26 July 2019, the Guy Parties sought an order under 3(ii) that legal professional privilege does not apply to any advice or communications received by the Brakes concerning the unlawful scheme as described in the witness statement of Geoffrey Guy dated 26 July 2019 in support this application.

51. The unlawful scheme is set out in paragraphs 50 to 70 of Dr Guy's first witness statement dated the 26 July 2019. As set out in paragraph 59 of that statement, the Guy Parties' case was that up until 17 February 2017, SPL was used by the Brakes as a vehicle to purchasing the farm from the Stay in Style estate at an undervalue to them to allow for a sale at its true value in due course, with the vast majority of the financial benefits flowing to the Brakes as part of a premeditated unlawful scheme and to avoid the effect of Sir William Blackburne's orders. These orders were a reference to the application by PWF on 16 January 2015 for a freezing order prohibiting dealing with the farm or cottage which was made by Sir William Blackburne on that date, and a further order dated 1 July 2015 made by Sir William Blackburne continuing the freezing order until it was discharged by Mr Iain Purvis QC on 9 September 2016.

52. The unlawful scheme was then summarised by Dr Guy in paragraph 68 of his first witness statement:

"*a. SPL was established in June 2015 for the purpose of acquiring the Farm at an undervalue (with a sale price of around £2.5m). Such undervalue being created by the Farm being sold without vacant possession given the Brakes' occupation (and SPL being the only bidder willing to purchase on that basis). SPL was a front for the Brakes and was used as a vehicle to conceal their continued beneficial interest in the Farm when it was sold in July 2015;*

b. The Brakes then orchestrated the sale of SPL to TCCEL in late 2016, with the sale concluding on 17 February 2017 for a price of £7m (which included payment towards goodwill in SPL and vacant possession of the Farm which TCCEL has not obtained on account of the Brakes refusal to leave the farm).

c. It is clear from the exchange between Mrs Brake and Mr Chedzoy in December 2016 leading up to the sale of SPL to TCCEL that it was intended the Brakes would receive the net proceeds of the SPL sale. Mrs Brake was concerned that receipt of the proceeds should be as tax efficient as possible and was advised that efficiency could be achieved by Ms Foster gifting the proceeds to the Brakes.

d. In late 2017 Ms Foster gifted the £2.6m sale proceeds (after payment of a mortgage and transaction expenses and tax) to the Brakes, to the apparent 'astonishment' of Mrs Brake.

e. It is apparent from the Letter that the Brakes sought to implement a similar scheme in respect of the Cottage whereby they would persuade the SIS administrator that a bid made by SPL (controlled by the Brakes) of £120,000 for the Cottage was a good price. In fact this appears to be significantly below the true price given the Brakes' bid of £470,000 for the Cottage in December 2018 (and the price of £500,000 paid by TCCEL)."

53. There are a number of difficulties with Dr Guy's description of the unlawful scheme. I summarise these by reference to the subparagraphs of paragraph 68 of Dr Guy's first witness statement:

(a) There is no evidence at present to show that 2.5 million was not the market value of the farm. Indeed, there is an email dated 13 November 2019 from the joint liquidator of the partnership sent to the Brakes' solicitors concluding that there had been no breach of section 238 of the Insolvency Act 1986. He concluded that:

"*However, I am unable to conclude that there is at present sufficient evidence for the liquidators of SIS to pursue a claim under section 238 of the Insolvency Act 1986 because the LPA Receivers would no doubt argue that they tested the market, sold to the highest bidder in good faith and relied upon their own valuation evidence to support the sale to Sarafina*."

I take into account that the liquidator expressed the reservation that he had no means to carry out further investigation and take legal advice. I also take into account the submission of Mr Sutcliffe QC that there was a later valuation at a higher price but on a different basis, but this was what the market could achieve. As to the allegation

that SPL was a front for the Brakes so that the Brakes continued their beneficial interest in the farm when it was sold in July 2015, it depends on the court rejecting the evidence of Mrs Foster. Mr Sutcliffe QC, in characteristic strong and skilful submissions, cited nine examples of inconsistencies which he submitted should drive me to that conclusion. Against that I must weigh the clear evidence that shows that Dr Guy took an active part in negotiating the purchase price and the way in which it should be allocated. Dr Guy wanted to reward the Brakes so that he could have the benefit of their services when he took over the farm. There is nothing to show that anyone else was prepared to pay the high price of some £7 million for the farm which Dr Guy paid. It is not the case that the property was marketed at that price. It appeared to be pure happenchance that Dr Guy wanted to pay this price, and this enabled Mrs Foster to make the gift to Mrs Brake of £2.6 million.

