



Neutral Citation Number: [2020] EWHC 591 (IPEC)

Case No: IP-2018-000134

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

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

Date: 12/03/2020

**Before :**

**HIS HONOUR JUDGE HACON**

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**Between :**

**TRAILFINDERS LIMITED**

**Claimant**

**- and -**

**(1) TRAVEL COUNSELLORS LIMITED**

**(2) ANDREW LA GETTE**

**(3) LAKI ECONOMOS**

**(4) SIMON CLIFFORD**

**(5) DAVID BISHOP**

**Defendants**

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**Gavin Mansfield QC and Alexander Robson (instructed by Lewis Silkin LLP) for the**  
**Claimant**

**Ian Mill QC and Tom Cleaver (instructed by Pinsent Masons LLP) for the First Defendant**

**Michael Lee (instructed by JMW LLP) for the Second and Fifth Defendants**

Hearing dates: 29-30 January 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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**HIS HONOUR JUDGE HACON**

**Judge Hacon :**

**Introduction**

1. The Claimant ('Trailfinders') is a travel agent with 37 branches in the UK and Ireland, employing over 700 sales consultants. The Second, Third, Fourth and Fifth Defendants are former sales consultants at Trailfinders. In 2016 they left to join the First Defendant ('TCL'), as did about 40 others by the date of the Particulars of Claim.
2. TCL trades using a franchise model with franchisee travel consultants. The Second to Fifth Defendants are therefore now at least nominally self-employed, although the precise form of this model has become an issue between the parties due to an allegation of vicarious liability on the part of TCL.
3. Trailfinders alleges that when the Second to Fifth Defendants left they took with them the names, contact details and much other information about their clients. It is further alleged that after they left they accessed a Trailfinders' customer database to obtain further information. Trailfinders says that the Second to Fifth Defendants were thereby in breach of implied terms in their contracts of employment and/or were in breach of equitable obligations of confidence owed to Trailfinders.
4. TCL is also alleged to have been in breach of confidence through having received the other defendants' confidential customer information and having allowed those defendants to exploit the information for TCL's and their benefit. Alternatively, TCL is said to have employed the other defendants and is accordingly vicariously liable for their acts. By way of a further alternative argument, it is said that the Second to Fifth Defendants have acted as agents of TCL, making TCL liable for those acts as principal.
5. For reasons of economy and to ensure that the trial would be completed in two days, Trailfinders elected two of the four individual defendants against whom to pursue the case to trial. They chose the Second Defendant ('Mr La Gette') and the Fifth Defendant ('Mr Bishop'). The action was stayed as against the other two individual defendants.
6. Gavin Mansfield QC and Alexander Robson appeared for Trailfinders, Ian Mill QC and Tom Cleaver for TCL and Michael Lee for Mr La Gette and Mr Bishop.

**Directive 2016/943**

7. Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition entered into force in 2016. The articles in Chapter II of the Directive set out the circumstances in which 'trade secrets' as defined in Chapter I may be lawfully acquired, used and disclosed and the circumstances in which they may not. Art.6 sets out the general obligation imposed on Member States, namely to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of 'trade secrets'.

8. The Directive was implemented in the UK in June 2018 by The Trade Secrets (Enforcement, etc.) Regulations 2018, to the extent that was thought necessary. This did not include any change in the law to comply with either Chapter II or art.6. The explanatory note states:

“A number of the provisions of the Directive, in particular the provisions in Chapter II and Articles 6, 7 and 16, have been implemented in the United Kingdom by the principles of common law and equity relating to breach of confidence in confidential information, and by statute and court rules.”

9. It is therefore to be assumed that the substantive principles governing the protection of confidential information under English law, including that afforded by terms implied into contracts of employment and by equitable obligations of confidence, are unaffected by the Directive. However, the Directive shines an occasional light on those principles.
10. Articles 1 to 7 provide:

## **CHAPTER I**

### ***Subject matter and scope***

#### ***Article 1***

### ***Subject matter and scope***

1. *This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.*

*Member States may, in compliance with the provisions of the TFEU, provide for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required by this Directive, provided that compliance with Articles 3, 5, 6, Article 7(1), Article 8, the second subparagraph of Article 9(1), Article 9(3) and (4), Article 10(2), Articles 11, 13 and Article 15(3) is ensured.*

2. *This Directive shall not affect:*
- (a) *the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;*
  - (b) *the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;*
  - (c) *the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;*

- (d) *the autonomy of social partners and their right to enter into collective agreements, in accordance with Union law and national laws and practices.*
3. *Nothing in this Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, in relation to the exercise of such mobility, this Directive shall not offer any ground for:*
- (a) *limiting employees' use of information that does not constitute a trade secret as defined in point (1) of Article 2;*
- (b) *limiting employees' use of experience and skills honestly acquired in the normal course of employment;*
- (c) *imposing any additional restrictions on employees in their employment contracts other than restrictions imposed in accordance with Union or national law.*

## **Article 2**

### **Definitions**

*For the purposes of this Directive, the following definitions apply:*

- (1) *'trade secret' means information which meets all of the following requirements:*
- (a) *it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.;*
- (b) *it has commercial value because it is secret;*
- (c) *it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;*
- (2) *'trade secret holder' means any natural or legal person lawfully controlling a trade secret;*
- (3) *'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret;*
- (4) *'infringing goods' means goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed."*

## **CHAPTER II**

### **Acquisition, use and disclosure of trade secrets**

#### **Article 3**

***Lawful acquisition, use and disclosure of trade secrets***

1. *The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:*
  - (a) *independent discovery or creation;*
  - (b) *observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;*
  - (c) *exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;*
  - (d) *any other practice which, under the circumstances, is in conformity with honest commercial practices.*
2. *The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.*

**Article 4**

***Unlawful acquisition, use and disclosure of trade secrets***

1. *Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.*
2. *The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:*
  - (a) *unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;*
  - (b) *any other conduct which, under the circumstances, is considered contrary to honest commercial practices.*
3. *The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*
  - (a) *having acquired the trade secret unlawfully;*
  - (b) *being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;*
  - (c) *being in breach of a contractual or any other duty to limit the use of the trade secret.*
4. *The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure,*

*knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.*

5. *The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of paragraph 3.*

### **Article 5**

#### **Exceptions**

*Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:*

- (a) *for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;*
- (b) *for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;*
- (c) *disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;*
- (d) *for the purpose of protecting a legitimate interest recognised by Union or national law.*

## **CHAPTER III**

### **Measures, procedures and remedies**

#### **Section 1**

#### **General provisions**

### **Article 6**

#### **General obligation**

1. *Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets.*
2. *The measures, procedures and remedies referred to in paragraph 1 shall:*
  - (a) *be fair and equitable;*
  - (b) *not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; and*
  - (c) *be effective and dissuasive.*

### **Article 7**

#### **Proportionality and abuse of process**

1. *The measures, procedures and remedies provided for in this Directive shall be applied in a manner that:*
  - (a) *is proportionate;*
  - (b) *avoids the creation of barriers to legitimate trade in the internal market; and*
  - (c) *provides for safeguards against their abuse.*
2. *Member States shall ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures as provided for in national law, where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. Such measures may, as appropriate, include awarding damages to the respondent, imposing sanctions on the applicant or ordering the dissemination of information concerning a decision as referred to in Article 15.*

*Member States may provide that measures as referred to in the first subparagraph are dealt with in separate legal proceedings.*

### **Implied contractual obligations of an employee**

11. It is well settled that an employee owes a duty of fidelity and good faith to his employer. The duty has been characterised as contractual, being an implied term of the contract of employment.
12. Included within that duty is an obligation not to misuse the employer's confidential information, see for example *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm); [2017] FSR 36, *per* Leggatt J:

“[111] The law implies into a contract of employment an undertaking by the employee to carry out the employment with fidelity and good faith. It is long established that this duty of fidelity includes an obligation on the employee to use information which is confidential to the employer solely for the purposes of the employment relationship and not for any other purpose: see *Merryweather v Moore* [1892] 2 Ch 518, 524 and *Robb v Green* [1895] 2 QB 315, 317, 318-319, 320.”

