Neutral Citation Number: [2021] EWHC 670 (Ch)

Case No: BL-2019-BRS-000028

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

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

Date: 25/03/2021

Before :

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

- -

Between :

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

- -
- -

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

Hearing date: 27 November 2020

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Approved Judgment

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

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

HHJ Paul Matthews :

Introduction

1. This is my judgment on a preliminary issue arising in the claim by the claimants for a final injunction and damages in respect of the alleged accessing, retention and deployment by the defendants of emails said to be private and confidential to the claimants and held within three email accounts. As it happens, part of that claim was tried during the same week as this issue, together lasting some five days. The preliminary issue and the part trial were heard first, because the full claim would have taken between 10 and 15 days to try. If the results of this part of the trial and of the preliminary issue show that it is necessary to go on to try the "iniquity defence", then the time taken by this part of the trial and the preliminary issue will not have been wasted, because these always needed to be decided. But if they show that the trial of the remainder is not necessary, considerable time and money will have been saved. I make clear that I have prepared this judgment first, and only afterwards did I embark on the judgment of the part-trial. In particular, all findings of fact in the latter were made after reaching my conclusions for this judgment.

2. This claim forms a discrete part of wider ranging litigation between the claimants on the one hand and the defendants on the other. I will not take time here to set out the details of the various claims between the parties, or the factual background which has led them to this point. In my judgment on the part-trial (to be delivered immediately after this judgment) I summarise these matters at paragraphs [4]-[13], and the reader of this judgment is referred to those paragraphs. The present claim (usually referred to by the parties as the "documents claim") concerns email accounts which were operated by the claimants at the time of their dismissal from the employment of the third defendant in November 2018, and emails and other data held within those accounts, to which the defendants subsequently gained access. The defendants thereafter shared this information with their lawyers and (in part at least) with some others, including the claimants' trustees in bankruptcy.

3. The claimants make two distinct claims against the defendants. First of all, they say that the defendants in accessing and sharing their information have committed the well-established equitable wrong of breach of confidence. Secondly, they say that the defendants in accessing and retaining their private information have committed the more recently established tort of misuse of private information. This wrong has been developed in recent times, particularly since the Human Rights Act 1998 enacted domestic rules of law equivalent to certain of the rights under the European Convention on Human Rights, and in particular article 8. The defendants deny both these claims. Part of the defence put forward by the defendants is that, even if the factual elements for either of the two claims advanced by the claimants were present (which they deny), in either case the defendants would be entitled to rely on the defence that there was a public interest in accessing, retaining and sharing the emails and the data contained in them. This defence is referred to for convenience (although inexactly) as the "iniquity defence".

4. The preliminary issue before the court, and the subject of this judgment, is the question

> "whether on the facts pleaded in paragraphs 16-47 and 75 of the Defence the 'iniquity defence' is available to the defendants as a matter of law".

Like the part trial, it was heard remotely, using the Zoom platform, curated by a third party provider. It was also livestreamed over the internet on YouTube.

5. The claim form was issued on 2 September 2019. On the same day the claimants sought an interim injunction to restrain the defendants from making further disclosure or other use of the emails and information in the accounts. On 26 July 2019 the defendants had applied in existing insolvency proceedings between the same parties for a declaration that the claimants were not entitled to assert legal professional privilege in respect of various of the documents in the account, as having been created in furtherance of an unlawful scheme. These two applications were heard by Mr John Jarvis QC, sitting as a deputy High Court judge, over seven days between 18 November 2019 and 27 November 2019. He gave judgment on 28 November 2019, dismissing the defendants' application as to legal professional privilege, and holding that the claimants were entitled to an interim injunction pending trial in relation to emails and information in the accounts. His order also required the defendants to provide a full copy of one of the accounts to the claimants, so that they could review them, distinguishing between private and business emails. Subject to any dispute between the parties (which would have to be resolved by the court) the claimants would then delete the business emails and defendants would delete the private emails. I shall have to refer to his judgment in more detail later on.

The claimants' submissions

6. Mr Stephen Davies QC, on behalf of the claimants, made three main submissions on the preliminary issue. First, he said that there was no "iniquity" defence available to a claim in the tort of misuse of private information. Second he said that that defence was not available even in relation to a claim for breach of confidence, unless the information was *lawfully* received by the defendant; it was not open to a defendant who "breaks into" the claimant's information and takes it unlawfully to rely on this defence. Thirdly, he says that there is no sufficient public interest on which the defendants can rely in this case, because there is no public interest in the past commission of civil wrongs by persons who have no public *persona*.

The first submission

7. As to the first of these submissions, Mr Davies QC referred me to the decision of the Court of Appeal in *Imerman v Tchenguiz* [2011] Fam 116. In that case, the litigation was twofold: first between a divorcing husband and wife, and second between the husband and his brothers-in-law. Lord Neuberger MR, giving the judgment of the court (himself, Moses and Munby LJJ) introduced the case in this way:

> "2. These are interlocutory appeals. They arise in the context of ancillary relief proceedings between Vivian Imerman and Elizabeth Tchenguiz Imerman. They raise fundamentally important questions in relation to the so-called *Hildebrand*

> rules: see *Hildebrand v Hildebrand* [1992] 1 FLR 244. A preliminary overview will help to identify the key issues which arise.
>
> 3. Fearing that their brother in law [the claimant] would conceal his assets, one of Mrs Imerman's [the wife's] two brothers, possibly with the help of others, accessed a server in an office which they shared with Mr Imerman and copied information and documents which Mr Imerman had stored there. ...
>
> 4. In summary proceedings in the Queen's Bench Division against the defendants who had gained access to Mr Imerman's documents stored on the server, Eady J on 27 July 2009 restrained the defendants from communicating or disclosing to third parties (including [the wife and her solicitors]) any information contained in the documents and from copying or using any of the documents or information contained therein. He also required the defendants to hand over all copies of the documents to Mr Imerman. The defendants appeal.
>
> 5. Mr Imerman sought the return of [the documents and any copies], and an order enjoining [the wife and her solicitors] from using any of the information obtained therefrom. On 9 November 2009 Moylan J decided that [the documents] should be handed back to Mr Imerman for the purpose of enabling him to remove any material for which he claimed privilege, but that Mr Imerman would then have to return the remainder of [them] to Mrs Imerman for use by her in connection with the matrimonial proceedings. Mr Imerman appeals against that decision. Mrs Imerman cross-appeals against the decision, seeking (a) more control over the process by which Mr Imerman can assert privilege, and (b) a reversal of Moylan J's refusal to restrain Mr Imerman from disposing of certain memory sticks."

8. Turning to the substance of the decision, Mr Davies QC referred me in particular to paragraph [65] of the judgment of the court, but it is necessary to see that paragraph in its proper context. At [64]-[69], Lord Neuberger MR said this:

> "64. It was only some twenty years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. He said (page 281) that confidence could be invoked 'where an obviously confidential document is wafted by an electric fan out of a window … or … is dropped in a public place, and is picked up by a passer-by.'
>
> 65. The domestic law of confidence was extended again by the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 21, [2004] 2 AC 457, effectively to incorporate the right to respect for private life in article 8 of the Convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Argyll v Argyll* and *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804. In the latter case, Laws J suggested (page 807) that the law recognised 'a right to privacy, although the name accorded to the cause of action would be breach of confidence'. It goes a little further than nomenclature in that, in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, the House of Lords held that there was no tort of invasion of privacy, even now that the Human Rights of Act 1998 is in force. Nonetheless,

following its later decision in *Campbell*, there is now a tort of misuse of private information: as Lord Phillips of Worth Matravers MR put it in *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125, a claim based on misuse of private information has been 'shoehorned' into the law of confidence.

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

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

> 'Cases asserting an "old fashioned breach of confidence" may well be addressed by considering established authority [whereas] cases raising issues of personal privacy which might engage article 8 ... will require specific focus on the case law of the European Court of Human Rights'.

However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the confidentiality *genus*, the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past twenty years.

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

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."