(b) It seems to me unfair to describe the Brakes as orchestrating the sale. It was Dr Guy's idea. Mrs Brake enabled Mrs Foster, through SPL, to purchase the farm. There was no secrecy about this between Mrs Brake and the Guy Parties.

(c) The emails between Mrs Brake and the accountants merely show the parties addressing tax issues. This does not indicate anything unlawful.

(e) A careful examination of the documents does not support the assertion that the Brakes were doing anything improper. It is apparent that Dr Guy was fully involved in the pricing of the cottage.

54. At paragraph 70 of Dr Guy's first witness statement, Dr Guy states that he was advised that the Brakes' involvement in the sale of the farm and the receipt of the proceeds is a prima facie breach of the terms of the first freezing order granted by Sir William Blackburne on 16 January 2015. Even if that were made out, it would not be a matter for the Guy Parties to take enforcement action.

55. The second iteration of the unlawful scheme appeared in the amended application notice dated 21 November 2019. In that amended application at paragraph 3(ii), Chedington seeks a declaration that:

"*... in respect of all documents sent or received by the Brakes on enquiries@axnoller.co.uk in furtherance of the following matters:*

(*1) The acquisition of West Axnoller Farm by Saffron Foster and/or Sarafina Property Limited (SPL);*

(2) Valuations of West Axnoller Farm up to and including its acquisition by SPL on 23 July 2015, including communications between the Brakes and those valuing West Axnoller Farm;

(3) The engagement of the Brakes in any capacity on behalf of SPL or any business pursued by SPL from 23 July 2015 until 23 January 2016;

(4) Receipt of monies and benefits in kind by the Brakes from Saffron Foster and/or SPL from 23 July 2015 to 9 September 2016, including all statements for bank accounts held by, or on behalf of, the Brakes (including account number 43955214);

(5) The sale of SPL, its assets and/or its business;

such documents are not private, confidential or privileged by reason of the iniquity principle."

56. In addition, Chedington seeks to rely on the second witness statement of Dr Guy dated 18 October 2019, given in reply to the witness statement of Mrs Brake dated 2 September 2019.

57. In its third iteration, as appears in the Guy Parties' revised draft order, paragraph 3 of the order is deleted and is replaced by these words:

58. "*Any services rendered by the Brakes directly or indirectly to Saffron Foster or a company connected to her in respect of West Axnoller Farm or any business operated therefrom which was conducted by the former partnership or similar thereto between 23 July 2015 and 23 January 2016*."

59. Paragraph 5 was also amended so that it now reads:

"*The sale of the share in SPL, its asset and/or its business*."

60. In short, the court is being asked to declare that the five categories of documents in iteration 3 of the unlawful scheme are not private, confidential or privileged by reason of the iniquity principle. The unlawful scheme not defined in the draft order. However, the unlawful scheme is said to be set out in the second witness statement of Dr Guy dated 18 October 2019.

61. In paragraphs 87 to 88, Dr Guy deals with the unlawful scheme. In paragraph 88, he sets out the facts upon which he relies, and then in paragraph 88(x), he says the scheme involves the following unlawful actions:

"*(a) Mr Williams and Ms Foster knowingly breaching (or assisting in breaching) the First Blackburne Order and Second Blackburne Order;*

(b) The Partnership and therefore the Partnership's creditors (in particular Ms Brehme and PWF) have been defrauded;

(c) The Brakes have breached fiduciary duties to the Partnership and PWF;

(d) Ms Foster has breached her duties to SPL by causing SPL to be involved in an unlawful scheme;

(e) The Brakes, Ms Foster and Mr Williams have committed the tort of unlawful means conspiracy;

(f) Mr Williams has dishonestly assisted the Brakes' breaches of fiduciary duty referred to above;

(g) The Brakes, Ms Foster and Ms Holt deceived TCCEL in its acquisition of WAF and its business; and

(h) The Brakes have breached Insolvency Rule 2916/1024 by failing (in their personal bankruptcies) to give notice of their beneficial interest in SPL."

