

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2012

Before:

MR JUSTICE EDWARDS-STUART

Between:

FAIRSTAR HEAVY TRANSPORT N.V.

Claimant

- and -

1. PHILIP JEFFREY ADKINS

Defendants

2. CLARANET LIMITED

Peter Susman QC (instructed by **Ince & Co LLP**) for the **Claimant**
Richard Spearman QC (instructed by **Schillings**) for the **First Defendant**

Hearing dates: 17 October 2012

Judgment

Mr Justice Edwards-Stuart:

Introduction

1. On 7 September 2012 the Claimant ("Fairstar") obtained an order from the court against the First Defendant ("Mr Adkins") on an application made without notice which, amongst other things, restrained Mr Adkins, and the Second Defendant ("Claranet"), from knowingly deleting or otherwise interfering with e-mails sent or received by Mr Adkins whilst acting on behalf of Fairstar (I have deliberately paraphrased the wording of the order in the interests of brevity). In addition, the order contained provisions the effect of which has been that copies of all the relevant e-mails are now held in electronic form by Mr Adkins's solicitors, Schillings, and in a manner that prevents any tampering with their contents. They are, in effect, sealed.
2. The order was made by Coulson J, but its terms were then varied (in respects not relevant to the issues before me) by Eder J following hearings on 11 and 14 September 2012 at which Mr Adkins was represented. A return date was subsequently set for 17 October 2012, when the case came before me.
3. At this hearing Fairstar wished to pursue a further application, which had formed part of its original application, for an order that an independent IT expert should be permitted to inspect the documents that are now held by Schillings. For his part, Mr Adkins applied to set aside the order (as varied) in its entirety.
4. Mr Adkins's position was that the application to Coulson J should never have been made without notice because, first, no sufficient urgency for making such an application had been shown and, second, Fairstar had disclosed no evidence of any risk of interference with the e-mails by Mr Adkins that would justify an application without notice. In addition, Mr Adkins asserts that Fairstar did not make full or accurate disclosure to Coulson J at the hearing on 7 September 2012 and, in particular, that it positively misled him about certain matters of fact.
5. However, and more fundamentally, Mr Adkins submits that Fairstar has no proprietary claim in relation to the content of the e-mails and since, for jurisdictional reasons, this was and is the only basis on which Fairstar has sought relief, the application has been misconceived from the outset.

Events leading up to the hearing on 17 October 2012

6. Shortly before the hearing before me there was a flurry of exchanges of evidence. On 10 October 2012 Mr Adkins served a witness statement accompanied, the following day, by about 450 pages of exhibits (without an index). On Monday, 15 October, Fairstar served evidence in reply consisting of three witness statements, together with about 100 pages of exhibits. On the following day, 16 October, Mr Adkins served a second witness statement taking issue with some parts of the witness statements served on the previous day. This provoked four witness statements in response on behalf of Fairstar, together with about 600 pages of exhibits. These were served by e-mail between about 6:45 and 10 pm on 16 October, the evening before the hearing.

7. Unsurprisingly, Mr Richard Spearman QC, who appeared for Mr Adkins, applied for an adjournment of the hearing on the ground that he had had no opportunity to read this additional material, let alone take instructions on it. This was opposed by Mr Peter Susman QC, who appeared for Fairstar, instructed by Ince & Co. He said that this evidence had been prepared earlier in case it was needed but that a decision had been taken by those advising Fairstar that it would not be necessary to rely on it. However, Mr Susman told me that evidence was thought to be necessary to make good one point on behalf of Fairstar arising out of the recent evidence, but that it was too late to edit the witness statements that had previously been prepared. In the result they were all served, together with the voluminous exhibits. Mr Susman said that, as things stood, there was only one document in those exhibits on which he needed to rely and that therefore he was content not to rely on any of the remaining material. In these circumstances he submitted that there would be no prejudice to Mr Spearman or his client if the hearing were to go ahead.
8. It seemed to me that this was a most unsatisfactory state of affairs. Whilst I did not doubt Mr Susman's sincerity in taking the view that he did, I did not consider that it would be right to deprive Mr Spearman of the opportunity to consider the additional material that had been served on behalf of Fairstar late on the evening before the hearing. Whilst Mr Susman may properly have regarded the material as adding nothing, it does not follow that Mr Spearman and those instructing him would necessarily take the same view.
9. The fresh material served by Fairstar on the evening of 16 October 2012 apparently related to the question of the adequacy or accuracy of the disclosure made to Coulson J at the hearing on 7 September 2012. It therefore seemed to me that there was no good reason why the court should not confine the hearing to determining the central issue raised by Fairstar's application, namely whether or not Fairstar had an enforceable proprietary claim to the content of the e-mails sent or received by Mr Adkins when acting on behalf of Fairstar.
10. When I raised this with the parties Mr Spearman was concerned that Mr Susman might attempt to put the claim on a rather wider basis than the simple proprietary claim which had been asserted hitherto. However, Mr Susman made it quite clear that he had no intention of pursuing the application on any basis other than that of a pure proprietary claim in the content of the relevant e-mails. I then gave the parties a few minutes in which to consider the position, after which I was told that each was content for the court to determine the issue at this hearing of whether or not Fairstar had such a proprietary claim. Accordingly, the hearing proceeded on the basis.
11. The issue, as subsequently agreed by the parties, is as follows:

“Does Fairstar have an enforceable proprietary claim to the content of the e-mails held by Mr Adkins (and/or Claranet) insofar as they were received or sent by Mr Adkins acting on behalf of Fairstar?”