9. What this case shows is that the tort of misuse of private information is now established in English law. At this stage I draw attention in particular to the statement (at [67]) by the court that

> "privacy is still classified as part of the confidentiality *genus*, [so that] the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality…"

I also draw attention to the statement (at [69]) that:

> "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)…" (emphasis supplied).

10. Mr Davies QC further submitted that there was a two-stage test in considering claims under article 8, and that the "iniquity" defence could not come into play at stage 1, but only at stage 2. He referred to the decision of HHJ Lewis (sitting as a High Court judge) in *JQL v NTP* [2020] EWHC 1349 (QB), where the judge said:

> "134. An overview of the general principles which relate to claims for misuse of private information was set out by Nicklin J in *ZXC v Bloomberg LLP* [2019] EWHC 970 (QB), at [110]:
>
> > 'There is a large degree of agreement as to the legal principles to be applied:
> >
> > (i) liability for misuse of information is determined applying a two-stage test: (1) does the claimant have a reasonable expectation of privacy in the relevant information; and (2) if yes, is that outweighed by countervailing interests, typically freedom of expression under Article 10: *McKennit -v- Ash* [2008] QB 73 [11];

(ii) stage one – expectation of privacy – is an objective assessment; what a reasonable person of ordinary sensibilities would feel if s/he were placed in the same position as the claimant and faced with the same publicity: *Murray* [35]; *In re JR 38* [2016] AC 1131 [88];

(iii) the Court will consider all the circumstances, but particular matters may include (*Murray* [36]; *In re JR 38* [60]):

a. the attributes of the claimant;

b. the nature of the activity in which the claimant was engaged;

c. the place at which it was happening;

d. the nature and purpose of the intrusion;

e. the absence of consent and whether it was known or could be inferred;

f. the effect on the claimant; and

g. the circumstances in which and the purposes for which the information came into the hands of the publisher.

(iv) whether the availability in the public domain of the same or similar information leads to the conclusion that the claimant cannot have a reasonable expectation of privacy is a matter of fact and degree, to be assessed in the individual case: the question is not whether the information was generally accessible, but rather whether the remedy of injunction would serve a useful purpose: *PJS -v- News Group Newspapers Ltd* [2016] AC 1081 [26], [32];

(v) at stage two – the balancing exercise – neither Article 8 nor Article 10 has precedence over the other; where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case; the justifications for interfering with or restricting each right must be taken into account; and the proportionality test must be applied, the so-called ultimate balance: see *PJS* [20]; *In re S* [2005] 1 AC 593 [17];

(vi) courts need to be on guard against bringing into account at stage one considerations which should more properly be considered at stage two: *Campbell -v- MGN Ltd* [2004] 2 AC 457 [21];

(vii) the "decisive factor" at stage two is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest: *Von Hannover -v- Germany* [2004] EMLR 21 [76]; *Ntuli -v- Donald* [2011] 1 WLR 294 [20]; *K -v- News Group Newspapers Ltd* [2011] 1 WLR 1827 [10(5)]

(viii) the ECtHR has given some broad guidance on factors relevant to the balancing exercise in *Axel Springer -v- Germany* [2012] EMLR 15 [79]:

> a. whether the publication contributes to a debate of general interest;
>
> b. how well-known is the person concerned and what is the subject of the publication;
>
> c. the prior conduct of the person concerned;
>
> d. the method of obtaining the information and its veracity; and
>
> e. severity of the sanction imposed: the proportionality of the interference with the exercise of the freedom of expression.'
>
> 135. The tort of misuse of private information protects a claimant against intrusion. In *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 the Supreme Court considered the principles relating to the tort of misuse of private information. Having reviewed those, the Court (Lord Mance) at [32], held that, in relation to the disclosure or publication of purely private sexual encounters: '…(ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made—especially if it occurs in a different medium…' "

11. Mr Davies QC pointed out that the judge there made no reference to any question of an "iniquity" defence in relation to stage I of the enquiry. He also referred to the textbook *Toulson and Phipps on Confidentiality*, 4th edition, 2020. He said, quite correctly, that chapter 5 of this work, dealing with the action for breach of confidence, also discusses the "iniquity" defence in detail. But chapter 7 of the textbook, dealing with the action for misuse of private information, does not mention it under this name at all. Similarly, *Gurry on Breach of Confidence*, 2nd edition 2012, deals with "the Public Interest" in chapter 16. After an introduction, the chapter contains two different sections, one being "the public interest defence to the action for breach of confidence", and the other being "defences to claims for misuse of private information".

12. Mr Davies QC accordingly submits that intrusion into fundamental rights such as that found in article 8 of the ECHR can only be justified either by qualifications to the fundamental right concerned or balancing rights elsewhere in the Convention (stage 2 of the two-stage test). Rules developed in the law relating to breach of confidence, such as the "iniquity" defence, cannot justify such intrusion. He points out that the cases referred to on behalf of the defendants in footnote 13 in paragraph 48 of their skeleton all concerned breach of confidence, and not claims for misuse of private information based on article 8. Indeed, as he further pointed out, the defendants' skeleton argument does not refer either to article 8 or article 10 as such.

13. In support of his submission, Mr Davies QC took me through a number of cases: *Foxley v United Kingdom*, 20 June 2000, ECtHR; *Haig v Aitken* [2001] Ch 110; *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, HL, *HRH the Prince of Wales v Associated Newspapers* [2008] Ch 57; *Copland v United Kingdom* (2007) 45 EHRR 37, ECtHR; *OBG v Allan* [2008] 1 AC 1; *Murray v Express Newspapers* [2009] Ch 481; *Mosley v News Group Newspapers* [2008] EMLR 20, *Barbulescu v*

Romania, 5 September 2017, ECtHR; and *Richard v BBC* [2019] Ch 169. I have read them all, and I discuss the relevant cases and the merits of the submission in due course. In addition, I mention in passing *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch), as a case decided by Warby J (as he then was) between argument and judgment in this case, but, although it contains a summary of some of the relevant law, I do not consider that it is necessary to invite submissions on it.

The second submission

14. Mr Davies QC's second submission was that there is no "iniquity defence" to a claim based on breach of confidence where the defendant has accessed the information without consent or otherwise unlawfully and later seeks to justify his access on the basis that the information so accessed is alleged to relate to "iniquity". In this connection, Mr Davies QC referred me to (i) the decision of Mr John Jarvis QC in this litigation in November last year ([2019] EWHC 3332 (Ch)), when he was considering whether to impose an interim injunction to restrain the defendants' use of the documents and information the subject of this claim pending trial, and also to (ii) the decision of Nicol J in *Pharmagona Ltd v Taheri* [2020] 1 WLR 3577.

15. In his decision, Mr Jarvis QC said:

> "70. Although *Spycatcher* [*AG v Observer Ltd* [1990] 1 AC 109] 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."

16. In *Pharmagona*, Nicol J said:

> "36. In support of the Claimant's application for an injunction, Mr Jones relied heavily on *Imerman v Tchenguiz* (see above). He referred me in particular to the following passages in the Master of the Rolls' judgment,

> '[72] If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information.
>
> [73] An injunction to restrain passing on or using the information would seem to be self-evidently appropriate – always subject to any good reason to the contrary on the facts of the case. If the defendant has taken documents, there can almost always be no question but that he must return them: they are the claimant's property. If the defendant makes paper or electronic copies, the copies should be ordered to be returned or destroyed (again in the absence of good reason otherwise). Without such an order, the information will still be "out there" in the possession of someone who should not have it. The value of the actual paper on which any copying has been made will be tiny, and where the copying is electronic, the value of the device on which the material is stored will also be tiny, or where it is not, the information (and any associated metadata) can be deleted and the device returned.
>
> [74] A claim based on confidentiality is an equitable claim. Accordingly, the normal equitable rules will apply. Thus, while one would normally expect a court to grant the types of relief we have been discussing, it would have a discretion whether to refuse all or some of the relief on familiar equitable principles. Equally, the precise nature of the relief which would be granted must depend on all the circumstances of the particular case: equity fashions the appropriate relief to fit the rights of the parties, the facts of the case and, at least sometimes, the wider merits. But, as we have noted, where the confidential information has been passed by the defendant to a third party, the claimant's rights will prevail as against the third party, unless he was a bona fide purchaser of the information without notice of its confidential nature.'