62. I note that allegation (a) involves the breach of the first and second orders of Sir William Blackburne. I have already commented on the relevance of this in the context of this application. I am far from convinced that the facts bear the meaning given and that they lead to the conclusions identified by Dr Guy in paragraph 88(x).

63. This amended application now appears to be far wider than LPP. As to LPP, it is common ground that the advice given by a solicitor in furtherance of future proposed criminal activity will not be treated as privileged because it is not within the scope of legal professional privilege, see the judgment of Mr Justice Popplewell in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 Comm at paragraph 76:

"*... communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality. It is this which prevents legal professional privilege attaching to communications for such purpose*."

64. As to that, there is no document showing any such advice from a solicitor. There are no grounds for me making such a declaration in relation to LPP. In any event, I am not satisfied that the unlawful scheme is identified with sufficient particularity to make any satisfactory finding. For this purpose, I must be satisfied that there is a case of iniquitous conduct which is supported by prima facie evidence and not mere allegation. Some courts have described this as a need for "*a strong prima facie case*". This test is most conveniently set out in paragraphs 34 to 39 of the judgment of Mrs Justice Moulder in *Hotel Portfolio II Ltd v SMA Investments Holdings Ltd* [2019] EWHC 1754 Comm.

65. In my judgment, the evidence does not reach that standard when read in totality. Further, in considering this evidence, I must take into account the submission of Mr Davies QC that the Guy Parties have cherry-picked the documents upon which they rely.

66. It is a fact there are still 30,000 documents which the Brakes have not seen. They have been able to counter some allegations by reference to the documents which they already possess, but it is apparent that the documents disclosed upon which reliance is made by the Guy Parties do not present the full picture. The danger of taking documents out of context was illustrated by the paper produced overnight by Mrs Brake showing the correct accounting treatment of payments. It demonstrates how complex the process was and how wrong we would be to draw an inference from one specially chosen document.

67. I conclude that the Guy Parties do not satisfy the court threshold test of strong prima facie case of unlawful conduct.

(f) Should the Guy Parties be given permission to amend their application?

68. In the light of the above, the question answers itself. As I have concluded, the threshold test is not met for the unlawful scheme. Allowing the amendment would be pointless. Had I concluded that the threshold test had been met by the parties, I would not have allowed this amendment for a number of reasons.

    (1) No explanation whatsoever has been given for such a late application. It was made at the end of the fourth day of the hearing.

    (2) At the telephone hearing on 19 November 2019, I refused to allow the Guy Parties to put in certain further evidence, since it was not practical at that stage for the Brakes to be able to obtain witness evidence to deal with it. It is not right that the Guy Parties should have a second bite of the cherry. The Brakes have deemed it not necessary to put in such evidence on their application, but that does justify the Guy Parties in saying the same must apply when they make an application in their own right. There are different considerations in play.

    (3) Even in its third iteration, the order sought is not of a sufficiently clear kind that the court could make an order which would be in terms with which a party would be able to comply with certainty.

(g) to what extent does the iniquity defence override a claim for breach of confidence?

69. If I had found that there had been a strong prima facie case of iniquitous conduct, I would have had to decide whether that iniquity destroyed the confidence. As pointed out by Lord Goff in *Attorney General v The Observer* (known as "the Spycatcher case") [1991] AC 9 at 282 F to G:

    "*In origin, [the defence of iniquity] was narrowly stated on the basis that a man cannot be made 'the confidant of a crime or fraud': see Gartside v Outram [1857] 26 LJ Ch 113, 114, per Sir William Page Wood V-C*."

70. Although *Spycatcher* deals with the disclosure which is required in the public interest, it did not detract from the basic principle that there can be no confidence in iniquity. The issue is what will the court permit a person who is in possession of a document showing iniquity to do with that document. If the person wants to make a public disclosure of that document in the public interest, then it will depend on the nature of the iniquity. In many cases, the proper course would be to refer the matter to a prosecuting or regulatory authority. In some cases, only publication in the media will suffice.