The background

12. In the light of the nature of the issue, I can deal with this fairly briefly. Fairstar is a company incorporated in the Netherlands and based in Rotterdam that specialises in the transport by sea of very heavy and valuable cargoes, such as drilling rigs, for which it owns some very large and specially designed vessels.
13. On 14 July 2012 Fairstar was taken over by the owners of a competitor, to whom I shall refer as Dockwise. It had been a hostile bid and the immediate result was that the services of Mr Adkins, as CEO of Fairstar, were terminated forthwith.
14. In the months immediately prior to the takeover Fairstar seems to have been in some financial difficulty, or at least in circumstances of some financial stringency, and Mr Adkins had been very preoccupied with raising funds to pay for the completion of two vessels that were currently under construction by a Chinese shipyard and to pay for the construction of another.
15. On 3 May 2011 Fairstar entered into an agreement with the shipyard to build an additional 50,000 DWT vessel, known as "Fathom". I have not read the agreement in any great detail and I have heard no submissions as to its meaning or effect, but it seems that the obligations of the parties under the agreement were or may have been triggered when Fairstar notified the shipyard that its directors had authorised the transaction and Fairstar made a down payment of US\$2 million. But on any view of the agreement as signed, it seems to me clear that it became unconditional once these two events had occurred - which was by mid November 2011. Thereafter, Fairstar became liable to make a second payment of about US\$20 million within 3 days of receipt of a Refund Guarantee from the shipyard, and a third payment 90 days after the cutting of the first steel plate of the vessel.
16. In the event, these two events occurred in reverse order and the cutting of the first steel plate took place on 15 October 2011 and the Refund Guarantee was issued by the shipyard on 4 May 2012, triggering the payment of the instalment of about US\$20 million three days later. Accordingly, it appeared that by 7 May 2012 Fairstar had become liable to pay a further US\$30 million odd to the shipyard.
17. On 23 May 2012 the naming ceremony took place in China of the first of the two vessels that were still under construction. On that day Mr Adkins signed a Memorandum of Agreement by which he acknowledged that Fairstar was in default in respect of the two instalment payments to which I have referred and by which the shipyard agreed not to serve a notice of default under the agreement, provided that Fairstar made the outstanding payments by 20 June 2012. In default of such payment, the memorandum provided that the shipyard would be entitled to terminate the agreement, upon which Fairstar would become obliged to pay a cancellation charge of about US\$37 million.
18. The position taken by Mr Adkins, but not intimated until after the takeover, is that the agreement was and is unenforceable by the shipyard because there was a collateral agreement by which either the agreement was to be treated as an option or was not to take effect until two conditions had been satisfied. Those conditions were, first, that Fairstar had the necessary funding in place to pay for the construction of the vessel (the price was US\$110 million) and, second, that it had

secured contracts that would provide for the employment of the vessel once constructed.¹ Although the option alternative was the one first canvassed in correspondence, I understand that Mr Adkins's position now is that it is the latter option that represents his case. So far as I am aware, there is not a single document that supports the case for the existence of such a collateral contract. Whether or not such a contract came into existence is a very important issue, not only in terms of this application but also, and more importantly, in terms of Fairstar's current position in relation to the shipyard.

19. It is Fairstar's case, in the hands of its new owners, that Mr Adkins never revealed during the period leading up to the takeover that Fairstar had incurred this very substantial liability to the shipyard. That is disputed by Mr Adkins, who says that Dockwise and the members of Fairstar's Supervising Board were well aware that Fairstar had ordered a further vessel from the shipyard and that, if certain payments in respect of that vessel were not made by the end of June, there would be significant financial consequences for Fairstar.
20. It is in relation to what was said to Coulson J about Fairstar's knowledge of the contract with the Chinese shipyard that the allegations of non-disclosure or misrepresentation by Fairstar at the hearing before Coulson J have come to be made. As I have already explained, I have directed that these issues will have to be determined at a separate hearing, together with the question of whether or not the application to Coulson J was properly made on a without notice basis.
21. I should explain at this point that Mr Adkins was not employed by Fairstar, although he acted as its Chief Executive Officer. He is employed by a company registered in Jersey, Cadenza Management Ltd ("Cadenza"), a company which I understand Mr Adkins controls. Fairstar contracted with Cadenza for the services of Mr Adkins. I have not seen that agreement but I have been told that it contains an exclusive jurisdiction clause, by which all disputes are to be determined by the Dutch courts. It is principally for this reason that Fairstar has confined itself to a proprietary claim.
22. The consequence of Mr Adkins not being a direct employee of Fairstar was that all incoming e-mails that were addressed to him at his Fairstar e-mail address were automatically forwarded by Fairstar's server to Mr Adkins's private e-mail address at Cadenza. Cadenza's e-mail account was hosted by Claranet, the Second Defendant, who has played no part in these proceedings, although it is aware of them and of the order made by Coulson J.
23. It is also said on behalf of Fairstar, although not accepted by Mr Adkins, that incoming e-mails that were forwarded to Mr Adkins were automatically deleted from Fairstar's server, with the result that Fairstar now has no copies of those e-mails. So far as outgoing e-mails were concerned, Mr Adkins sent those directly from his own computer and so, unless copied to someone at Fairstar, no copies of such e-mails would have reached Fairstar's server.