[…]

43. I did not find Mr Jones's reliance on *Imerman v Tchenguiz* assuaged my concerns:

i) The Court of Appeal was there concerned with a case where there had never been a justification for the defendant to have access to the confidential information in question. That was not the case here since, at least during his employment, the first defendant was entitled to have access to the information in question.

ii) It was the premise for the Master of the Rolls' observations that the defendant was threatening to disclose the information (see [72]). I am examining the evidence for there being such a threat in this case.

> iii) In any event, the Court was careful to recognise that everything depended on the facts of the particular case and that ordinary equitable principles (of which delay by the claimant is one) and even the wider merits may justify a different course."

The third submission

17. Mr Davies QC's third submission was that there is no public interest in the commission of past civil wrongs by private persons who have no public *persona*. Unlike the other two submissions, this third submission applied to both the misuse of private information and breach of confidence claims. He said there was no sufficient public interest pleaded in the defence. In particular, the defendants were not creditors in the bankruptcy or the liquidation, and the trustee in bankruptcy and the liquidators have not carried out an investigation into the alleged iniquity although they had the powers to do so in accordance with the law. There was no public interest in simply trawling through all these documents.

18. Mr Davies QC referred me again to *Pharmagona Ltd v Taheri* [2020] 1 WLR 3577, where Nicol J said that the defendants claimed (at [22])

> "that their position [was] protected by the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996. They deny that they have acted for private gain."

19. But he submitted that in the present case there was no public interest that could be invoked by the defendants. He referred me to the defence at paragraph [75], which he said was the only paragraph that could even be argued to plead a public interest:

> "Further, and in any event:
>
> (1) It is denied that any emails evidencing wrongdoing on the part of the Brakes are confidential or private against the Guy Parties. The Guy Parties are entitled to use such documents in their litigation with the Brakes.
>
> (2) It is denied that confidentiality and privacy can be asserted over any emails which evidence matters that may be the subject of legitimate interest to the Brakes' trustees in bankruptcy or the Partnership's liquidators and which the Guy Parties wish to disclose to the same.
>
> (3) It is denied that any emails evidencing or sent in furtherance of the Unlawful Scheme are confidential or private."

20. Mr Davies QC further submitted that the first subparagraph did not amount to a public interest in law, and that the third did not identify a public interest at all. In relation to the second subparagraph, he reminded me that the defendants were not creditors in, but in fact strangers to, the insolvency proceedings. The trustee in bankruptcy and the liquidators had all the powers that they needed under the insolvency legislation. Accordingly, he submitted that there was no public interest involved in the defendants' deciding that any of the information or documents "may be the subject of legitimate interest" to the insolvency offices and passing it to them. He did not

address me, in this context, on the allegations made elsewhere in the defence, and which I refer to in summary form below.

The defendants' submissions

21. For the defendants, Mr Sutcliffe QC said that the defendants' case was that there had been

> "very serious contempts of court arising from intentional breaches of freezing orders and prohibitory injunctions"

and that the claimants had

> "breached their fiduciary duties as partners, dishonestly assisted"

by others, including an unlawful means conspiracy, and also breached duties arising under the Insolvency Act 1986, amongst other things. This is summarised in more detail in the defendants' skeleton argument, at [41].

22. I am not going to spend time setting them out verbatim, but in summary form the main allegations in the defendants' pleaded defence which are relevant to this argument are the following. The defendants say that the claimants had engaged in an unlawful scheme to acquire West Axnoller Farm at an undervalue, in breach of court orders and their fiduciary duties as partners in Stay in Style, together with advice and assistance provided by Mr Desmond Phillips and Mr Peter Williams (at [16]-[17]). Next, the defendants say that the claimants' affidavits sworn in compliance with the order made by Sir William Blackburne on 1 July 2015 were false ([35]). They go on to allege that, in breach of (i) their fiduciary duties as partners in Stay in Style, (ii) the freezing injunction made by Newey J on 8 July 2015 and renewed thereafter until it was discharged in September 2016, and (iii) the earlier order made by Sir William Blackburne on 16 January 2015, the claimants acquired the farm indirectly through Mrs Foster and her company Sarafina Properties Ltd from the LPA receivers, or alternatively that Mrs Foster and her company were nominees for them, and that they so acquired it at a substantial undervalue, so that unsecured creditors of the partnership (including Mrs Brehme) received nothing (at [38]-[40] and [45]-[46]). The defendants go on to plead that the claimants further breached the order of Sir William Blackburne dated 1 July 2015 by working within the business of Sarafina Properties Ltd when prohibited from doing so (at [41]) and breached their duties under section 333 of the Insolvency Act 1986 by hiding assets and income from their trustees in bankruptcy in ways specifically pleaded (at [42]). All these paragraphs are within the parameters set out in the preliminary issue, to be taken into account in deciding that issue.

23. For the purposes of this preliminary issue the court has to assume that that the defendants will succeed in proving these allegations at trial. On that basis, the defendant submitted that they should be allowed to retain and then pass documents evidencing these wrongs to the trustees in bankruptcy, the liquidators of the partnership and the principal creditor and former partner of the claimants, Patley Wood Farm (whose principal is Mrs Lorraine Brehme).

24. Mr Sutcliffe QC referred me to *Gartside v Outram* (1857) 26 LJCh (NS) 113, *Initial Services Ltd v Putterill* [1968] 1 QB 396, CA, *Lion Laboratories v Evans* [1985] 1 QB 526, CA, *AG v Observer Ltd* [1990] 1 AC 109, *Pharmagona Ltd v Taheri* [2020] 1 WLR 3577, *Imerman v Tchenguiz* [2011] Fam 116, *Metropolitan Police Commissioner v Times Newspapers* [2014] EMLR 1, *Weld-Blundell v Stephens* [1919] 1 KB 520, CA, *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, *Brevan Howard Asset Management v Reuters Ltd* [2017] EMLR 28, and *HRH the Prince of Wales v Associated Newspapers* [2008] Ch 57. I will hope to be forgiven for not examining them all in detail. I shall discuss the merits shortly.

The claimants' reply: a pleading point

25. In reply, Mr Davies QC once again submitted that the only defences available to a claim based on misuse of private information (and therefore based, he says, on article 8(1) of the European Convention on Human Rights ("ECHR")) are those in article 8(2) and the other rights and freedoms in the same convention, such as article 10 (freedom of expression). Mr Davies QC further submits on the present application that the defendants have not pleaded either article 8(2), article 10 or indeed any other ECHR article in their defence.

26. For the sake of convenience, I set out the text of these articles here:

> "Article 8 Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. 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.
>
> Article 10 Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. 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 national security, territorial integrity or 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."

Discussion

The first submission

27. Mr Davies QC's first point is that there is no "iniquity" defence available to a claim in the tort of misuse of private information. He says the only defences available to such a claim are those in article 8(2) and the other rights and freedoms in the same convention, such as article 10. I note in passing that that Mr Jarvis QC discussed this question in his judgment in November last year on the interim injunction application ([2019] EWHC 3332, [74]-[80]). On that occasion, the judge recorded that Mr Davies had accepted that

> "before the enactment of article 8, the iniquity defence was available to defend a breach of privacy,"

but submitted that

> "post the enactment of article 8 … 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."

28. Mr Jarvis QC considered the terms of articles 8 and 10, and in his judgment held:

> "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."

29. I respectfully agree. *Imerman* (at [69]) makes clear that there can be defences to the claim. And again, at [73], Lord Neuberger MR said:

> "An injunction to restrain passing on or using the information would seem to be self-evidently appropriate – *always subject to any good reason to the contrary on the facts of the case*. If the defendant has taken documents, there can *almost always* be no question but that he must return them: they are the claimant's property. If the defendant makes paper or electronic copies, the copies should be ordered to be returned or destroyed (*again in the absence of good reason otherwise*)" (emphasis supplied).