### *Three classes of information*

13. *Faccenda Chicken Ltd v Fowler* [1985] FSR 105 concerned an action against former employees for breach of an implied term in their contracts of employment not to use sales information acquired in the course of their employment. In his judgment Gouling J divided information to which an employee may have gained access into three classes (at 114-116). The first class was information which is not confidential. The second was confidential information acquired during the normal course of employment which remains in the employee's head and becomes part of his own experience and skills. The third was confidential information in the form of specific trade secrets.

14. It should be noted that in *Faccenda Chicken* and later judgments ‘trade secrets’ is a term which has been used narrowly to mean information having a high degree of confidentiality. Directive 2016/943 uses the term ‘trade secrets’ broadly, covering any sort of confidential information and thus both of Goulding J’s classes 2 and 3. To avoid confusion, I will use Goulding J’s class numbers rather than referring to trade secrets.
15. Goulding J ruled that the general duty of good faith restrains an employee from misusing his employer’s confidential information, both classes 2 and 3, during the course of his or her employment. Such misuse would include the disclosure of the information to the employer’s competitor. The duty of good faith comes to an end upon the termination of employment and with it the end of any restraint on the use of class 2 information. There is a further, narrower implied term, biting on class 3 only, not to disclose or otherwise misuse class 3 information even after the end of the employment.
16. On appeal, the Court of Appeal ([1987] Ch 117) agreed with the application of two different implied terms to two classes of confidential information. Neill LJ (giving the judgment of the Court) said (at 135-7):

“(3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see *Vokes Ltd. v. Heather*, 62 R.P.C. 135); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see *Robb v. Green* [1895] 2 Q.B. 315 and *Wessex Dairies Ltd. v. Smith* [1935] 2 K.B. 80.

(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (*Amber Size and Chemical Co. Ltd. v. Menzel* [1913] 2 Ch. 239), or designs or special methods of construction (*Reid & Sigrist Ltd. v. Moss and Mechanism Ltd.* (1932) 49 R.P.C. 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.

The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only ‘confidential’ in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith. This distinction is clearly set out in the judgment of Cross J. in *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1; [1965] R.P.C. 239 where he had to consider whether an ex-employee should be restrained by injunction from



making use of his recollection of the contents of certain written printing instructions which had been made available to him when he was working in his former employers' flock printing factory. In his judgment, delivered on 29 April 1964 (not reported on this point in [1965] 1 W.L.R. 1), he said [1965] R.P.C. 239, 253:

‘In this connection one must bear in mind that not all information which is given to a servant in confidence and which it would be a breach of his duty for him to disclose to another person during his employment is a trade secret which he can be prevented from using for his own advantage after the employment is over, even though he has entered into no express covenant with regard to the matter in hand. For example, the printing instructions were handed to Holloway to be used by him during his employment exclusively for the plaintiffs' benefit. It would have been a breach of duty on his part to divulge any of the contents to a stranger while he was employed, but many of these instructions are not really ‘trade secrets’ at all. Holloway was not, indeed, entitled to take a copy of the instructions away with him; but in so far as the instructions cannot be called ‘trade secrets’ and he carried them in his head, he is entitled to use them for his own benefit or the benefit of any future employer.’

The same distinction is to be found in *E. Worsley & Co. Ltd. v. Cooper* [1939] 1 All E.R. 290 where it was held that the defendant was entitled, after he had ceased to be employed, to make use of his knowledge of the source of the paper supplied to his previous employer. In our view it is quite plain that this knowledge was nevertheless ‘confidential’ in the sense that it would have been a breach of the duty of good faith for the employee, while the employment subsisted, to have used it for his own purposes or to have disclosed it to a competitor of his employer.”

17. The Court of Appeal differed with Goulding J’s analysis as to where the line was to be drawn between classes 2 and 3. Goulding J seems to have started with class 2, i.e. information carried in the employee’s head as part of his working skill; all other confidential information fell within class 3. The Court of Appeal in effect started with class 3, setting out a non-exhaustive list of four characteristics by which it can be recognised. If confidential information is not within class 3, it falls within class 2.
18. By drawing the distinction in this way the Court of Appeal appears to have contemplated the possibility (which must exist) that a former employee can carry in their head information which was not deliberately memorised but which is class 3 information and therefore subject to an implied term restraining its use or disclosure after the end of the employment.
19. The characteristics likely to confer upon information the status of class 3 were set out by the Court of Appeal at pp.137-8. In summary they are:
  - (a) The nature of the employment. Employment in a capacity where confidential material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature.

- (b) The nature of the information itself. A secret process of manufacture was given as an obvious example of class 3 information. The fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.
  - (c) Whether the employer impressed on the employee the confidentiality of the information. Though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information may assist in determining whether or not the information can properly be regarded as within class 3.
  - (d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose.
20. This was discussed further by the Court of Appeal in *Lancashire Fires Ltd v S.A. Lyons & Co Ltd* [1996] FSR 629 (CA), at 668-9.
21. I would therefore summarise the effect of the Court of Appeal's judgment in *Faccenda Chicken* in this way. If the information in issue falls within class 3, an implied term in the employee's contract of employment restrains the use or disclosure of the trade secret without the employer's consent, both during and after the period of employment. If the information is confidential but is not within class 3, it falls within class 2. The general duty of good faith restrains misuse of class 2 information during the period of employment, such as by disclosing it to a competitor of the employer, but that duty terminates when the employment ends.
22. It does not follow, however, that class 2 information can always be freely used or disclosed after the end of the relevant employment. This is for two reasons.

*Continuing liability for misuse of class 2 information during employment*

23. First, if the class 2 information was not part of the employee's experience and skills carried in the head of the employee when they left employment, in practice the former employee is likely to have retained this information by a means such as copying a document while still employed or by deliberately memorising the information. Although a breach of confidence in relation to class 2 information can only be consequent upon acts done during the individual's employment, the Court of Appeal in *Faccenda Chicken* expressly approved earlier authorities in which it was found that copying or making a list of the employer's customers for use after the end of the employment, or deliberately memorising the list for such use, is liable to constitute an act in breach of confidence, in particular *Robb v Green* [1895] 2QB 315 (CA) (copying a list of the names and addresses of customers). See also *Universal Thermosensors Ltd v Hibben* [1992] FSR 361, at 372-3 (employees taking lists of customers' product requirements, prices and contacts during their employment for use in their own business).
24. It follows that while a defendant will not be in breach of an implied term in his contract of employment for anything done in relation to class 2 information post-employment, he or she will remain liable for their acts in breach done during the employment, such as copying down customer information or deliberately memorising

it for use or disclosure afterwards. If that information is or threatens to be used or disclosed afterwards, the copying or memorising is liable to give rise to a claim for an injunction and/or damages.

*Selling acquired knowledge and experience*

25. The second reason why the use or disclosure of class 2 information might be restricted after the end of the relevant employment is that the Court of Appeal expressly left open the possibility that even if class 2 information is part of the employee's experience and skills and therefore could be used by the employee for their benefit and the benefit of a new employer, it may be that the information cannot just be sold off. Neill LJ said (at 138-9):

“We would wish to leave open, however, for further examination on some other occasion the question whether additional protection should be afforded to an employer where the former employee is not seeking to earn his living by making use of the body of skill, knowledge and experience which he has acquired in the course of his career, but is merely selling to a third party information which he acquired in confidence in the course of his former employment.”