71. This same principle was recognised by the Court of Appeal in *Weld-Blundell v Stephens* [1920] 1 KB 520. At page 527,Bankes LJ drew a distinction between a contract to keep secret the proposed commission of the crime, in which the duty to disclose a criminal or illegal intention would override the private duty to respect and protect confidence. But if the wrong was completed, then public policy is best served by respecting the confidence, rather than abusing it. Warrington LJ at page 535 of the judgment concluded that there was no reason in public policy for an agent to disclose evidence of a private wrong committed by his principal.

72. In my judgment, it would be wrong in principle for a court to make a ruling that an unlawful scheme could permit any form of disclosure. The nature of the disclosure will inform the balancing exercise which the court performs.

73. Further, in my view, that balancing exercise is best performed when judging relevance and inspection in the disclosure process of particular proceedings. For example, in the employment proceedings, the Employment Tribunal will have to decide on an application by the employer whether it is appropriate to order disclosure from the Brakes of any particular class of documents. It will consider whether the request relates to properly pleaded issues, or whether it is a mere fishing exercise. In the cottage proceedings, the court will again consider the issue of relevance. The court hearing that issue will bear in mind what Mr Davies QC has asserted: that the liquidators, as a result of disclosed documents, are not defending the proceedings, and the Guy Parties have not pleaded a defence of bona fide purchase of the value. These are not issues which are appropriate for consideration now by this court.

(h) To what extent does the iniquity defence override a claim under article 8 of the European Convention on Human Rights?

74. Mr Davies QC, on behalf of the Brakes, submitted that there is a distinction between breach of privacy cases before and after the enactment of article 8 of the Human Rights Act 1998. He accepts that before the enactment of article 8, the iniquity defence was available to defend a breach of privacy. He submits that post the enactment of article 8, a rights-based approach is necessary to the assessment of whether the disclosure of private information infringes a person's rights. This is because privacy rights are not now so much about public interest in maintaining confidences, but rather an obligation to respect privacy under the Convention. Privacy is not weighed as a public interest as such against another public interest. Rather, it is weighed on its own merits against any public interest that is shown to exist, and, again, freedom of expression arguments under article 10 if applicable. He quotes from *Gurry on Breach of Confidence*, second edition, at paragraph 16.59, which describes the pre-Human Rights Act case law as "*largely of historic interest only*" when assessing privacy rights under article 8.

75. However, it must be remembered that the Convention is not directly enforceable in the United Kingdom. The cause of action for breach of privacy has to be interpreted in accordance with article 8, but Mr Davies QC submits that the Spycatcher limitation no longer has relevance in privacy cases.

76. It seems to me that the answer to this question can be answered by comparing article 8.2 and article 10.2 of the Convention. Article 8.2 provides:

> "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*."

77. Article 10.2 provides:

"*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

78. In my view, the reference to the rights of others in article 10.2 is not a reference to or restricted to Convention rights, because the rights of others are included in the list of other matters, including the prevention of the disclosure of information received in confidence. This must extend beyond protection of purely private information, which is beyond Convention rights. Similarly, the protection of reputation is also not a Convention right, although some attacks on a person's reputation may engage article 8. The rights of others in article 8.2 should be read consistently with article 10.2.

79. I referred the parties to *Cream Holdings Ltd v Banerjee & Ors* [2005] 1 AC 253, and each party has sent me a note in relation to that case. The principal issue in that case concerned the meaning of the word "*likely*" in section 12(3) of the Human Rights Act 1998. The relevance of this case is the balancing act which was carried out by the House of Lords. The House of Lords concluded that the claimant's right to prevent the disclosure of information received in confidence was a right which was not a Convention right, but it was recognised within article 10.2 and it could be weighed against the defendant's article 10 rights. There was no suggestion that the claimant's non-Convention right should be afforded less weight on the ground that it was not a Convention right.

80. In the present case, if a case were made out for the disclosure of a confidential document, then a court order for such disclosure would be based on a balancing of those rights against the need for the iniquity to be revealed. As ever, the balancing exercise must be based on all the relevant facts, including the purpose of the disclosure.

Conclusion

81. It follows that the application by the Guy Parties should be dismissed. The Brakes' application has in substance been made out. There are matters which have been agreed between the parties, and I will hear argument on the precise form of the order to reflect the judgment which I have given.