30. The provisions of article 8(2) and article 10 are wide enough to cover the parameters of the public interest ("iniquity") defence as understood in relation to claims in breach of confidence. I consider it to be formalistic to worry about whether there is such a defence *under that name* in relation to claims for misuse of private information, or whether strictly speaking it is only the terms of article 8(2) or article 10 (or, indeed,

some other article) which can provide a defence. The real point is that the same facts being proved will potentially serve as a defence in both kinds of claim. As the Court of Appeal said in *Imerman* (at [67]), "the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases".

31. As I said earlier, Mr Davies QC referred me to extracts from Toulson and Phipps, *Confidentiality*, 4th edition 2020, and *Gurry on Breach of Confidence*, 2nd edition 2012. He says that the authors and editors of these textbooks discuss the "iniquity" defence in the context of claims for breach of confidence, but not in that of misuse of private information. He is of course correct that they do not discuss any defence which they call "the iniquity defence" or "the public interest defence" in that context. However, what those authors and editors *do* discuss in the context of misuse of private information are the protection of the rights of others and the public interest. Thus, for example, Toulson and Phipps say

> "7-064. If art.8 is engaged, the second issue is whether the defendant's interference with the claimant's art.8 rights was justified by other relevant considerations (such as the defendant's own rights, the rights of others, and/or the public interest).
>
> […]
>
> "7-143. An individual's interest under art.8 in not having information about their private life published or otherwise used against their wishes has to be set against the rights and freedoms of others, particularly the right to freedom of expression under art.10, and the interests of the general public.
>
> 7-144. There is no single test or formula for deciding which should prevail. It is necessary in each case to consider, on the one hand, the particular aspect of a person's private life which is or would be affected by the publication, and the degree of harm which would be caused; and, on the other hand, the public interest which publication would serve, and the degree of harm which would be caused by prohibiting it."

32. The distinguished editors of *Gurry* say:

> "16.03. … In the first edition of this work, privacy cases were considered alongside cases involving other kinds of confidential information, and were comparatively few in number. That is no longer appropriate following the Human Rights Act 1998 … and substantial caselaw that followed in its wake. The public interest still has a role to play in this context but needs to be examined separately."

33. They go on to say (at [16.58]-[16.59]) that, whereas before the Human Rights Act "the public interest defence was conceived as a counterweight to the public interest in upholding confidences", since

> "the privacy rationale is not so much a public interest in maintaining confidences, but rather an obligation to respect privacy under the ECHR. Privacy, therefore, 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 against the freedom of expression arguments under article 10, if applicable".

34. They then set out the statement by Lord Steyn (in *Re S (a Child)* [2005] 1 AC 593, [17], of the four principles arising from *Campbell v MGN* [2004] 2 AC 457, including the reference, in case of conflict between articles, to the need for "an intense focus on the comparative importance of the specific rights being claimed in the individual case". Finally, taking the four principles together, they go on to comment:

> "16.62. … In essence, this means that the court hearing such an action must examine whether the degree of the intrusion into the claimant's privacy was proportionate to the public interest being served by such intrusion."

35. In my judgment, these matters are the elements of the "iniquity" or public interest defence, as expanded for modern times, and tailored to the requirements of the ECHR, by the standards of which the substantive domestic law is measured. Of course (as Lord Steyn said) it is necessary in misuse of private information claims to focus on the precise facts of the case. But so it now is in breach of confidence cases too: see *eg Saab v Dangate Consulting Ltd* [2019] PNLR 29, [159], a case which Mr Davies QC both cited to me and accepted as a breach of confidence case. In my opinion, the question is not whether the defendants have formulated their defence in law in terms which textbook writers recognise under a particular name. It is whether what they have pleaded could, if proved at trial, found a defence recognised by law, referred to for convenience in the formulation of the preliminary issue as the "iniquity" defence.

36. There is certainly no express statement in either Toulson and Phipps or Gurry that what amounts in substance to the "iniquity" defence is available *only* in breach of confidence claims and *not* in misuse of private information claims. And, for the reasons given above, I cannot draw from these writings the inference to that effect which Mr Davies QC seeks to draw from them. As the parties may be aware, I am both an author of original textbooks and an editor of later editions of the textbooks written by others. As a result, my experience tells me that, first of all, the process of authorship is quite different from that of advising clients or judging cases, and, second, that editing another's established work is a task generally more respectful of the earlier text than it is of the editor's personal opinions. And, inevitably, the design and structure of the original text will reflect a view of the legal architecture at the time it was originally conceived, albeit with more modern flourishes as it is updated from time to time.

37. In this connection I remind myself that, in *Cordell v Second Clanfield Properties Ltd* [1969] 1 Ch 9, 16-17, Megarry J said, in a famous passage:

> "The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law."

38. And I will give a practical example. In the nineteenth century lawyers separated out several classes of trust in addition to express trusts: these included implied, resulting and constructive trusts. But the textbook writers were not consistent. For example, Snell's *Equity*, in its first edition of 1868, contained chapters on 'Implied Trusts' and 'Constructive Trusts'. The former chapter included resulting trusts (both presumed and automatic). The second edition of 1872, and subsequent editions, too, continued this approach, though by the time of the seventh edition, in 1884, the title of the former chapter was 'Implied and Resulting Trusts', more accurately describing the contents. However, Lewin's *Practical Treatise of the Law of Trusts and Trustees*, at more or less the same time, took a different approach. There *was* a chapter on implied trusts, but this merely dealt with trusts created by precatory words, that is, trusts implied in *fact*. There were separate chapters on resulting and on constructive trusts, the former of which dealt with both presumptive and automatic resulting trusts.

39. In the 13th edition, of 1928 (the first after the 1925 legislation, and in particular section 53(2) of the Law of Property Act 1925), the separate treatment of 'implied trusts' was retained, but the two chapters on 'resulting' and 'constructive' trusts respectively were amalgamated into a single chapter called 'The Creation of Trusts by Operation of Law'. This arrangement lasted until the 16th edition of 1964, which omitted the separate treatment of 'implied trusts', but retained the chapter on trusts by operation of law. By the 19th edition in 2019 the treatment had expanded to four separate chapters: Trusts arising by operation of law generally, Resulting and other trusts arising by failure of dispositions, Trusts arising in relation the acquisition of property, and Creation of trusts by contract. "Implied trusts" were reduced to a single paragraph in the first of these. In the current (20th) edition these four chapters are retained, but the last of them has been brought forward to an earlier place in the text, as a kind of intentional rather than imposed trust. In my judgment, what this shows is that it is unwise to read too much into the way in which different textbooks writers organise their material over time for the purposes of exposition and discussion.

40. I also do not consider that it matters that there is (at least) a two-stage test in considering claims for misuse of private information, and that the "iniquity" defence does not come into play at the stage of considering whether there was a reasonable expectation of privacy, so that the information was private, but only at the subsequent stage of considering whether there was any justification for the use made or proposed to be made.

41. As I have said, Mr Davies relied on a number of cases in support of his arguments. In *Foxley v United Kingdom*, 20 June 2000, ECtHR, the trustee in bankruptcy obtained an order for the redirection of post from the bankrupt under the Insolvency Act 1986, but (i) received some legally privileged material, and (ii) continued to receive private information through it after the order had expired. This was held a violation of Art 8, because (i) was not "necessary in a democratic society", and (ii) was not in accordance with the law.

42. Another case was *Haig v Aitken* [2001] Ch 110, where Rattee J held that a bankrupt's personal correspondence was excluded from his estate for the purposes of section 283 of the 1986 Act, and from papers relating to his "affairs" under section 311. But he expressly reached this conclusion on the true construction of the Act without considering the provisions of Art 8 of the ECHR, although he added (at 118G) that

> "I am confirmed in that conclusion by the fact that it seems to me at least strongly arguable that the construction of the Act contended for by the trustee in bankruptcy would indeed constitute an infringement of article 8."

This is accordingly a decision on the 1986 Act itself, and *not* on Art 8, and I obtain no assistance from it in relation to the present case.

43. A third case was *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, HL, involving the model Naomi Campbell. Mr Davies relied on this for being a case about the balance to be struck between Art 8 and Art 10. The next case was *HRH the Prince of Wales v Associated Newspapers* [2008] Ch 57, which Mr Davies relied on as similar. I accept this view of these cases, but do not see how that helps me here. It does not show, for example, that this is the "only game in town".