¹ At paragraphs 28 and 30 of his first witness statement Mr Adkins gives apparently conflicting accounts in relation to these two preconditions. In the former paragraph he refers to both conditions, whereas in the latter paragraph he refers only to the securing of funding. However, for present purposes nothing turns on this.

24. Fairstar's case on the application to Coulson J, and today, is that without access to these e-mails, both incoming and outgoing, in the possession of Mr Adkins it cannot tell what has been going on in relation to the dealings with the Chinese shipyard and the construction of the last vessel. In addition, it says that it is being investigated by the stock exchange authorities in Oslo (its shares are listed on the Norwegian stock exchange) in relation to what was said in its 2011 accounts in relation to its existing liabilities, in particular in relation to its liabilities to the Chinese shipyard, and that it needs to see the e-mails in order to respond properly to that investigation.
25. As I have indicated, the position taken by Mr Adkins is that Fairstar has no entitlement to inspect these e-mails, at any rate not by means of any claim that can be asserted in this jurisdiction.

The submissions of the parties

26. As is clear from the issue, Fairstar's case is that it has a proprietary claim to the content of the e-mails held by Mr Adkins. It is not a claim to the electronic medium on which the e-mails are stored or to any paper documents.
27. Further, Fairstar does not seek to rely on any claim based on copyright or upon any obligation of confidentiality owed by Mr Adkins to Fairstar.
28. Mr Susman submits that materials that are created by or come into the possession of an agent whilst acting for his principal are the property of the principal. The submission of course assumes that the content of the relevant e-mails are to be regarded as property, which Mr Susman submits they are.
29. Mr Spearman submits that the content of an e-mail (as opposed to the medium on which that content is stored electronically) is information, and that information is not property (leaving aside claims to copyright, which are not contended for here). Mr Spearman submits that this is the position that has been arrived at by a consensus of current authority and that there is no authority that supports the proposition for which Mr Susman contends. I therefore turn now to the authorities.

The authorities

The authorities relied on by Fairstar

30. The case on which Mr Susman primarily relied was the decision of the Court of Appeal in *Lamb v Evans* [1893] 1 Ch 280. The plaintiff was the printer and publisher of a multi-lingual European trade directory. He engaged the defendants as commission agents to solicit businessmen to pay for their business to be listed in the directory. The businessmen could, if they wished, supply wood blocks or other materials from which illustrations could be printed in the directory. The defendants left to work for a rival publication, intending to use the wood blocks and other materials still in their possession to get illustrations printed in the rival publication. There was nothing in their contract which expressly prevented them from doing so. The Court of Appeal unanimously upheld the injunction restraining

them from doing so, and from other activities which would also have constituted a breach of good faith.

31. Lindley LJ said, at page 226:

“That suggests this question - which has nothing to do with copyright - What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. No case, unless it be the one which I will notice presently, can I believe be found which is contrary to the general principle upon which this injunction is framed, viz, that an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got.”

Bowen LJ agreed, saying, at page 229:

“Then we come to the second part of the case. Has not the Plaintiff a right to restrain the Defendants from using such blocks and materials or copies as they obtain while they were in the employment of the Plaintiff and for the purposes of their service and work which they had to do, that is to say, which they obtained for the purpose of doing their duty to the Plaintiff? Ought not the Plaintiff be able to restrain them from afterwards using those materials and of those documents in competition with the Plaintiff himself? It is not a question of copyright - that must be kept out of sight altogether - nor is it, on the other hand, a simple question of the absolute property at law in the documents themselves or in the blocks themselves. It is a question of whether the Plaintiff, whatever the property in the documents may be, or whatever the property in the materials may be, has not sufficient special property in them to entitle him to restrain the use of them against him when they had been obtained for his use by his agents in the course of their employment. That depends entirely, I think, upon the terms upon which the employment was constituted through which the fiduciary relation of principal and agent came into existence. I think my Brothers have already during the course of the argument expressed what I fully believe, that there is no distinction between law and equity as regards the law of principal and agent. The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect to the parties must have intended it to have and without which it would be futile.”

32. Kay LJ, who also agreed, said that he assumed that the agents would have had notebooks in which they would note down all the information collected from the people they canvassed. He then said:

“The argument was put most forcibly as I followed it in this form: Why should they not retain these notebooks in their hands, having now left the Plaintiff's employer, and use them in order to find out the persons abroad with whom they

had formally entered into engagements, and to obtain from those advertisers authority to put advertisements of theirs into a rival publication to be published as a rival of the Plaintiff's book? The answer is a very simple one. All those materials were obtained awhile you, the Defendants, were acting as the Plaintiff's agents, while you were in that confidential relation to him and for the purpose for which he employed and paid you, viz, of compiling this book of the Plaintiffs, and therefore to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled - you, while you compiled them, being in the position of the Plaintiff's agent, and there being a confidential relation between you and the Plaintiff. I turn to one of the leading cases on the subject, and I take the language of Lord Justice Turner in his judgment in *Morison v Moat*: "That the Court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence - meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds that jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

. . . The jurisdiction against these Defendants is because these materials which they want to use were obtained by them when they were in the position of agents for the Plaintiff, and, although the Plaintiff might not be able to prevent anybody else in the world from publishing or using such materials as he is trying to prevent these Defendants from using, that would be no answer, because these Defendants, from the position in which they were in, are put under a duty towards the Plaintiff not to make this use of the materials."