*Public policy*

26. The judgment in *Faccenda Chicken* with regard to experience and skills reflects a consistent reluctance by courts to allow a term which has the effect of preventing an individual from using information acquired in the normal course of their job when subsequently employed elsewhere. It could be viewed as the application of public policy to this area of the law. In the parallel context of an equitable duty of confidence, the Supreme Court spelt this out in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31; [2013] 1 WLR 1556. Lord Neuberger PSC (with whom the remainder of their Lordships agreed) said (at [44]):

“Particularly in a modern economy, the law has to maintain a realistic and fair balance between (i) effectively protecting trade secrets (and other intellectual property rights) and (ii) not unreasonably inhibiting competition in the market place. The importance to the economic prosperity of the country of research and development in the commercial world is self-evident, and the protection of intellectual property, including trade secrets, is one of the vital contributions of the law to that end. On the other hand, the law should not discourage former employees from benefiting society and advancing themselves by imposing unfair potential difficulties on their honest attempts to compete with their former employers.”

27. The balance referred to by Lord Neuberger is reflected in Directive 2016/943, including art.1(3) (see above).

*The distinction between Goulding J's classes 1 and 2*

28. In *Faccenda Chicken* the Court of Appeal did not discuss information which has no relevant quality of confidence and why that would be the case, i.e. Goulding J's class 1.

29. The best guide to the distinction between information which is confidential and that which is not is now to be found in the definition of ‘trade secret’ in art.2(1) of Directive 2016/943 (always bearing in mind the broad interpretation of ‘trade secret’ in the Directive).

*The relevance of the employee’s knowledge as to confidentiality*

30. The Court of Appeal in *Faccenda Chicken* did not directly address the question whether it was necessary for the employees to have known that the information in question was confidential for an implied term of confidence to bite, whether in the context of class 2 or 3, although generally this would be self-evident in relation to class 3.
31. In the context of an equitable obligation of confidence, the obligation arises where the recipient of the information appreciated, or ought to have appreciated that it was confidential, see below. It seems to me that consistently with this, an implied contractual obligation of confidence binds the employee only where the employee knew, or a reasonable person in his or her position would have known, that the information was confidential.

*Information taken which also forms part of the individual’s experience and skills*

32. Class 2 information may have been, for instance, contained in a document which was taken by an employee during their employment for use afterwards, yet some of the information in the document is within his or her experience and skills, held in mind. After the end of the employment can the employee still use that part of their experience and skills?
33. In *Roger Bullivant Ltd v Ellis* [1987] FSR 172, Nourse LJ (with whom May LJ agreed) said (at p.181):

“The value of the card index to Mr. Ellis and the other defendants was that it contained a ready and finite compilation of the name and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular individuals to be contacted. While I recognise that it would have been possible for Mr. Ellis to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs’ property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of *Robb v. Green* which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained.”

34. The penultimate sentence in that passage was explained by Nicholls V-C in *Universal Thermosensors* at 373-4:

“The one point of disagreement on the law concerned a contention by the plaintiff to the effect that once it is shown that the defendants had stolen

documents containing confidential information, and that they had used those documents in soliciting orders, there arises an irrebuttable presumption that any business resulting from the orders derives from the wrongful use of the confidential information and the defendants are liable in damages accordingly. The court will not inquire at all into whether the defendants knew the name of the particular customer or contact anyway. I am not able to accept a proposition expressed in such comprehensive and rigid terms. In assessing and awarding damages here the object of the law is to award fair compensation to a plaintiff, for the wrong done to him by a defendant's misuse of his confidential information. Whether particular business obtained by a defendant was obtained as a result of misuse by him of a plaintiff's confidential information is essentially a question of fact in each case.

In seeking to answer that question, the court will inquire into the facts and surrounding circumstances as much in this case as in any other. In doing so, of course, a court will not take leave of commonsense. It will view with considerable circumspection, even scepticism, a contention by a defendant, who has chosen to use a list, that he already carried some of the information in his own head and that looking at the list for any particular name or names was quite superfluous and unnecessary. Moreover, any doubts and obscurities arising from the evidence are likely to be resolved against the defendant. So that, in practice, such a defendant will have a difficult row to hoe. But such an approach by the court is far removed from saying that in no circumstances will the court look further once user of the list is proved. That would be altogether too sweeping, and it could easily result in a plaintiff being awarded more than fair compensation for the loss suffered by him from the misuse of his confidential information. I do not understand Nourse L.J. to have said otherwise in *Roger Bullivant Ltd. v. Ellis* [1987] I.C.R. 464 at 475, when he observed that, having made deliberate and unlawful use of the plaintiff's property, a defendant cannot complain if he finds that the eye of the law is unable to distinguish between the potential customers whom, had he so chosen, he could have contacted lawfully and those whom he could not."

*The relevance of class 2 information being publicly available*

35. Lewison LJ observed in *Force India Formula One Team Ltd v Aerolab Srl* [2013] EWCA Civ 780; [2013] RPC 36 (with whom Briggs LJ and Sir Stanley Burton agreed):

"It is certainly not a defence [to an allegation of breach of confidence] that the person in breach of confidence could have obtained the information elsewhere if he did not in fact do so." (at [72])

36. Lewison LJ referred to *Saltman Engineering Co Ltd Campbell Engineering Co Ltd* (1948) 65 RPC 203 in which the rationale for that proposition was explained by the Court of Appeal:

"In that case, the plaintiffs instructed the defendant to make tools for the manufacture of leather punches in accordance with drawings which the plaintiffs provided to the defendant for this purpose. The defendant used the drawings to make tools, and the tools to make leather punches, on their own

account. The finished product (i.e. the leather punches) were readily available to buy in the shops; and the defendants could have bought one and reverse engineered it. But they did not. Lord Greene M.R. said at p.215:

‘What the defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship. No doubt, if they had taken the finished article, namely, the leather punch, which they might have bought in a shop, and given it to an expert draughtsman, that draughtsman could have produced the necessary drawings for the manufacture of machine tools required for making that particular finished article. In at any rate a very material respect they saved themselves that trouble by obtaining the necessary information either from the original drawings or from the tools made in accordance with them. That, in my opinion, was a breach of confidence.’”

37. Although Lord Greene spoke of the defendants saving themselves a great deal of labour and calculation and careful draughtsmanship, it seems to me that the same reasoning will apply whenever the defendant saves himself a significant amount of trouble after his employment by obtaining information from documents taken or made during his employment, instead of sourcing the information from public sources. In *Seager v Copydex (No. 1)* [1967] 1 WLR 923 Lord Denning said (at p.931):

“When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble.”

38. *Seager* was concerned with an equitable duty of confidence but I think the same principles apply in the context of an implied term of confidence in a contract.

### **Equitable duty of confidence**

39. Separately from any implied obligation arising in contract, there co-exists the possibility of an equitable obligation of confidence. It was explained by Lord Neuberger PSC (with whom the remainder of their Lordships agreed) in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31; [2013] 1 WLR 1556:

“[22] ... [A]n action in breach of confidence is based ultimately on conscience. As Megarry J said in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 46, ‘the equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust.’

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

...

[25] Liability for breach of confidence is not, of course, limited to such classic cases. Thus, depending on the other facts of the case, a defendant who learns of a trade secret in circumstances where she reasonably does not appreciate that it is confidential, may none the less be liable to respect its confidentiality from the moment she is told, or otherwise appreciates, that it is in fact confidential. From that moment, it can be said that her conscience is affected in a way which should be recognised by equity.”