44. Next there was *Copland v United Kingdom* (2007) 45 EHRR 37, where the ECtHR held that the expression "in accordance with the law" for the purposes of Art 8

> "46. … not only requires compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law (see, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 26, ECHR 2000-V, and *P.G. and J.H. v. the United Kingdom*, cited above, § 44). In order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any such measures (see *Halford*, cited above, § 49, and *Malone*, cited above, § 67)."

45. In civil law countries, where law essentially means legislated law, the foreseeable law will almost certainly refer to a specific legislative law. In England and Wales, however, where the bulk of the law is the common law, created by the judges over centuries of decision-making, and legislated law is, at least for the most part, a *derogation* from the common law, law is 'foreseeable' for the purposes of the European Convention on Human Rights if either the common law or the legislative law so provides. Of course, there will be marginal cases where there is difficulties or doubt, and in such cases it may be that the law for this purpose is not 'foreseeable'. But that is not this case, and such cases can be dealt with as and when they arise. In my judgment, the so-called "iniquity" defence is well established in the English common law, and expounded and delineated by the many cases that had been decided upon it. It is 'foreseeable' for these purposes.

46. After that there was *OBG v Allan* [2008] 1 AC 1, also known as *Douglas v Hello! Ltd*. This appeal however was not about the Douglases, well-known actors who had married, but about the proprietors of *OK!* magazine, who had secured an exclusive arrangement with the Douglases to publish photographs of their wedding. They were seeking to restrain *Hello!* magazine from publishing photographs surreptitiously taken at the wedding. Mr Davies' submission was that this case was simply about the protection of commercially valuable information, and not about privacy at all. He referred to paragraph 118, where Lord Hoffmann said:

> "But this appeal is not concerned with the protection of privacy. Whatever may have been the position of the Douglases, who, as I mentioned, received damages for an invasion of their privacy, *OK!*'s claim is to protect commercially

> confidential information and nothing more. So your Lordships need not be concerned with Convention rights."

47. The next case was *Murray v Express Newspapers* [2009] Ch 481, where the child of a famous author was photographed in the street whilst being pushed along in a buggy by his parents, the photograph subsequently being published in a national newspaper. This was in the same category as *Campbell* and *HRH the Prince of Wales*, another case balancing Art 8 and Art 10.

48. Following that there was *Mosley v News Group Newspapers* [2008] EMLR 20, where a public figure successfully claimed damages from a media group which had published an (inaccurate) article about a private sex party which the claimant had been involved in, and where one of the participants had breached confidentiality, taking clandestine photographs, and passing information to a reporter who must have known of the breach of confidence. Eady J did not accept either that there was no reasonable expectation of privacy in relation to the private sex party, or that there was a sufficient public interest in disclosure of it. This was a very different case from the present, and of no assistance to me.

49. The next case was *Barbulescu v Romania*, 5 September 2017, ECtHR, where the applicant had created a Yahoo Messenger account at work on his employer's instructions to answer customers' enquiries and was the only person who knew the password, although the employer had access to it, and indeed did access it. Despite a ban on personal use of the internet at work, he then used it for personal purposes. The employee was dismissed. He complained of a breach of Art 8. The court held that it did not need to decide whether there was a reasonable expectation of privacy, because "an employer's instructions cannot reduce private social life in the workplace to zero." So, this was *not* a case where the court's application of Art 8 depended on any reasonable expectation of privacy, because the court expressly did not decide that any such expectation existed. That does not assist in the application of the domestic English tort of breach of privacy, which depends on that.

50. Lastly, there was *Richard v BBC* [2019] Ch 169, where the defendant broadcaster was "tipped off" by the police that a search of the claimant's home was to be undertaken in the course of an investigation into an allegation of historic sexual offences. The defendant published significant coverage of the search, including footage taken from a helicopter. No charges were brought against the claimant. He claimed a violation by the defendant of his right to privacy. The defendant argued that the claimant had no legitimate expectation of privacy in relation to the fact of the investigation and of the search of his home, and that in any event any rights he might have were outweighed by its right to freedom of expression under Art 10. Mann J held that the claim succeeded. In circumstances such as this, a suspect had a reasonable expectation of privacy in relation to a police investigation. Moreover, there was no public interest in identifying the claimant as the subject of the investigation, and in the circumstances the claimant's rights under Art 8 were of great weight in the balance than the defendant's Art 10 rights.

51. Mr Davies relied on these cases in order to support his submission that there is no "iniquity" defence to a claim based on Art 8 of the Convention. I am afraid that I do not accept that they establish that proposition. None of them turned on this point.

The second submission

52. I turn to consider Mr Davies QC's second submission, that the "iniquity" defence was not available even in relation to a claim for breach of confidence, unless the information was *lawfully* received by the defendant. I say now that I reject this submission. Even in *Gartside v Outram* itself, it appears that the confidential clerk had unlawfully made copies of the relevant documents to disclose to the victims of what he alleged were his employer's wrongs towards them. He did not just walk away with the information in his head. And in principle I can see no difference in moral liability between the two situations. The law is not here concerned with the ownership of pieces of paper on which information is recorded, but with rights to control the information itself. It would make no sense to say that, if the confidential clerk took away the employer's information in his head, he could reveal it to the authorities as evidence of wrongdoing, but if he had a poor memory and copied the relevant documents, or simply took them, intending to return them later, he could not.

53. Mr Davies QC relied on the decision of Mr Jarvis QC of 28 November 2019 in this very case, when considering whether to grant an interim injunction pending trial. I have already set out above the passages from that decision on which Mr Davies QC relies. But, as I understand him, when the judge (at [72]) said "it would be wrong in principle for a court to make a ruling that an unlawful scheme could permit any form of disclosure", the words "*any* form of disclosure" were intended to mean "*all* forms of disclosure". In other words, the form of disclosure permitted by reason of the unlawful scheme alleged would be fact-sensitive, and restricted to what was necessary in the circumstances. He did not mean that the court would be wrong *ever* to permit disclosure *at all* in such a case. And the case put to him there was this very case, where, on the allegations made by the claimants, the defendants did not receive the information by consent, but "broke into" the claimants' private email accounts to do so. So, even in such a case, of "breaking-in", in *some* circumstances, said the judge, there could be a defence.

54. In relation to the *Pharmagona* case, the judge (Nicol J) was at pains to make clear that the facts of his case were quite different from those in *Imerman*, on which counsel had relied. He therefore regarded the observations of the court in *Imerman* as inapplicable to his case. But even those observations do not help Mr Davies QC, because *Imerman is* a very different case from this one. In particular, the context of *Imerman* is important. As is clear from paragraph [3] of the judgment (set out above at [8]), it was a case where the so-called *Hildebrand* rules, relied on so often in cases about financial provision on divorce, were brought into question. The court concluded that those "rules" were wrong, and did not represent the law.

55. The court described the *Hildebrand* rules as follows:

> "36. What have become known as the *Hildebrand* rules form the basis of advice by lawyers to their clients with the apparent approval of the judges of the Family Division. In essence clients are encouraged to access documents belonging to the other spouse, whether they were confidential or not, provided force is not used. Once access to such documents or information has been gained, the spouse may retain and use copies, though not the originals, but those copies should be disclosed when a questionnaire is served, or earlier if either party makes what has become a standard request."

56. The Court of Appeal discussed the so-called rules and concluded:

> "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."

57. The court was not asked to consider whether the defendants' obtaining, retention and use of the private information of the claimant might be justified as evidence of some past wrongdoing on the part of the claimant. All that was alleged as justification for the abstraction of the claimant's information was that he was engaged in proceedings for divorce from the defendants' sister, and that the defendants *feared that he would* conceal his assets from her in the matrimonial proceedings. The abstraction took place within a few weeks of the wife's presenting a petition for divorce, but before the husband had filed any documents as to his assets, and therefore before he could have done anything amounting to wrongdoing, such as lying about his assets in the proceedings.