33. Whilst Lindley LJ may have based his decision on the ground that the materials were the property of the claimant, I consider that Bowen LJ took a different view. He appears to have approached the question by considering, whatever the property in the materials may have been, whether the claimant had a sufficient interest in those materials to entitle him to restrain the use of them by the defendants to his detriment. I think that Mr Susman was inclined to accept that Bowen LJ's reference to "sufficient special property" was not a reference to a property right, so called, but to the existence of some form of interest in the relevant materials sufficient to found a claim for the relief sought.
34. Similarly, I consider that Kay LJ also did not found his decision on the ground that the employer had a proprietary right in the relevant materials. Indeed, during argument he made the observation that the principle in play was the fact that the employee was doing something inconsistent with the duties of his employment. He was in no doubt that the jurisdiction to restrain the defendants from making use of the materials to the detriment of their employer undoubtedly existed, even if there was room for argument about the precise basis of that jurisdiction.
35. To the extent that Mr Susman was relying on this case as authority for the proposition that any materials created by or coming into the possession of an employee during the course of his employment must necessarily belong to the employer, I consider that the decision does not go that far. In any event, and as

one might expect from a case decided in 1892, it does not assist on the question of whether or not the contents of e-mails that are held on a server in the possession of the defendant (as opposed to the server itself) can be regarded as property or "materials".

36. Mr Susman then relied on *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, a decision of Sir Donald Nicholls V-C, and *Pattihis v Jackson* [2002] EWHC 2480, a decision of Nelson J. The first involved the theft by employees of the employer's customer lists and the second involved the un-authorised taking of client files from a firm of solicitors by a former employee. In each case what was taken was clearly physical property which belonged to the employer. I derive no assistance from either of these cases.
37. The only case which really provided any support for Mr Susman's submissions was a decision of Mr Justin Fenwick QC, sitting as a Deputy Judge of the Queen's Bench Division, in *Pennwell Publishing v Ornstien* [2007] EWHC 1570. In that case a former employee had copied contact information from the employer's Microsoft Outlook into an Excel spreadsheet. It was not disputed that during the course of his employment the employee had himself added many names and addresses to the list. Apart from this, it is not necessary to say anything more about the facts: it is the judge's conclusion on which Mr Susman relies. Mr Justin Fenwick QC said this:
 127. I am satisfied that where an address list is contained on Outlook or some similar programme which is part of the employer's e-mail system and backed up by the employer or by arrangement made with the employer, the database or list of information (depending on whether one is applying the Database Regulations or the general law) will belong to the employer. I do not consider that the position will change where the database is accessed not from the employer's computer but from the employee's home computer by "dialling up" or otherwise "logging on" to the employer's e-mail system by some form of remote access.
 128. In all those circumstances, I find that such lists will be the property of the employer and may not be copied or moved in their entirety by employees use outside their employment or after their employment comes to an end."
38. It appears from the judgment that it was not disputed that an address list stored on a computer was property. The question was: whose property was it? There were three options: (a) that it belonged to the employer to the exclusion of the employee; (b) that it belonged to the employee to the exclusion of the employer (although the employee did not seek to prevent the employer from using the list in common with him); and (c) that it was jointly owned and could be used by both. It is not clear to me whether any distinction was being drawn between the database in the form of the electronic material on the drive that held the data, and the information itself taken apart from the medium. I rather doubt it. Be that as it may, the arguments that have been addressed to me were not made to Mr Fenwick, and so in those circumstances the conclusion that he reached was perhaps unsurprising (even assuming that it was a conclusion about the pure information rather than the electronic material on the server's drive). It is also worth noting that the contract between the claimant and the defendants contained a definition of company property that extended to "software provided for your use

by the company". However, I think that Mr Susman may be correct in his submission that the conclusion at paragraphs 127-8 was expressed in general terms and was not limited to property as defined in the contract.

39. In any event, I am not prepared to assume that Mr Fenwick would have reached the same conclusion if the arguments that have been addressed to me had been addressed to him. For this reason I feel unable to place any reliance on this decision. In saying this I intend no disrespect to Mr Fenwick.
40. Mr Susman also relied on a decision of HH Judge Richard Seymour QC in *WRN Limited v Ayris* [2008] EWHC 1080. One of the issues in that case was whether or not business cards that had been given to the employee in the course of his employment, as well as cards that were already in his possession and which he brought with him at the start of his employment, were the property of the employer. The judge held that the cards, including those in the latter category, were the property of the employer. He found that the employee had effectively given the cards that he had brought with him to the employer by using them for the purpose of carrying out his work. Mr Susman submitted that no relevant distinction can be made between a collection of business cards amassed on behalf of a company and a collection of e-mails received and sent on behalf of a company. But that submission begs the question. Judge Seymour's decision does not assist in determining whether or not the content of an e-mail is to be regarded as property.
41. Finally, Mr Susman referred me to *Huddleston v Control Risks* [1987] 1 WLR 702, a decision of Hoffmann J (as he then was). The claimants were members of the Anti-Apartheid movement. The defendant, a political risks consultancy, was about to produce a report, which would be available for purchase for a fee, on the activities of anti-apartheid groups in Europe, their relationship with terrorist groups and their intentions. The claimants were concerned that the report might contain material that was defamatory of them and they wish to see it before it was released. They applied for an order requiring the Defendant to permit them to inspect the report under section 33(1) of the Supreme Court Act 1981. That section conferred on the High Court, subject to the rules of court, a power to make an order providing for "*the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject matter of subsequent proceedings in the High Court, or as to which any question may arise in any such proceedings*".
42. Section 33(2) of the Act conferred a power to order the discovery of documents before the commencement of proceedings, but only in claims for personal injury or in relation to the death of any person. The claimants did not seek disclosure under this provision because their prospective claim did not fall within it. Accordingly, the claimant sought to inspect the document as "property" within section 33(1). Hoffmann J said this, at 703:

"It seems to me that a written instrument or any other object carrying information such as a photograph, tape-recording or computer disc, can be both "property" for the purposes of section 33(1) of the Act and a "document" for the purposes of section 33(2). Whether for the purposes of a particular case it is the one or the other depends on the nature of the question which it is said may arise. In my

judgment Parliament intended, whatever Marshal McLuhan might have said, to distinguish between the medium and the message. If the question will be concerned with the medium, the actual physical object which carries the information, the application is to inspect "property" within section 33(1). If the question will be concerned with the message, the information which the object conveys, the application is for discovery and can be granted before writ only in the limited classes of proceedings to which section 33(2) applies. Thus in *Re Saxton, dec'd*, there was no question in issue about the message. The meaning of the writing was perfectly clear. The question was whether the medium, the characters written on a particular piece of paper, had been put there by the person purporting to have done so.

In this case the issue in any prospective libel action will be whether the defendants have published words defamatory of the plaintiffs. The plaintiffs are not concerned with the medium by which this is done; whether it is on A4 or foolscap, printed or typewritten, Roman or italics. What matters to them is the message. It follows that in my judgment this is not an application for inspection of property but an application for discovery which I have no power to entertain."

43. If anything, it seems to me that this case appears to be against Mr Susman, which is no doubt why, very properly, he referred me to it. He submitted that the distinction made in that case, which he said was in a statutory pre-action context, has no relevance when an action has already been brought to recover e-mails on the ground that the claimant has a proprietary interest in their content. I disagree; there is or may be an important distinction between the physical object which carries the information - for example, a letter - and the information which that object conveys. A letter, which consists of paper together with the ink of the writing which is on it, is clearly a physical object that can be owned. However, it does not follow from this that the information which the letter conveys is also property that is capable of being the subject of a proprietary claim (for this purpose I leave aside the possibility of any claim arising out of copyright in respect of the contents of the letter).

The authorities relied on by Mr Adkins

44. As I have already indicated, Mr Spearman's principal submission was, in essence, very simple. He submitted that the preponderance of authority, and at the highest level, is to the effect that information is not property. Perhaps the clearest statement of this is that of Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46, at 127, who said:

"In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, "know-how," confidential information as to the prospects of a company or of someone's intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship.

With all respect to the views of Russell LJ I protest at the idea that information acquired by trustees in the course of their duties as such is necessarily part of the assets of the trust which cannot be used by the trustees except for benefit of the trust. Russell LJ referred to the fact that two out of three of the trustees could have no authority to turn over this aspect of trust property to the appellants except for the benefit of the trust; this I do not understand, for if such information is trust property not all the trustees acting together could do it for they cannot give away trust property.”

45. Perhaps rather less emphatically, Viscount Dilhorne said this, at 89:

“While it may be that some information and knowledge can properly be regarded as property, I do not think that the information supplied by Lester & Harris and obtained by Mr. Boardman as to the affairs of that company is to be regarded as property of the trust in the same way as shares held by the trust were its property. Nor do I think that saying that they represented the trust without authority amounted to use of the trust holding.”

46. Lord Cohen said, at 102:

“This is an attractive argument, but it does not seem to me to give due weight to the fact that the appellants obtained both the information which satisfied them that the purchase of the shares would be a good investment and the opportunity of acquiring them as a result of acting for certain purposes on behalf of the trustees. Information is, of course, not property in the strict sense of that word and, as I have already stated, it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case . . .

That is enough to dispose of the case but I would add that an agent is, in my opinion, liable to account for profits he makes out of trust property if there is a possibility of conflict between his interest and his duty to his principal. Mr. Boardman and Tom Phipps were not general agents of the trustees but they were their agents for certain limited purposes. The information they had obtained and the opportunity to purchase the 21,986 shares afforded them by their relations with the directors of the company - an opportunity they got as the result of their introduction to the directors by Mr. Fox - were not property in the strict sense but that information and that opportunity they owed to their representing themselves as agents for the holders of the 8,000 shares held by the trustees. In these circumstances they could not, I think, use that information and that opportunity to purchase the shares for themselves if there was any possibility that the trustees might wish to acquire them for the trust.”

47. However, in his skeleton argument Mr Spearman very properly pointed out two passages in the other speeches that point the other way (on which, understandably, Mr Susman relied). At 107, Lord Hodson said:

“As to this it is said on behalf of the appellants that information as such is not necessarily property and it is only trust property which is relevant. I agree, but it is nothing to the point to say that in these times corporate trustees, e.g., the Public Trustee and others, necessarily acquire a mass of information in their capacity of

trustees for a particular trust and cannot be held liable to account if knowledge so acquired enables them to operate to their own advantage, or to that of other trusts. Each case must depend on its own facts and I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called "know-how" in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case which was capable of being and was turned to account can be properly regarded as the property of the trust. It was obtained by Mr. Boardman by reason of the opportunity which he was given as solicitor acting for the trustees in the negotiations with the chairman of the company, as the correspondence demonstrates. The end result was that out of the special position in which they were standing in the course of the negotiations the appellants got the opportunity to make a profit and the knowledge that it was there to be made."