40. In *Primary Group (UK) Ltd v The Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch); [2014] RPC 26, Arnold J detected an inadvertent inconsistency in paragraph 23 of *Vestergaard*:

“[222] In the first sentence Lord Neuberger is plainly applying Lord Goff's statement of principle and stating an objective test, consistently with *Campbell v MGN* and *Imerman v Tschenguiz*. Although the second sentence, if read in isolation, might be thought to indicate that the test is subjective, Lord Neuberger cannot have intended to contradict what he had said in the first sentence. Nor can he have intended to depart from *Campbell v MGN* and *Imerman v Tschenguiz*, which, although they were not cited in *Vestergaard*, he would obviously have been familiar with. I would add that Lord Neuberger went on at [39] to say that an injunction to restrain misuse of confidential information against a recipient of confidential information ‘might well be justified, once it could be shown that she appreciated, or, perhaps, ought to have appreciated, that [the information was] confidential’. Again, this seems to recognise that the test is objective, albeit with what I consider to be surprising hesitation.”

41. In *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC 457, Lord Nicholls said at [14]:

“... the law imposes a ‘duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.”

42. The short point is that the test regarding the defendant's appreciation of whether the information was confidential, is objective in the sense that it requires the claimant to show that the defendant *ought* to have appreciated that it was confidential, irrespective of her actual state of mind. This corresponds to the test as formulated by Megarry J in *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41, at 48 :

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

43. I earlier quoted the passage from Lord Neuberger’s judgment in *Vestergaard* at [44] in which he stated the need to balance, on the one hand, the effective protection of trade secrets and on the other, not unreasonably inhibiting competition, particularly not imposing unfair difficulties in the honest attempts of employees to seek new employment. I think that, consistently with the law on implied contractual terms of confidence, the balance will generally be achieved if a former employer is entitled to enforce an equitable duty of confidence to restrain the use of his confidential information by a former employer except where that information forms part of the experience and skills acquired by the former employee during the normal course of doing his or her job, held in mind at the time of leaving the employment. The exception will not apply to any information deliberately memorised for use or disclosure after the conclusion of the employment or to any class 3 information (to use the classification taken from the law on implied terms).

#### **Vicarious liability of an employer**

44. In *Vestergaard* Lord Neuberger stated that a third party, such as an employer, may be liable for breach of confidence even where the employer is not aware (and, presumably, would not reasonably be aware) of any confidentiality in the information concerned:

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

#### **Clarification of the issues in dispute**

45. A point made on behalf of TCL and Messrs La Gette and Bishop was that Trailfinders was attempting to argue issues which fell outside those pleaded and outside the list of issues agreed by the parties and approved at the CMC.
46. It is a feature of this court that the parties are each required to think through their case sufficiently by the time of the CMC such that all issues they wish to raise are clearly pleaded and thereby find their way into the list of issues identified at the CMC. The rules make it difficult to submit any material at trial in support of any other issue (see CPR Part 63.23(1) and (2)) with the consequence that, in effect, parties cannot stray outside those issues. It discourages costly additional applications and consequential steps in the litigation should further arguments from time to time come to the mind of any party. Requiring the parties to put all their cards on the table by the time of the CMC may also assist in promoting settlement.



47. This does not mean that the issues identified at the CMC are forever fixed in stone. It may be that proposed amendments to the pleadings after the CMC are agreed between the parties; if the parties are content to have further issues aired and resolved at trial, the amendments will probably be allowed. Unforeseen matters may emerge after the CMC which justify amendments to a party's case even if the amendments are resisted. It is also frequently the case that some of the issues identified at the CMC have fallen away by the time of the trial.
48. However, where there is a dispute at trial as to whether an issue has been raised on the pleadings, there will be a presumption that the pleadings and answers to Part 18 Requests are to be read consistently with the list of issues settled at the CMC (subject to amendment of the pleadings after the CMC). Rule 63.23(1) and (2) cannot be circumvented by a creative interpretation of the pleadings or by answers given to Part 18 Requests.
49. At the start of the trial Mr Mill identified arguments which, he said, were being advanced in the Trailfinders' skeleton but which had no basis in their pleaded case or in the list of issues settled at the CMC.

*Class 3 confidential information*

50. Trailfinders' skeleton contained an argument by way of an alternative to its allegation of misuse of class 2 information, namely that the confidential information fell within class 3. Mr Mill pointed out that this had not been pleaded. Mr Mansfield very properly disavowed the argument in opening, together with the corresponding part of his skeleton argument.

*Duty of good faith and fidelity*

51. Mr Mill further submitted that Trailfinders was not only saying that the individual defendants were in breach of their duty of good faith insofar as it led to an implied obligation not to disclose class 2 confidential information, but sought now to run a wider argument, alleging a breach of the duty of good faith and fidelity in its broader sense, not tied to any misuse of confidential information.
52. In September 2019 Trailfinders applied to re-amend its Particulars of Claim. By an Order dated 2 October 2019 I allowed agreed re-amendments, but refused permission to make other re-amendments, including an allegation of a breach by the defendants of their duty of good faith and fidelity in the broader sense.
53. The duty of good faith as pleaded by Trailfinders consequently refers only to that part which implies an obligation not to misuse or disclose confidential information. At least by the time of closing argument I did not understand Mr Mansfield to put his case any more widely than that.

*Breach by the former employee defendants of the express terms of their contracts*

54. Trailfinders' skeleton, unlike the Re-Amended Particulars of Claim, quoted express terms of the contracts of employment of Mr La Gette and Mr Bishop. TCL saw this as an unpleaded attempt to make an allegation of breach of those express terms. Mr Mansfield told me that the express terms were relied on solely to identify whether the

relevant material – that said to have been unlawfully disclosed – was confidential. There was no argument at trial based on an alleged breach of any express term.

*Vicarious liability of TCL if Mr La Gette and Mr Bishop were not employees*

55. An argument undoubtedly pleaded by Trailfinders was that TCL was vicariously liable for the acts in breach of confidence done by its employees. The defendants denied that any of the individual defendants was ever an employee of TCL.

56. Trailfinders' skeleton also raised an extended argument, namely that vicarious liability was incurred by TCL even if the other defendants were not employees. The judgment of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 was cited. Mr Mansfield submitted that the argument was soundly based on Trailfinders' pleaded case, relying on paragraph 53 of the Re-Amended Particulars of Claim. That paragraph said:

“53. In the further alternative, it formed part of the contractual relationship between TCL and each of the Former Employees that each of the Former Employees should acquire data, put that data into TCL's systems, and utilise that data for the benefit of TCL's business. In acquiring that data, providing it and utilising it, each of the Former Employees was acting as agent for TCL and accordingly the knowledge of each of the Former Employees as to how that data was obtained is attributable to TCL for the purposes of paragraph 21 above.”

57. Like the defendants, I read that paragraph as an allegation that the Former Employees (the title there given to them has some significance) were agents of TCL.

58. The list of issues agreed at the CMC did not raise the question whether TCL was vicariously liable if the other defendants were neither employees nor agents. Allowing Trailfinders to run the point would have visited a significant unfairness on the defendants who neither filed evidence nor prepared their case to deal with it. I therefore do not allow the argument.

*Mr Bishop's Contact Book*

59. An issue in dispute is what, if any, confidential information was taken from Trailfinders by its former employees. In the course of disclosure and evidence Mr Bishop revealed that he had kept what came to be referred to as his 'contact book' which contains the names, contact details and booking reference numbers of 136 customers.