58. It is thus clear that the context in which the court was dealing with the problem of access to confidential material of others was far removed from that of the present case. The present is not a case where the defendants accept that they feared that the claimants would commit some civil wrong in the future against someone close to them (or even to them), and therefore decided to break into their private information before that could happen. It is a case where the defendants say they stumbled lawfully across the claimants' private information (though the claimants allege them to have broken into it) and then sought to retain that which the defendants claim (and the claimants deny) to be evidence of wrongdoing against creditors and against insolvency officials, in order to pass it on to those officials and to relevant victims. In my judgment, that is a quite different case.

59. Moreover, and as I have already said in relation to Mr Davies QC's first submission, the observations of the Court of Appeal in *Imerman* at every turn make clear that, even when the claim in misuse of private information may otherwise lie, there *can* be defences to the claim. As a result, I do not accept that there cannot be a good defence to a claim for misuse of private information based on proposed use as evidence of wrongdoing already committed by the claimant, in exactly the same way as in relation to a claim for breach of confidence.

60. In my judgment, moreover, the cases make clear that the defence applies even though the defendant takes possession of the information *unlawfully*. In *Gartside v Outram* (1857) 26 LJ(NS) 113, for example, the facts stated in the report (at 114 col 2-115 col 1) were that

> "It was alleged that the defendant had availed himself of the facility afforded by his employment to obtain, and that he had fraudulently made copies of and extracts from the books, accounts, letters and other documents relating to the plaintiffs' business, and had also circulated various false and unfounded reports respecting the plaintiffs calculated materially to injure their business and credit…"

61. So the decision was made on the basis that the defendant clerk had made unauthorised copies of his employer's books and papers, which he had passed (or intended to pass) to those whom he considered to be the victims of his employer's wrongdoing. As I said earlier, it was not merely that the clerk had passed on information learned (with consent) in the course of his employment. He had deliberately made copies (without consent) for the purpose. Page-Wood V-C (later Lord Hatherley LC) said (at 115 col 1):

> "the question is, whether, supposing the case so averred by the answer, definite and precise in all particulars, to be proved or admitted, the plaintiffs are entitled to say there shall be an injunction to restrain the defendant from making a disclosure which may enable others to recover, as Messrs. Rathbone have done ? I hold that it is a good defence if those facts are made out…"

62. Like the present case, that was a case where the issue of law was decided in advance of the trial of facts, and the court had to assume that the allegations of wrongdoing would be proved. Like the present case, it was one where the person obtaining the information wished to pass it, not to the whole world, but to those whom they considered to have been wronged by the persons whose information it was, or (in the present case, at any rate) to those officials whose function it was to protect the victims' interests.

63. In *Initial Services Ltd v Putterill* [1968] 1 QB 396, CA, the plaintiffs' sales manager resigned, and without their consent took with him a number of documents belonging to the plaintiffs. He passed these to the press, who used them to publish news stories about alleged price-fixing by the plaintiffs (in breach of the relevant law). The plaintiffs claimed an injunction, damages for breach of confidence and an order for delivery up of the documents. The defendant pleaded that it was in the public interest to make these disclosures. The plaintiffs applied to strike out this defence. They failed both at first instance and on appeal.

64. In the Court of Appeal, Lord Denning MR (with whom Winn LJ agreed) said (at 405-06):

> "Mr. Michael Kerr [for the plaintiffs] suggested that this exception was confined to cases where the master has been 'guilty of a crime or fraud.' But I do not think that it is so limited. It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others.
>
> […]
>
> The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."

Salmon LJ agreed, though on the narrower basis that it was at least arguable that what was pleaded was sufficiently iniquitous for the purposes of the *Gartside* defence. Again, it should be noted that the employee took the documents away without consent.

65. In *Lion Laboratories v Evans* [1985] 1 QB 526, CA, the first and second defendants were employed by the plaintiffs as technicians working on their 'breathalyser' testing kit. They left the plaintiffs' employment, taking with them, without authority, confidential internal memoranda which cast doubt on the accuracy of the functioning of the kit. Those documents were offered to the third and fourth defendants for publication in their newspaper, which had already published some reports reflecting such doubts. The plaintiffs obtained an interim injunction at first instance to restrain further disclosure or use of the confidential information in the memoranda, The defendants appealed. The appeal was allowed, and the injunction discharged.

66. In the Court of Appeal the judges took a more expansive view of the public interest than mere 'iniquity'. Stephenson LJ said (at 537):

> "Thirdly, there are cases in which the public interest is best served by an informer giving the confidential information, not to the press but to the police or some other responsible body, as was suggested by Lord Denning MR in *Initial Services Ltd v Putterill* [1968] 1 QB 396, 405-406 and by Sir John Donaldson MR in *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 WLR 892, 898.
>
> Fourthly, it was said by Page-Wood V-C in 1856, in *Gartside v Outram* (1856) 26 LJCh 113, 114, 'there is no confidence as to the disclosure of iniquity'; and though Mr. Hoolahan concedes on the plaintiffs' behalf that, as Salmon LJ said in *Initial Services Ltd* v *Putterill* [1968] 1 QB 396, 410, 'what was iniquity in 1856 may be too narrow or . . . too wide for 1967,' and in 1984 extends to serious misdeeds or grave misconduct, he submits that misconduct of that kind is necessary to destroy the duty of confidence or excuse the breach of it, and nothing of that sort is alleged against the plaintiffs in the evidence now before the court."

67. O'Connor LJ said (at 548):

> "Everything depends upon the facts of the case; thus the court will not restrain the exposure of fraud, criminal conduct, iniquity; but these are only examples of situations where the conflict will be resolved against the plaintiff. I do not think that confidence can be overridden without good reason to support the contention that it is in the public interest to publish. The plaintiff will not necessarily be seeking to prevent publication of matters derogatory to himself, but nevertheless there may be circumstances that make it just not to restrain publication."

68. Griffiths LJ said (at 550):

> "I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information."

69. Again, it is to be noted that the former employees were acting without consent, and hence unlawfully, in taking away the plaintiffs' property.

70. In *AG v The Observer Ltd* [1990] 1 AC 109, the House of Lords dealt with the so-called "Spycatcher" case, where the Crown sought an injunction to restrain the publication in newspapers of extracts from a book written by a former member of the UK security services and which was alleged to contain confidential information belonging to the Crown. Lord Griffiths summarised the law relevant to this case as follows (at 268-69):

> "The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In *Gartside v Outram* (1857) 26 LJ Ch 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed … This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material. Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry … [I]n the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiffs right to have his confidential information protected."

71. Lord Goff put the matter this way (at 282-83):

> "The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure. Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made 'the confidant of a crime or a fraud': see *Gartside v. Outram* (1857) 26 LJCh 113, 114, *per* Sir William Page Wood V-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v Pressdram Ltd.* [1973] 1 All ER 241, 260, *per* Ungoed-Thomas J, and *Lion Laboratories Ltd v. Evans* [1985] QB 526, 550, *per* Griffiths LJ. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v Mirror*

> *Group Newspapers Ltd* [1984] 1 WLR 892. A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Service. Here there are a number of avenues for proper complaint; these are set out in the judgment of Sir John Donaldson MR … Like my noble and learned friend, Lord Griffiths, I find it very difficult to envisage a case of this kind in which it will be in the public interest for allegations of such iniquity to be published in the media. In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source."

72. I have already discussed the *Imerman* case above. That was a case where the defendants "broke into" the claimant's information, without any consent or claim of right to do so. The claim was for misuse of private information. The defendants could not say that the information they had obtained was evidence of any wrongdoing on the claimant's part, or that there was any public interest served in so doing. They could only say that they feared that the claimant would in due course not disclose his assets in the matrimonial proceedings which had just been commenced by the claimant's wife, their sister. The court held that matrimonial proceedings had no special privilege compared to the rest of the law. So the claim against them for an injunction and delivery up succeeded. But in its judgment the court made clear, as I have set out above, that in appropriate circumstances there *could* be a defence to the claim. Accordingly, this case does not support the submission of Mr Davies QC that there is no 'iniquity' or public interest defence to a claim for misuse of private information at all. On the contrary, it suggests the opposite. It was simply that that defence was not available on the facts of that case.