48. Finally, and in perhaps rather stronger terms, Lord Guest said, at 115:

"Boardman would never have been able to obtain all the information which was obtained in phase 2 unless he had been acting for the trustees. This information enabled him to put forward the offer of £4 10s. per share which was fully acceptable to Smith. I take the view that from first to last Boardman was acting in a fiduciary capacity to the trustees. This fiduciary capacity arose in phase 1 and continued into phase 2, which glided into phase 3. In saying this I do not for one moment suggest that there was anything dishonest or underhand in what Boardman did. He has obtained a clean certificate below and I do not wish to sully it. But the law has a strict regard for principle in ensuring that a person in a fiduciary capacity is not allowed to benefit from any transactions into which he has entered with trust property. If Boardman was acting on behalf of the trust, then all the information he obtained in phase 2 became trust property. The weapon which he used to obtain this information was the trust holding. And I see no reason why information and knowledge cannot be trust property."

49. The appeal was dismissed by a majority, Lords Dilhorne and Upjohn dissenting. In relation to what was decided, paragraph (1) of the headnote reads as follows:

". . . the appellants had placed themselves in a special position, which was of a fiduciary character, in relation to the negotiations with the directors of the company relating to the trust shares. That out of such special position and in the course of such negotiations the appellants obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they will be accountable accordingly."

50. The question of whether the information that came available to the appellants was or was not to be regarded as trust property was not decided, so it seems to me that none of the references to the status of information in the passages that I have quoted above forms part of the *ratio* of the decision. Nevertheless, the majority of their Lordships were clearly of the view that information was not property.

51. In *Nicrotherm Electrical Company v Percy* [1957] RPC 207, referred to in the *Force India* case referred to below but not specifically cited to me, Lord Evershed MR (with whom Hodson and Romer LJJ agreed) said, at 209:

“ . . . a man who thinks of a mechanical conception and then communicates it to others for the purpose of their working out means of carrying it into effect does not, because the idea was his (assuming that was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.”

52. In *Fraser v Evans* [1969] 1 QB 349, another case referred to in the *Force India* case cited below and again not specifically cited to me, Lord Denning MR said, at 361:

“Those cases show that the court will in a proper case restrain the publication of confidential information. The jurisdiction is based not so much on property or on contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so.”

53. By way of an aside, in the high Court of Australia it has been held that the equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information does not lie in proprietary right, but in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained: see *Moorgate Tobacco Ltd v Philip Morris Ltd* [1985] RPC 219, at 234, per Deane J, with whom the other members of the court agreed. There is also an interesting discussion on the question of whether or not for some purposes confidential information can be property by Binnie J, giving in the judgment of the court in the Supreme Court of Canada in *Cadbury Schweppes Inc v FBI Foods Ltd* [2000] FSR 491, at [39]-[48].² In the concluding paragraph, after referring to an article in which the authors suggested that confidential information could be property, he said:

“I agree, of course, with the author's emphasis on confidentiality. Breach of confidentiality is the gravamen of the complaint. When it comes to a remedy, however, I do not think a proprietary remedy should automatically follow. There are cases (as in *Lac Minerals*) where it is appropriate. But equity with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label ("property") rather than a case-by-case balancing of the equities. In some cases, as Lord Denning showed in *Seager v Copydex Ltd (No. 2)*, above, the relevance of the specific quality of the information to a remedy will not be its property status but its commercial value. In other cases, as in *Lac Minerals*, the key to the remedy will not be the "property" status of the confidence but the course of events that would likely have occurred "but for" the breach. Application of the label "property" in this context would add nothing except confusion to the task of weighing the policy objectives furthered by a particular remedy and particular facts of each case. In the present case, the trial judge considered the confidential information to be nothing very special, and that "but for" the breach the respondents would in any event have faced a merchantable

² I am indebted to Arnold J for the reference to these authorities (in paragraph 376 of his judgment in the *Force India* case, to which I refer later in this judgment).

version of Caesar Cocktail in the marketplace within 12 months. On these facts, a "proprietary" remedy is inappropriate.”

54. In *Douglas v Hello! Ltd* (one of three appeals reported under the name of the first case, *OBG Ltd v Allan*) [2008] 1 AC 1, the litigation which arose out of the celebrated wedding of Michael Douglas and Catherine Zeta-Jones, Lord Walker of Gestingthorpe dealt with the question in fairly clear terms, at page 76:

274. . . . *Philip v Pennell* [1907] 2 Ch 577 is of some interest as it shows the court addressing the distinction between intellectual property rights in the form of a communication and confidentiality in its substance. It was concerned with letters written by James McNeill Whistler (who had died in 1903) . . . Kekewich J rightly distinguished between property in the letters as tangible property; copyright in the linguistic contents of the letters as literary compositions; and the more debatable right to restrain misuse of confidential information contained in the letters. On the last point he remarked, at p 587: "it cannot be said that the confidence runs with the letters."

275. That observation still holds good in that information, even if it is confidential, cannot properly be regarded as a form of property."