60. Paragraph 23 of the Re-Amended Particulars of Claim makes the allegation that Mr Bishop and the other former employees used and/or disclosed Trailfinders' confidential information. It continues:

“Trailfinders is not presently aware of the full extent of the Former Employees' acts of breach of confidence and reserves the right to give further particulars following disclosure and/or evidence in this action or its own further investigations.”

61. Mr Mill submitted that once the contact book came to the knowledge of Trailfinders, reliance on it should have been expressly pleaded, as foreshadowed in paragraph 23. There was no such amendment so Trailfinders could not rely on it.
62. I disagree. It is true that in this court the parties must set out concisely in their pleadings all the facts and arguments on which they intend to rely at trial, see rule 63.20(1). This does not require each party to list exhaustively all the evidence on which it will rely, amending their pleading every time something new comes to light. An important guideline is whether reliance on evidence or an argument is likely to come as a surprise to an opposing party if it is not pleaded (see the IPEC Guide, July 2019, para. 4.5(a)).
63. I have no doubt that Mr Bishop's contact book was disclosed because he and his legal team were conducting this litigation in a correct manner and with every expectation that Trailfinders would rely on the contact book in support of its case. In my view Trailfinders is entitled to do so.

### **The witnesses**

64. On behalf of Trailfinders I heard evidence from Ross Simpson, its Sales Director, and David Ryder who is a Corporate Travel Supervisor. Stephen Byrne, CEO of TCL gave evidence, as did Mr La Gette and Mr Bishop.
65. I found Mr Simpson and Mr Ryder both to be good witnesses, answering questions clearly and where necessary acknowledging and explaining minor inconsistencies in their witness statements.
66. My impression was that both Mr La Gette and Mr Bishop were for the most part doing their best to give honest evidence, although Mr Bishop was more consistently willing to be direct and clear in the answers he gave. Mr Byrne was reluctant to accept key matters put to him even though, given the documentary evidence, they seemed to warrant acceptance.

### **Whether the information relied on by Trailfinders was confidential**

67. The information in issue was identified in paragraph 7 of the Re-Amended Particulars of Claim. I will call this the 'Client Information'.

“In the course of its business Trailfinders maintains records of information relating to its clients including:

- (1) Clients' names, nationalities and dates of birth, passport numbers and frequent flyer numbers.
- (2) Clients' contact details, including home addresses, telephone numbers and email addresses.
- (3) Details of trips that clients have booked with Trailfinders, including provisional bookings and past bookings. Such details include itineraries, hotel bookings, flight details and prices.

- (4) Booking reference numbers which are assigned to clients' bookings and used by clients to access Viewtrail as set out below.
  - (5) Details of clients' typical budgets, interests, preferences and special requirements.
  - (6) Information relating to the time of year clients' tend to book trips and significant dates such as honeymoons and anniversaries."
68. 'Viewtrail', referred to in paragraph 7(4), is an online portal used by Trailfinders. Once a customer has booked a trip, they may access Viewtrail on Trailfinders' website which records their booking details. Until a change made after this dispute started, customers could do this using their surname and a unique reference assigned to their booking, with which they had been provided.
69. As appears from the authorities discussed above, the Client Information is highly characteristic of information long regarded by the courts as capable of being confidential and thus liable to be subject both to an implied term of confidence in a contract of employment and to an equitable obligation of confidence.
70. The Client Information was stored on a Trailfinders' system to which only Trailfinders' employees had access, using an ID and alphanumeric password allotted to each employee. Some of the information could also be accessed by clients via Viewtrail, but each client could view only data relating to themselves.
71. Mr Simpson described the Client Information as 'the lifeblood of the business' Mr Byrne confirmed that information of the type in issue would be valuable to any travel business and that in so far as it applied to TCL's customers, TCL regarded it as being confidential. Mr La Gette confirmed that the Client Information contained confidential information and he accepted that parts of it were on their own confidential.
72. I have no doubt and I find that the Client Information was confidential to Trailfinders. It has the characteristics set out in art.2(1) of Directive 2016/943. It falls within Goulding J's class 2 of confidential information held by an employer.
73. There was a suggestion by the defendants that the Client Information could not be the subject of an action for breach of confidence because it had not been sufficiently protected from public disclosure by Trailfinders. I reject that. The protection may not have been as rigorous as it should have been but Trailfinders clearly took steps to ensure that the Client Information was not openly available to anyone by requiring the use of a password or, in the case of Viewtrail, limiting access to information to clients only if their name and booking reference was known.
74. By way of a related argument, it was said that Trailfinders' employees were not sufficiently informed of the confidential nature of the Client Information such that they could be liable for its use or disclosure without Trailfinders' permission. I also reject that argument. Mr La Gette accepted that he knew that a lot of the information forming the Client Information was confidential. He thought that some of it was not because it could be obtained from public sources. That is a separate matter which I discuss below. Mr Bishop held a similar view.

### **The duties owed by Mr La Gette and Mr Bishop**

75. I find that the implied terms of confidentiality in the contracts of employment between Trailfinders and its employees restrained the employees from using or disclosing the Client Information save in pursuance of the business interests of Trailfinders.
76. That duty ceased after the end of their employment. However, to the extent that any employee acted in breach of the implied term during the course of their employment, liability remains. Such acts in breach would include copying or deliberately memorising any confidential parts of the Client Information for use by the employee after leaving Trailfinders' employment.
77. The equitable obligation of confidence owed by Trailfinders' employees was similar, but differed in that the obligation did not cease once Mr La Gette and Mr Bishop left the employment of Trailfinders. That said, the obligation cannot be enforced by Trailfinders in relation to information forming part of the experience and skills acquired during the normal course of their employment with Trailfinders. The latter covers only information that was held in the mind of Mr La Gette or Mr Bishop, as the case may be, when each left Trailfinders' employment, and excludes any information which was deliberately memorised.

### **Relevant acts by Mr La Gette**

78. In closing, Trailfinders' relied only on acts admitted by Mr La Gette, although it maintained the position that there were likely to have been other, similar, acts done in breach of confidence.

### *Superfacts*

79. The first type of act admitted concerned a software system owned by Trailfinders called 'Superfacts', which records information about clients. Mr Simpson identified a wide range of information held on the system and his characterisation of the information was confirmed by Mr La Gette. Superfacts is of particular value when a client calls a sales consultant. The software recognises the telephone number of the client and causes other information relating to that client to appear on the consultant's screen.
80. Sales consultants access Superfacts using an identification unique to them and a password. Generally it is only possible to access Superfacts while on Trailfinders' premises but in exceptional circumstances, such as having responsibility to take calls on Christmas Day, an individual may be authorised to log in remotely, in which case this will be enabled by Trailfinders' IT team.
81. When the Defence of the Second to Fifth Defendants was re-amended, the following paragraphs were among those added:
  - "25A. Prior to the commencement of his franchise arrangement with TCL, Mr La Gette compiled a list of contacts and certain information about those contacts to be uploaded in due course to his database within TCL's system ('the List'). The contacts in the List included friends, family members, former school and

university friends, social and business contacts of Mr La Gette, as well as certain clients that Mr La Gette had dealt with during the course of his employment at Trailfinders.