73. In *Brevan Howard Asset Management LLP v Reuters Ltd* [2017] EMLR 28, CA, a fund manager sent sensitive commercial information in confidence to potential investors. Some of this information reached the hands of the defendants, a financial news publisher and a journalist employee, who threatened to publish it. An injunction to restrain publication was granted at first instance. The Court of Appeal dismissed an appeal.

74. The Court (Sir Terence Etherton MR, Longmore and Sharp LJJ) said:

> "60. The Judge applied the principles laid down by the Court of Appeal in the *Prince of Wales* case ([2008] Ch 53), which was binding on the Judge and is binding on us. That case post-dated the coming into effect of the HRA and was centrally concerned with the issue whether the common law of confidence had to be revised in order to give full effect to art.10 rights. As Lord Phillips CJ, giving the judgment of the Court of Appeal, said at [32]:
>
> > "Before the Human Rights Act 1998 came into force, the English law of confidence had recognised that there were circumstances where the public interest in disclosure overrode the duty of confidence, and that these circumstances could differ depending upon whether the duty was owed to a private individual or to a public authority. The present case raises the question whether the principles permitting publication of information

> disclosed in breach of an obligation of confidence require to be revised in order to give full effect to article 10 rights. … "
>
> 61. As the Court of Appeal said at [65], in a privacy case, where no breach of a confidential relationship is involved, a balance has to be struck between art.8 rights and art.10 rights and that will usually involve weighing the nature of and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.
>
> 62. Unlike the *Campbell* and *Couderc* cases, to which Mr Vassall-Adams referred, this is not such a case. This is a case where the information was imparted and received in confidence. The Court of Appeal addressed the principles in such a case in paragraphs [65] to [68]. It observed in paragraph [66] that the fact that information relates to information received in confidence is a factor that art.10(2) recognises as, of itself, capable of justifying restrictions on freedom of expression."

75. Paragraph [68] of the decision of the Court of Appeal in the *Prince of Wales* case reads:

> " … the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

76. That is a clear statement by the Court of Appeal, post the enactment of the Human Rights Act 1998, that in a breach of confidence case there will have to be a balancing exercise conducted, to decide whether a public interest defence should succeed or not. The later decision of that Court in *Brevan Howard* shows that even in a privacy case there *can* be a public interest defence, although once again there will have to be a balancing exercise conducted. That case in fact involved a breach of confidence claim rather than one for misuse of private information, but in that regard it is to be noted that there was no suggestion that the defendants in *Brevan Howard* had come by the information *lawfully*. The court saw no difficulty in applying a public interest defence to a breach of confidence claim even where the information was acquired unlawfully. However, the court concluded on the facts of the case that the defence could not be made out.

77. In *Pharmagona Ltd v Taheri* [2020] 1 WLR 3577, the defendants were dismissed from their employment with the claimant. The first defendant thereafter unlawfully accessed the claimant's computer system and abstracted confidential information from it, which he shared with the second defendant. When the claimant sued the defendants for misuse of confidential information, and sought an interim injunction against them, they pleaded a public interest defence, that the claimant had been engaged in serious criminal conduct, and asserted that they had passed the information to various regulatory authorities. At the hearing of the application for the interim injunction, the defendants argued that at least in relation to some of the

information, which had been passed to regulatory authorities, there was a public interest defence available.

78. The judge said:

> "56. In my judgment, the evidence which the first defendant has produced is not yet of a kind which would allow the defendants to override the confidential character of the claimant's information and publish it to the world at large. However, in my view, the defendants have persuaded me that they should be free to continue to co-operate with the CAA or any other public authority investigating the claimant's activities. That means that any injunction should contain a proviso that allows them to answer questions from such authorities or provide documents which those authorities request, either of a generic or a specific kind.
>
> 57. Mr Jones argued that the CAA and other public authorities already had ample investigatory powers of their own. They may have wide powers, but it would be naive to consider that they provide the authorities with all the information which they need to carry out their duties. Whistle-blowers continue to play a valuable role. The CAA appears to have acknowledged the assistance which the first defendant has already given. If the authorities require further assistance from the defendants, I consider that they should not be restrained from providing it."

79. The judge in this case clearly considered that, although the defendants had unlawfully accessed the claimant's confidential information after their dismissal, in principle a public interest defence was open to them at least in relation to material which was relevant to the functions of regulatory authorities looking into allegations of wrongdoing.

80. In my judgment, neither on principle nor in the caselaw is there any support for the distinction in the availability of the public interest defence that Mr Davies QC seeks to draw between lawful receipt and unlawful acquisition of confidential information. In my judgment, whether the information was lawfully acquired or not is less important than whether the public interest in publishing it (whether narrowly to relevant regulatory authorities, or more widely to the media) is sufficient to overcome the public interest in the preservation of confidential information or the article 8 right to respect for private life.

The third submission

81. Mr Davies QC's third submission is that, in relation to both the misuse of private information and breach of confidence claims, there is no public interest in the commission of past civil wrongs by private persons who have no public *persona*. First of all, I accept that the defendants were not creditors in the bankruptcy or the liquidation, and that the insolvency officials dealing with the claimants' affairs may not have carried out an investigation into the alleged iniquity despite having powers to do so under the law. But these matters cannot be determinative. The former employees in *Gartside v Outram*, *Initial Services Ltd v Putterill*, *Lion Laboratories v Evans*, and *Pharmagona Ltd v Taheri* were not creditors or victims of their employers' alleged wrongdoing either. And, as Nicol J said in *Pharmagona* (at [57]), informants play a valuable role in enforcing the law, and regulatory agencies should

have the benefit of their help where possible. Nor did the employers in those cases have any public *persona*. They were just business persons or organisations, none of them up till then newsworthy or in the public eye.

82. As for the commission of past civil wrongs, it must obviously depend on the circumstances whether the importance in preserving the confidentiality of the claimant's information outweighs the importance to a third party in being able to obtain a remedy for a civil wrong committed against that third party. If the defendant has obtained the claimant's confidential information tending to show that the claimant walked across the third party's land on a single occasion some years ago, it seems unlikely that the balance will come down on the side of disclosure to the third party. If on the other hand the information obtained shows that the claimant has recently committed significant frauds against his or her many creditors, the balance may well fall the other way. It certainly did in *Gartside v Outram*. There is, as it seems to me, a considerable public interest in the law's insolvency systems working as intended, to protect the interests of creditors when a person becomes unable to pay debts but (say) nevertheless attempts to hide assets from them. Much will depend on the actual documents concerned.

83. In my judgment, I am not in a position at present to conclude, as a matter of law, that the defendants are not entitled to plead a public interest in disclosure of information to relevant victims or authorities the commission of past civil wrongs by private persons who otherwise have no public *persona*.

The pleading point

84. I turn finally to the pleading point made by Mr Davies QC, in which he complained that the defendants had not pleaded article 8(2) or 10 of the ECHR. Those articles (and others) of the ECHR are given direct effect in English law by the Human Rights Act 1998, which creates parallel rights to those conferred by the convention as a matter of international law, but justiciable in English courts as a matter of domestic law. I agree that the defendants have not pleaded or referred to those articles in their defence. But I do not think those articles are the source of the public interest defence. It seems to me rather that the existing public interest defence (developed in the cases before the Human Rights Act) has been adapted to fit the strictures of the ECHR, so that our law remains compliant with our international obligations. This seems to have been also the view of Mr Jarvis QC: see his decision at [2019] EWHC 3332 (Ch), [79].

85. Either way, of course, the public interest defence is a matter of law, not fact. Yet the defendants do not need to plead matters of law, as the Court of Appeal (Slade, Stocker, Bingham LJJ) made clear in *Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, at 436 B-C:

> "In answer, it has been contended that some of these points are not open to M & R on their pleading, and, furthermore, have not been foreshadowed in the affidavit evidence sworn on their behalf. One of Mr. Waller's responses to this contention has been to refer us to the general observations made by Lord Denning MR in *In re Vandervell's Trusts (No 2)* [1974] Ch 269, 321, as to the modern practice concerning pleadings:

> 'It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated.'