55. In *Coogan v News Group Newspapers Ltd* [2012] EWCA Civ 48, referred to in the *Force India* case cited below, Lord Neuberger of Abbotsbury MR said, at [39]:

“In my view, the upshot of this summary of the position as discussed in the cases and the books is that, while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property. Accordingly, unless there is binding authority to the contrary, I am of the view that, given the normal meaning of 'commercial information', the draftsman of section 72 intended confidential information of a commercial nature to be included in the definition of 'intellectual property'.³

56. In *Force India Formula One Team v 1 Malaysian Racing Team* [2012] EWHC 616 (Ch) Arnold J, a judge with particular experience of this field, said this, at [376]:

“Confidential information is not property, however, even though businessmen often deal with confidential information as if it were property and judges often use the language of property when discussing breach of confidence: see *Jefferys v Boosey* (1854) 4 HLC 814 at 966 (Lord Brougham); *E.I. Du Pont de Nemours Powder Co v Masland* (1917) 244 US 100 at 102 (Holmes J, US Supreme Court); *Federal Commissioner of Taxation v United Aircraft Corp* (1943-44) 68 CLR 525 at 534 (Latham CJ, High Court of Australia); *Nicrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 209 (Lord Evershed MR, with whom Hodson and Romer LJ agreed); *Boardman v Phipps* [1967] 2 AC 46 at 89G-90A (Viscount

³ When this case went to the Supreme Court, as *Phillips v News Group Newspapers Ltd* [2012] 3 WLR 312, Lord Walker said, at [20], in the context of the provisions relating to self incrimination in s 72 of the Senior Courts Act 1981, that “*technical and commercial information ought not, strictly speaking, to be described as property (the majority view in the House of Lords in Phipps v Boardman . . .) cannot prevail over the clear statutory language*”.

Dilhorne), 102G (Lord Cohen) and 127F-128A (Lord Upjohn); *Fraser v Evans* [1969] 1 QB 349 at 361 (Lord Denning MR); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* [1985] RPC 219 at 234 (Deane J, with whom the other members of the High Court of Australia agreed); *Cadbury Schweppes Inc v FBI Foods Ltd* [2000] FSR 691 at [39]-[48] (Binnie J delivering the judgment of the Supreme Court of Canada); *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 at [126]-[127] (Lord Phillips of Worth Matravers MR delivering the judgment of the Court of Appeal) and [2007] UKHL 21, [2008] 1 AC 1 at [276] (Lord Walker of Gestingthorpe); and *Coogan v News Group Newspapers Ltd* [2012] EWCA Civ 48 at [39] (Lord Neuberger of Abbotsbury MR, with whom Lord Judge CJ and Maurice Kay LJ agreed). (It may be noted that Rix LJ's statement in *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2010] EWCA Civ 1214, [2011] Env LR 12 at [111] that "confidential information is a well recognised species of property" was made without reference to any of these authorities, although *Coogan v News Group* was of course decided later.) It follows that the user principle is not directly applicable to claims for breach of confidence. Although proprietary remedies have sometimes been granted in breach of confidence cases, these have been based not purely upon breach of confidence, but upon breach of a fiduciary duty, as for example in *Boardman v Phipps*."

57. Arnold J's conclusion is supported by the authors of *Gurry on Breach of Confidence*, 2nd Edn, in which the authors say, at paragraph 4.101:

"It is submitted that none of the arguments discussed above support 'property' as the jurisdictional basis of the law of confidentiality. Moreover, there is a wealth of *dicta* denying the existence of a proprietary right in confidential information and confining rights in such information to circumstances in which there was a breach of confidence in contract or equity."

Discussion and conclusion

58. In my judgment it is clear that the preponderance of authority points strongly against there being any proprietary right in the content of information, and this must apply to the content of an e-mail, although I would not go so far as to say that this is now settled law. Some of the observations that I have quoted are in terms that are less than emphatic and, of course, the two contrary views in *Boardman v Phipps* are entitled to significant weight. However, I accept Mr Spearman's submission that Mr Susman's case is not supported by any authority binding on me.
59. Nevertheless, Mr Susman submitted very forcefully that logic and the circumstances of the modern world should encourage the court to hold that the content of an e-mail was a form of property. In effect he submitted that it would be unrealistic for the courts not to recognise the proprietary right of an employer or principal in electronic materials that were created by or came into the possession of his employee or agent in the course of his employment or agency.
60. Beguiling as this submission is, it is perhaps worth considering how Mr Susman's case might operate in practice, bearing in mind that we are not concerned with the medium but only with the message.

61. Assuming, for the purposes of this part of the exercise, that the content of an e-mail is capable in law of being property, then it seems to me that there are five possible options in relation to the ownership of the content of any particular e-mail. They are:
- (1) that title to the content remains throughout with the creator (or his principal);
 - (2) that, when an e-mail is sent, title to the content passes to the recipient (or his principal) - this being by analogy with the transfer of property in a letter when one person sends it to another;
 - (3) as for (1), but that the recipient of the e-mail has a licence to use the content for any legitimate purpose consistent with the circumstances in which it was sent;
 - (4) as for (2), but that the sender of the e-mail has a licence to retain the content and to use it for any legitimate purpose; and
 - (5) that title to the content of the message, once sent, is shared between the sender and the recipient and, as a logical consequence of this, is shared not only between them but also with all others to whom subsequently the message may be forwarded.

Obviously, options (1) and (2) are, by definition, mutually inconsistent.