- 25B. Mr La Gette compiled the List using information from a range of sources including: (i) [his] own knowledge and skill; (ii) his personal accounts and devices; (iii) other third parties (including friends and family members); and (iv) other publicly available sources (such as his contacts' personal or business websites, LinkedIn and 192.com).
- 25C. For the sake of expedience, Mr La Gette took the details of a small number of the clients on the List from Trailfinders' Superfacts system, albeit he could have obtained that information from the sources set out in the paragraph above. The confidentiality of that information is denied, as set out at paragraph 7 above. Mr La Gette cannot now recall precisely which, and how many, of the contacts in the List that applied to. He estimates the number to be between 5 and 8.
- 25D. On 14 October 2016 Mr La Gette sent the List to TCL. This was to enable the information in the List to be input into Mr La Gette's database within TCL's system. That database was to be used by Mr La Gette once he began working as a franchisee of TCL. It was not, so far as Mr La Gette was aware, to be used by anyone else at TCL in the ordinary course of business. The intention was that Mr La Gette would use the contact information to contact certain of the individuals in the List with a view to obtaining business from them."
82. As pleaded, Mr La Gette's defence was that the information he took from the Superfacts system was not confidential. In cross-examination he explained this in more detail. He said that he copied information from Superfacts on to an A4 sheet of paper on the last day of his employment, 4 October 2016. The information was then uploaded on to a spreadsheet which was given to TCL in advance of his induction into that company. Mr La Gette said that he had been very confident that he would have been able to collect the information himself without resorting to Superfacts. But for ease of time and speed he filled in a few of the gaps. He did not believe that he was taking anything confidential because the gaps could have been filled from publicly available sources.

#### *Client A*

83. Mr La Gette also admitted that before he left Trailfinders he printed two hard copies of the information relating to an individual referred to in the proceedings as 'Client A'. Client A was described in the Re-Amended Defence of the Second to Fifth Defendants as a longstanding and high-value client of the Trailfinders' Nottingham office, with whom Mr La Gette had developed a strong professional relationship over many years. When Mr La Gette left Trailfinders he was in the process of booking two large trips for Client A. He wanted the information about those trips so that he could complete the bookings for Client A after he left Trailfinders.

#### *Viewtrail*

84. As I have said, Viewtrail is the name of another computer system used by Trailfinders, this one accessible by clients. At the relevant time a client could access their details by using their booking reference number and surname or alternatively using a hyperlink sent by a Trailfinders sales representative.
85. In the Re-Amended Particulars of Claim Trailfinders identified 30 occasions on which Mr La Gette had accessed Viewtrail after he had left Trailfinders' employment, obtaining information in relation to 10 clients.
86. In the Re-Amended Defence of the Second to Fifth Defendant this was admitted (the admission appears to have been made on the assumption that there were only 9 clients, but nothing turned on it). It was also admitted that Mr La Gette solicited the business of all those clients after he had left Trailfinders' employment and that 8 of them had booked trips with Mr La Gette since he started work with TCL.

### **Relevant acts by Mr Bishop**

87. Two categories of act by Mr Bishop were relied on in closing.

#### *Viewtrail*

88. The first consisted of accessing Viewtrail after he left Trailfinders' employment. He admitted that he had done so on 63 occasions. Mr Bishop's pleaded case was that of the 32 clients concerned, he had received permission from 23 of them to access their Viewtrail details.

#### *The contact book*

89. About six months before Mr Bishop left Trailfinders he started to assemble what came to be referred to as his 'contact book'. This contained the names, contact details and other information about clients he had dealt with. Mr Bishop said that the majority of this information had been taken from Trailfinders' Superfacts system.

### **Overlap data**

90. In advance of the trial Trailfinders produced what was called the 'overlap data' that is to say a list of individuals who appear on both Trailfinders' Superfacts system and on the databases maintained by TCL for use by Mr La Gette and Mr Bishop, together with data relating to those individuals. I did not find it to be of much value. By itself, the existence of clients which were common to both Trailfinders and TCL proved nothing. It could mean that names were passed by Mr La Gette and/or Bishop to TCL in breach of confidence, or alternatively that the identities of overlap clients of TCL were within the experience and skills of Mr La Gette or Mr Bishop, or had been acquired from publicly available sources.

### **Whether Mr La Gette was in breach of confidence**

91. Mr La Gette resigned from Trailfinders on 30 September 2016. About 6 weeks earlier, on 16 August 2016, he discussed his proposed move from Trailfinders to TCL in a phone conversation with Cathy Oldfield, an employee of TCL. I was shown a transcript and given an audio copy of the conversation. Several sections of the conversation were drawn to my attention, with one passage on which Trailfinders

particularly relied. Here Mr La Gette and Ms Oldfield discussed the date on which Mr La Gette should hand in his notice to Trailfinders and details of his transfer to TCL. He said:

“I mean, I’ve been, I’m a good, decent person, I promise you, but I’ve been taking what I need to take at the moment. I’ve got my, I’m only interested in my clients, I’m not tapping up other people but I’ve got my details and I’ve been keeping email trails clear and stuff cos I’m aware they may be looking. It’s all so exciting. It’s like being a spy.

*[Ms Oldfield laughs and Mr La Gette continues:]*

I feel dreadful, you know, I do not like it. And I’m not, I’m not going to, people get to know me over time and I’m not saying, you know, I’m perfect this, perfect that but I just, it does feel a bit, you do feel a bit sort of, you question yourself I think. Am I being a bit underhand here, but at the end of the day I’m only taking contacts. I’m giving, I’m gonna say to clients I’ve had this opportunity to work from home ...”

92. Mr La Gette was cross-examined about this. He denied that in this part of the conversation he was talking about taking client details from Trailfinders’ records. He said that he was having a soul-searching moment because he was leading a double life, not telling colleagues he had known for many years that he was leaving.
93. Although in this passage Mr La Gette spoke of keeping email trails clear because he was aware that, presumably Trailfinders, may be looking, he said that he felt like a spy and later that he was only taking contacts, I find the passage and the transcript more generally was too ambiguous for me to conclude that Mr La Gette was saying that he had copied or that he intended to copy client information from Trailfinders’ records. He may just have been telling Ms Oldfield that he intended to bring clients with him to TCL, which he did.
94. There was also evidence about a further phone call, this one with Helena Thompson of TCL on 21 September 2016, shortly before Mr La Gette left Trailfinders. The call shows, which is anyway not in doubt, that Mr La Gette was going to provide at the least names and contact details of his Trailfinders clients. This was part of the exchange:

Ms Thompson: Yeah, the only thing we need to have is their title so that’s Mr, Mrs or whatever, first name, surname and email address, there are also fields for their phone number and their postal address if you’ve got them, you can put them in and they will get uploaded automatically.

Mr La Gette: And as long as they are in that format they will upload.

Ms Thompson: Yeah, that’s fine, but if you haven’t got all their details don’t worry about it, it’s just the email we need really at this stage.



95. It is clear that Mr La Gette provided a lot of contact information to TCL after he left Trailfinders on 30 September 2016. On 14 October 2016 an individual at TCL from the ‘Graduate (Recruitment)’ section, whose name was redacted from the copies of emails in evidence, responded to Mr La Gette’s having sent TCL his client list. The email had the subject heading ‘Re: Andy La Gette – Client list’. It included this:
- “Thanks for sending this over. It looks largely fine, and fantastic that you have so many contacts!”
96. Mr La Gette confirmed in cross-examination that he had more than 200 contacts. It is apparent from his conversation with Ms Thompson that he is likely to have provided the names of those contacts, at the minimum their email addresses and possibly in addition some phone numbers and postal addresses.
97. Ms Thompson’s remark that all TCL really needed was a name and an email address makes sense. If, for instance, it were the case that Mr La Gette had copied down all his clients’ names and email addresses to be uploaded on TCL’s system, I do not think that it would have made any real difference had Mr La Gette drawn the remaining information about those clients from public sources or by speaking to the clients. What mattered had been copied and passed to TCL.
98. However, I do not know that this was the case. To the extent that Mr La Gette’s case is that he did this from his own knowledge, I doubt that he remembered over 200 names, far less 200 email addresses, leaving aside other information about his clients, but it is impossible for me to say how much he did remember.