We respectfully agree with this statement as a general proposition."

86. What that means is that a party is not obliged to refer in his or her statement of case to an applicable legal rule as such, or the source of its authority, such as a decided case or cases or primary or secondary legislation. And, as I said in an earlier decision between the parties, *Brake v Swift* [2020] 4 WLR 113, [176], referring to a different decision of the Court of Appeal,

> "Even if Chedington pleaded a legal result, it is
>
> > 'not bound by or limited to the legal result … alleged, but may rely on any legal consequences of the pleaded facts which may properly flow from them': per Ralph Gibson LJ (with whom Sir John Megaw agreed) in *Denyer v Jones*, unreported, 23 September 1991."

87. CPR rule 16.5 is the current procedural rule embodying this principle. So far as material, it provides:

> "(1) In his defence, the defendant must state –
>
> > (a) which of the allegations in the particulars of claim he denies;
> >
> > (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
> >
> > (c) which allegations he admits.
>
> (2) Where the defendant denies an allegation –
>
> > (a) he must state his reasons for doing so; and
> >
> > (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.
>
> (3) A defendant who –
>
> > (a) fails to deal with an allegation; but
> >
> > (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,
>
> shall be taken to require that allegation to be proved.
>
> […]"

88. Nevertheless, Mr Davies QC submits that the articles of the ECHR to be relied on should be expressly pleaded. He also goes on to submit that the defendants have not pleaded even the material facts needed to justify the invocation of those articles as

defences to the claim. Moreover, he submits that, even if they had, they would have also to show the "necessity" referred to in paragraph 2 of article 8 by reference to the documents which have actually been disclosed.

89. In this latter respect, he referred me to a passage from the judgment of Cockerill J in *Saab v Dangate Consulting Ltd* [2019] PNLR 29, at pages 665-66:

> "158. In relation to this the Defendants' case was regrettably unclear. There was a tendency to refer to 'criminality' in broad terms and not to focus on what allegations might need to be brought to a regulator's attention. This was perhaps the natural correlate of the extent of the disclosure made. While I was never provided with a precise list of the material supplied, it appeared clear from the evidence that what was supplied was virtually a 'document dump' of the materials which the Defendants had acquired during the course of their retainer, together with the products of their work. For example in a set of particulars the Defendants stated that they 'did disclose their investigation papers and reports to the Cyprus Agencies'. It is likely that this extensive disclosure was done as I have noted above, at least in part because of the Defendants' own concerns about their exposure. But the consequence has been that a case of public interest has had to be advanced which covers the entirety of the disclosure.
>
> 159. In a sense therefore in order to run a defence of public interest as regards the entire spectrum of disclosure the Defendants were really driven to a very broad case on the necessity for that disclosure. The problem for the Defendants is that the cases are clear that a defence of public interest disclosure has to be related back to the material disclosed. The exercise which the court does is to look at what was disclosed and to decide whether the disclosure of that material was necessary in the public interest. Generally therefore the authorities where the defence is made out deal with relatively focused disclosures. For example in *Lion Laboratories* the focus of the defence on four documents dealing specifically with the question of the reliability (or otherwise) of the claimants intoxicometer. In *Initial Services* the defendant had given the Daily Mail 'smoking gun' documents said to evidence a price-fixing agreement.
>
> 160. In the end it was plain that such a broad disclosure of multiplicitous documents going to different aspects could not reach the hurdle required on the evidence in this case (with which I deal further below). Indeed I suspect that it would be vanishingly rare for a situation to arise which justified such a very broad disclosure."

90. I should say that Mr Davies QC expressly accepted that *Saab* was not itself an article 8 case, but a case in breach of confidence. Nevertheless, I readily accept that, in considering the defence put forward of public interest (or protection of the rights of others), the court must relate it to the actual documents disclosed. I note that Mr Jarvis QC, in his judgment of November 2019, appears to have reached a similar conclusion: [2019] EWHC 3332 (Ch), [80]. However, that is an exercise which I would only be in a position to conduct at the trial of the iniquity defence, and *that* has been postponed until the court has decided both (i) the non-iniquity trial issues, and (ii) the preliminary issue (which this judgment addresses). In other words, it cannot be an objection as a matter of law to the trial of the iniquity defence that the court cannot *yet* be satisfied that the disclosure of the actual documents disclosed is justified in the

public interest (or for the protection of the rights of others). That must await trial of the relevant facts.

91. As to the pleading point, I asked Mr Davies QC to tell me what it was that he said the defendants needed to plead but had not. He told me that they needed to plead:

(1) that they had a right to freedom of expression under Article 10 (or any other article relied on),

(2) by reference to documents, that it was necessary for those documents to be disclosed to the trustee in bankruptcy and to the partnership liquidators in the public interest or for the protection of the rights of others,

(3) explaining what that public interest was, or what were the rights of others (and which others) that were being protected.

92. As to (1), whether the defendants' case is that their conduct is justified under article 8(2) (lawful disclosure derogating from article 8(1)) or article 10 (freedom of expression), or under the general public interest defence as adapted to fit those articles, this is a matter of law, which in my judgment is not required to be pleaded. I agree that it would be normal, and courteous to the other side, to make clear how a party's case is put on the law. But that function is largely carried out these days by the skeleton argument. I cannot agree that it is compulsory under the CPR to do so. In particular, I do not consider that the reference to providing reasons for disagreeing in CPR rule 16.5(2)(a) is sufficient to impose such an obligation. Those reasons are given by pleading the unlawful scheme and the breaches of other duties and orders. In any event, the hearing before Mr Jarvis QC in November 2019 dealt in detail with these articles of the ECHR, and both sides were well aware what was in play. I accept that the defence was only filed and served subsequently, but I do not agree that it shows a substantively different defence being put forward to that at the earlier hearing, or that the defendants were silently abandoning a central plank in their defence. On the contrary, it seems quite consistent with the approach previously taken. Under CPR rule 16.5(3) it is sufficient for the defendant to "set out in his defence the nature of his case in relation to the issue to which that allegation is relevant". In my judgment the defendants have done that.

93. As to (2), there are a number of elements. Whether the facts pleaded (if proved) make it "necessary in a democratic society" and in the public or certain other interests to disclose certain documents is not a *fact* to be pleaded in itself. Whether something is *necessary* is a matter of law for the judge to decide after finding the facts. Similarly, whether the facts pleaded (if proved) mean it is in the public interest or for the protection of others' rights to disclose private information will also be a matter of law for the court. The defendants have stated their own version of events, and it is for them (if they can) to prove that version at trial. For example, the defendants have pleaded that the claimants had engaged in an unlawful scheme to acquire West Axnoller Farm at an undervalue, thus damaging creditors' interests, of which Mrs Brehme's vehicle Patley Wood Farm was one. Whether a disclosure of these documents to insolvency officials or to Mrs Brehme would be justified by the terms of article 8(2) is a matter of law, not fact, and does not need to be pleaded.

94. As to (3), identifying the public interest invoked, or the others (and their rights) concerned, the same applies. If a disclosure is justified by the public interest, or as being for the protection of the rights of others, the justification is given by stating the facts and matters alleged to amount to such justification. The defendants say they committed or intend to commit acts which might otherwise amount to misuse of private information because (they say) the claimants have committed frauds on their creditors, breaches of their duties under the insolvency legislation and breaches of injunctions intended to protect creditors. And they give detailed particulars of these allegations. It is obvious that there is potentially a public interest in disclosing information about alleged wrongs to a relevant regulatory body or to victims of those alleged wrongs (as in *Gartside*), and moreover that this is potentially to protect the rights of the creditors. I say 'potentially' because, as I have said and the cases make clear, it depends on exactly what documents are disclosed and to whom. But that is a matter for the trial of the iniquity defence in due course. In my judgement there is no requirement to plead expressly what is the public interest concerned and who are the persons whose rights (and what rights) are being protected.

Conclusion

95. My conclusion overall is that the claimants have not shown that the public interest (or "iniquity") defence put forward by the defendants in this case cannot succeed as a matter of law, and I therefore answer the preliminary issue in that way.