62. However, one difficulty with the argument advanced by Mr Susman is that he is asserting that both options (1) and (2) and, by extension, options (3) and (4) also, apply at the same time. This is because he is submitting that Fairstar has title to both messages sent and messages received. As he put it in paragraph 8.1 of his skeleton argument:

“Fairstar seeks no more than access for itself to copies of e-mails received or sent by Philip Adkins on behalf of Fairstar and currently stored in England. Fairstar's cause of action is a proprietary interest in the content of those e-mails. Philip Adkins’ challenge raises the question of whether under English law Fairstar has such a proprietary interest in the content of the e-mails.”

63. He made it quite clear that this challenge did not raise any other issue, that no question arose in relation to copyright and that Fairstar was not relying upon any obligation of confidence. In addition, he accepted that Fairstar could not rely on any express or implied term of its contract with Cadenza for the provision of the services of Mr Adkins.
64. Even though Mr Susman does not seek to rely on option (1) only but not option (2), or *vice versa*, I should perhaps consider them. The implication of adopting option (1) is that in principle the creator of an e-mail would be able to assert his title to its contents against all the world. If that were so, one has to ask what it would involve in practice. It would be very strange - and far reaching - if the creator of an e-mail could require any recipient of it, however far down the chain,

to delete it (this would have to be the remedy because the content of an e-mail is not something that one can simply return). But if he cannot do this, what is the use of having this proprietary right?

65. However, some support for option (1) can be found in the standard rubric that appears at the foot of many e-mails sent within government departments.⁴ This reads as follows:

This e-mail (and any attachment) is intended only for the attention of the addressee(s). Its unauthorised use, disclosure, storage or copying is not permitted. If you are not the intended recipient, please destroy all copies and inform the sender by return e-mail.

This might tend to suggest that the creator of the e-mail is asserting some proprietary right to its contents, although possibly in line with my option (3).

66. The implication of adopting option (2) is that the creator of the e-mail would cease to have any right in its contents from the moment he sent it. It would seem to follow from this that the recipient would be entitled to ask the sender (in this case the creator) of the e-mail to delete it. Logically, the same would apply down the line so that the only person entitled to the contents of a particular e-mail would be the last recipient. However, if the initial e-mail was sent to several recipients, some of whom forwarded it to others, the question of who had the title in its contents at any one time would become hopelessly confused.
67. In my judgment, one only has to consider the difficulties that could arise if one adopts either option (1) or option (2), in order to rule them both out as being quite impractical and unrealistic. This leaves options (3) and (4). However, it seems to me that these two options, which would seem perfectly workable, would have the result that the proprietary interest in the content of any e-mail would in reality be deprived of any value. In practice, the right to control another's use of the content of an e-mail would depend on the extent to which that other person was or was not making a legitimate use of it. This would amount to applying much the same test as that which applies under the existing equitable jurisdiction (or contractual right if it exists) to restrain the misuse of confidential information. The only difference, I suppose, is that it would not be necessary to show that the information (ie. the content of the e-mail) was confidential in order to exercise a proprietary right of control. However, if the information was not confidential, then the situations would be few in which a person would need or want to restrain another's use of it. In my judgment, there is no compelling need or logic for adopting either of options (3) or (4) and so in relation to these options I would reject a plea that the law is out of line with the state of technology in the 21st century.
68. This leaves option (5) above as the only one that is consistent with the claim that Fairstar is advancing. However, this also seems to me to be unrealistic. It could have all sorts of repercussions. For example, suppose that a supplier of components loses his database of e-mails when his server unexpectedly crashes. If he had a proprietary right in the content of all e-mails sent to and received by him from each of his customers, would he have the right to demand access to the

⁴ I am grateful to my former clerk, Claire Thomas, for bringing this to my attention.

copies of those e-mails on those customers' servers in order to enable him to reconstitute his database? In a different situation would parties who had formerly communicated with each other on a regular basis by e-mail but had since fallen out have the right to demand access to each other's servers in order to see to whom e-mails that they had sent had been forwarded? If the answer to questions such as these is No, then I have difficulty in seeing what advantage there might be if it were to be held that there was a shared proprietary right in the content of e-mails: it would be of little or no value. But if the answer was Yes, the ramifications would be considerable and, I would have thought, by no means beneficial.

69. For all these reasons I can find no practical basis for holding that there should be property in the content of an e-mail, even if I thought that it was otherwise open to me to do so. To the extent that people require protection against the misuse of information contained in e-mails, in my judgment satisfactory protection is provided under English law either by the equitable jurisdiction to which I have referred in relation to confidential information (or by contract, where there is one) or, where applicable, the law of copyright. There are no compelling practical reasons that support the existence of a proprietary right - indeed, practical considerations militate against it.
70. Accordingly, I determine the agreed issue against Fairstar. It must follow from this that Fairstar's application to inspect the e-mails held by Mr Adkins cannot succeed on the ground on which it is presently based.
71. I have to say that this is not a result that I view with any enthusiasm in the circumstances of this particular case. Although Fairstar has put forward compelling reasons in support of its application to inspect the e-mails, its inability to deploy other grounds for relief that would usually be available under English law has had the consequence that the application had to fail. For the avoidance of any doubt, I express no view as to whether or not there is any other ground upon which the application could have been made in this jurisdiction.
72. If the liability for the costs of the previous applications that have been reserved by Coulson and Eder JJ cannot be agreed, then I will hear the parties on a date that will have to be arranged through counsel's clerks.