*Information taken from Superfacts*

99. At least some of the information which Mr La Gette passed to TCL was copied from the Superfacts system on his last day of work at Trailfinders. The argument advanced by Mr La Gette in cross-examination and later on his behalf was first, that none of this information was confidential because it was also available from public sources. But the names of all his clients was not public knowledge and for the reasons discussed above, it is no defence to an allegation of breach of confidence by taking information from confidential data held by an employer that the information could have been obtained from publicly available sources.
100. Secondly it was said that this information was also part of Mr La Gette’s experience and skills, held within his memory. As Nicholls V-C observed in *Universal Thermosensors* (see above), the argument that a former employee went to the trouble of copying information although he need not have bothered because it was in his mind makes for “a difficult row to hoe”. I have no good reason to accept that argument in the present case and I do not.
101. I find that the information Mr La Gette copied from Superfacts was class 2 information and at least in part beyond his experience and skills. The copying was done in breach of the implied term in Mr La Gette’s contract of employment. The disclosure of that information to TCL and its subsequent use by Mr La Gette was also in breach of his equitable obligation of confidence to Trailfinders. Further, these were unlawful acts within the meaning of art.4(2) and (3) of Directive 2016/943.

*Client A*

102. For similar reasons Mr La Gette is liable for the copying of information relating to Client A, its subsequent disclosure to TCL and its use by Mr La Gette once he had joined TCL.

*Viewtrail*

103. Mr La Gette admitted that he accessed Viewtrail after he had left Trailfinders and used that information for his TCL franchise business. He accepted that a lot of information on Viewtrail was confidential.
104. Mr La Gette's reason for being entitled to that information was that anyone who knew the relevant clients' surnames and booking references could access Viewtrail and obtain it. It was also his and Mr Bishop's written evidence that names and booking references were given to third party suppliers of services used by Trailfinders' clients, so they too had access to the Viewtrail information.
105. As to the latter point, Mr La Gette accepted in cross-examination that third party suppliers were not given names and booking references in order to permit them access to Viewtrail, but for other reasons connected with providing a service to the clients. Mr La Gette also accepted that the suppliers may not have known that they could have gained access to Viewtrail and that he knew of no instance in which this had happened.
106. In his witness statement Mr La Gette said Trailfinders actively encouraged clients to use Viewtrail to forward their quotes to friends and family. In cross-examination he accepted that this was done by a friends and family link that clients would find when they accessed their own Viewtrail information. He was unsure as to how much of the Viewtrail information could be transferred using the link.
107. Mr La Gette also said in his witness statement that in about October 2015 he had spoken to his General Manager, Steve Lane, about former employees accessing Viewtrail. According to Mr La Gette, Mr Lane had contacted Head Office and was told that no rules had been broken and that nothing need be done about it.
108. It is self-evident that any client of Trailfinders was free to pass on any information about themselves and their booking to whomever they chose. It appears that Viewtrail made this easy in respect of at least some of the information on the system. I can give no weight to Mr La Gette's evidence about what an unnamed person at Trailfinders' head office said to Mr Lane, as reported by Mr Lane to Mr La Gette. One real possibility is that head office was told or assumed that former employees were given a booking reference by former clients and were accessing those clients' information on their behalf. If so, it would be understandable that Trailfinders took the view that they could not object.
109. TCL commissioned a report from an organisation called Conflict International. Central to it was reference to a conversation on 25 November 2019 between an individual posing as a client and a sales agent at Trailfinders called James. I was also shown a transcript of the call. It established nothing more than that Trailfinders

allows its clients to access their details on Viewtrail and pass those details to friends and family.

110. None of the evidence supported the implied contention made on behalf of Mr La Gette that Viewtrail was a free-for-all source of data and that this was common knowledge. I think the true position was that each client could access their own information, as could anyone else permitted to do so by that client. Otherwise, the information on Viewtrail contained, as Mr La Gette accepted, information confidential to Trailfinders and was therefore, as a whole confidential.
111. In his witness statement Mr La Gette said that he had always asked a client for permission to access their Viewtrail information before he did so. In cross-examination he admitted that there were no emails recording such a request from him or permission being given by any client. He said that this was because all requests and permissions had been done by phone. He also said that when clients told him of their booking references, which would have allowed access to their information on Viewtrail, he would have written the booking references down on an A4 sheet of names that was destroyed some time later. Mr La Gette agreed that obtaining the agreement of his clients to access their information on Viewtrail was important to him. It was suggested to him that it would therefore have been important to him to keep a record of the permissions given. Mr La Gette replied that at the early times it was important but that as time went by, his new database superseded retained history on Viewtrail.
112. Although I have some doubt about Mr La Gette's claim that his Viewtrail access to information about 10 former clients after he left Trailfinders was done, without exception, with the permission of the relevant client, I am not able to say that the claim is false and on balance I accept that evidence.

### **Whether Mr Bishop was in breach of confidence**

113. On 28 February 2017 Mr Bishop resigned from Trailfinders. On 1 March 2017 he signed a franchise agreement with TCL. By an email to Abigail Hamer of TCL dated 4 May 2017 Mr Bishop sent TCL his contacts list.
114. Mr Bishop's potential liability in respect of his accessing Viewtrail after he left Trailfinders is the same as Mr La Gette's. He took information concerning 32 clients. He said that he had obtained permission from 23 of them. I accept that if he obtained permission from a client before he accessed their information on their behalf, the taking and using of that information was licensed by Trailfinders and could give rise to no liability on the part of Mr Bishop. There was no written evidence of permission from any of the 23 clients in question. Mr Bishop said that this was because the permission was always given in unrecorded phone calls. But in cross-examination Mr Bishop, understandably, had only a vague recollection of what clients had said in all these phone calls and at one point he admitted that he had not had permission in the majority of cases. I was not convinced that his conversations with former clients went further than informing them that he had left Trailfinders and raising the possibility that they might nonetheless wish to continue using Mr Bishop for booking holidays or other trips in the future. I find on the balance of probabilities that Mr Bishop was not on any occasion given permission by a client to access information about them from Viewtrail.

115. The other undisputed allegation against Mr Bishop was that he compiled his contact book of client information while he was still at Trailfinders and that the majority of this information came from Superfacts. Mr Bishop offered two reasons why he was entitled to do this. The first was that he made no secret of it. Yet he admitted that he had not told anyone that he was doing this. I do not accept the implied suggestion that his compilation of his contact book was sanctioned by Trailfinders. Secondly, Mr Bishop said that the information taken from Superfacts was available from public sources. For the same reasons I have given in relation to Mr La Gette, this does not afford a defence.
116. I find that Mr Bishop was in breach of an implied term in his contract of employment not to use or disclose information confidential to Trailfinders and that he acted in breach of that term when he compiled his contact book. He was also in breach of an equitable obligation of confidence to Trailfinders. See also art.4(2) of Directive 2016/943.
117. Mr Bishop was further in breach of his equitable obligation when he accessed Viewtrail after he left Trailfinders and obtained and used information about 32 of his former clients. See also art.4(2) and (3) of Directive 2016/943.

#### **Alleged breach of confidence by TCL**

118. For the reasons discussed above, equity imposed a duty of confidence on TCL if it received information it knew or ought to have known was fairly and reasonably regarded as confidential. See also art.4(4) of Directive 2016/943. If the duty was imposed, TCL was in breach of it because the information in question consisted of the client details received from Mr La Gette and Mr Bishop and TCL used those for the benefit of its business. So the short question is what TCL knew or ought to have known about the client details it received.
119. At the time when TCL was first in contact with Mr La Gette and Mr Bishop, TCL knew that they were employed by Trailfinders as sales consultants. The brochure provided by TCL to potential franchisees included this, under the heading ‘Do you [TCL] supply business leads [to franchisees]?’:
- “No – because we don’t need to. It’s amazing how quickly word gets around when a Travel Counsellor arrives on the scene! Everyone wants a VIP service – and when it comes to travel, they’ll get it from you. You’ll love the challenge of cultivating your customer base. Keeping existing customers warm and introducing yourself to new ones. If you’re coming from a travel background already, feel free to bring your old customer contact list along with you. We’ll add them to your Contact Centre ready for your first day – a great start to a rewarding career running your own travel business.”
120. As appears from the brochure, TCL did not supply new franchisees with potential customers. They were expected to bring their own and in the case of those in the travel business, bring their customer contact list. Mr La Gette and Mr Bishop did exactly that.
121. It is highly improbable that TCL believed that Trailfinders did not regard their customers lists, including the names and details of those customers who dealt with

any one sales consultant, as being confidential. TCL plainly maintained that its own equivalent information was confidential. The franchise agreement with TCL signed by Mr La Gette and Mr Bishop required that their customer lists formed part of the confidential information and intellectual property owned by TCL. Mr Byrne, CEO of TCL, stated that TCL would not wish someone outside TCL to have access to a franchisee's customer database.

122. Mr Byrne was asked in cross-examination about the recruitment process. He said that the recruiter would know whether a candidate franchisee worked in a travel business such as Trailfinders. When it was put to Mr Byrne that if the recruit was working for a travel business there was an obvious risk that they might bring with them the current employer's contact information, he said that TCL expected such individuals to respect agreements with their employer. But he could not point to any document in which TCL stated to candidate franchisees that this was TCL's expectation.
123. Mr Byrne thought that any risk of the current employer's customer information being passed to TCL would emerge during the oral interview. He also said that recruiters had been told to make sure that potential franchisees were aware of data protection issues. However, in the transcript of the phone conversation on 16 August 2016 between Mr La Gette and Cathy Oldfield of TCL, referred to above, to which Mr Byrne was taken, Mr La Gette is recorded to have said that he will be bringing contacts from his Trailfinders' employment. Ms Collins said nothing about data protection or confidentiality. Nor did she at any stage ask Mr La Gette to ensure that he was not taking data from Trailfinders' systems. On the balance of probabilities I find that potential franchisees were encouraged to bring with them details of existing clients and were not warned about any risk of breach of confidence.
124. Mr Mill made three particular points in closing. The first was a proposition of law, namely that in order to be fixed with an obligation of confidence, a third party must *know* that the information was confidential. I was taken to *Toulson & Phipps on Confidentiality*, 3<sup>rd</sup> ed., (2012), where that assertion is made, drawing a parallel with the law on knowledge as it applies to accessories to a breach of trust and referring to the Court of Appeal judgment on breach of confidence in *Thomas v Pierce* [2000] FSR 718. I do not accept the proposition of law as advanced. *Campbell v MGN* and *Vestergaard* both post-date *Thomas v Pierce* and the edition of *Toulson & Phipps* relied on. *Thomas v Pierce* was considered by Arnold J in *Primary Group (UK) Ltd v The Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch); [2014] RPC 26, at [229] to [234]. Arnold J concluded that it is no longer good law on the question of the test to be applied with regard to the imposition of an equitable obligation of confidence, for reasons with which I respectfully agree. Finally, Mr Mill's proposition of law cannot be good, having regard to art.4(4) of Directive 2016/943.
125. Mr Mill's second point was that sales consultants started to leave Trailfinders for TCL in 2015 and by the time Mr La Gette left at least 20 had left. No complaint was made to TCL about misuse of Trailfinders' confidential information in the year or so before Mr La Gette and Mr Bishop each passed client details to TCL, so there was no reason for TCL to believe that Trailfinders had any concern about it.
126. I do not accept that this follows. There may have been many reasons why Trailfinders did not raise a complaint with TCL before it did, not least the unattractive prospect of paying for legal advice and being drawn into litigation. This argument was raised for

the first time in closing. For it to carry any weight the point ought to have been put to Mr Simpson in cross-examination.

127. Mr Mill's third point was that if anyone at TCL knew or ought to have known that TCL was receiving confidential information from Trailfinders it could not have been anyone more senior than a recruiter such as Cathy Oldfield. She was too junior for her knowledge to be imputed to TCL.
128. I do not accept this argument either. All franchisees joining TCL were encouraged to disclose the names and details of their contacts to TCL. Mr Byrne must have known this because he claimed (although I have not accepted his evidence on this point) that at the time Mr La Gette and Mr Bishop joined TCL, recruiters were given oral advice to ensure that the recruiter was entitled to give these details to TCL. Mr La Gette's and Mr Bishop's franchise agreements were signed on behalf of TCL by Abigail Hamer. It was not made clear where she stood in the seniority of TCL's operations. But even if neither Mr Byrne nor anyone else with sufficient seniority knew that either Mr La Gette or Mr Bishop was being recruited, which I find unlikely, they knew that TCL was receiving Trailfinders' client information via new franchisees, whoever the franchisees were.
129. This was also an argument left until closing; one which, were to have any prospect of succeeding, should have been raised earlier so that the witnesses could have dealt with it and in particular so that questions could have been put to Mr Byrne about what he knew.
130. It goes further: in this court parties are required to plead, concisely, the arguments on which they intend to rely (CPR 63.20(1)) so that opposing parties can file any evidence required and deal with the matter properly at trial.
131. In my view a reasonable person in the position of Mr Byrne or other person of sufficient significance in TCL's operations would have been aware that at least part of the contact information brought to TCL by Mr La Gette and Mr Bishop was likely to have been copied from Trailfinders' customer data. There was too much of it to have been carried in their heads. Such persons at TCL knew or ought to have known that Trailfinders would regard the information as confidential. A belief that TCL was thereby receiving confidential information could only have been reversed if Mr La Gette and Mr Bishop had given TCL convincing reasons why this was not the case. They did not and I have the impression that TCL did not wish to inquire.
132. In those circumstances TCL ought to have known that they were in receipt of information which Trailfinders reasonably regarded as confidential. Equity imposed on TCL an obligation of confidence and it was in breach of that obligation.

### **Agency and employment**

133. The alleged liability of TCL, either as employer or agent of Mr La Gette and Mr Bishop adds nothing. Neither allegation was pursued in any rigorous detail. I will deal with each briefly.
134. On the evidence the arrangement between TCL and its franchisees was that franchisees each create their own business, operating under the TCL name with

technical and administrative support, benefiting also from TCL's marketing efforts. In return 40% of the franchisee's profits go to TCL. The franchisees do not bind TCL in relation to their business dealings with their clients. I am not persuaded that the franchisees are agents of TCL.

135. With regard to the suggestion that the franchisees are employed by TCL, I was referred to the judgment of Ward LJ in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722, at [70]:

“The cases analysed in the immediately preceding paragraphs should be noted with a view to abstracting from them, if it is possible, the essence of being an employee. To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss.”

136. Neither Mr La Gette nor Mr Bishop is paid a wage or salary by TCL. They work in and for their own business. While it true that TCL shares a risk as to the profit they make, the principal risk is that of Mr La Gette and Mr Bishop. TCL shares no risk at all as to any loss. I take the view that neither is employed by TCL. This is consistent with a finding by HMRC in 2016 in connection with an investigation into eligibility for a VAT Flat Rate Scheme.

### **Conclusion**

137. Mr La Gette and Mr Bishop were each in breach of the term of confidence implied into their respective contracts of employment with Trailfinders and also in breach of an equitable obligation of confidence owed to Trailfinders. TCL was in breach of an equitable obligation of confidence which it owed to Trailfinders.