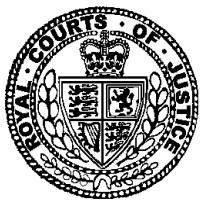

Neutral Citation Number: [2022] EWCA Civ 235

Case No: CA-2021-000586 and 000587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

HH Judge Matthews

BL-2019-BRS-000028

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 2 March 2022

Before :

LORD JUSTICE LEWISON

LADY JUSTICE ASPLIN

and

LORD JUSTICE BAKER

- -

Between :

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

- -

- -

Heather Rogers QC and Jonathan Price (instructed by **Seddons Law LLP**) for the **Claimants**

Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law**) for the **Defendants**

Hearing dates : 2 and 3 February 2022

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Wednesday 2 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER :

1.
This is an appeal against an order dismissing a claim by Nihal and Andrew Brake against Dr Geoffrey Guy and two of his companies, Chedington Court Estate Ltd and Axnoller Events Ltd ("AEL"), sometimes referred to below as "the Guy Parties", for a final injunction and damages for misuse of private information and breach of confidence. The information said to be private was contained in emails sent and received by the first claimant, Mrs Brake, via an email account, enquiries@axnoller.co.uk ("the enquiries account"), which was set up and operated by AEL in circumstances described below. The judge held that the claimants had no reasonable expectation of privacy and no right of confidentiality in respect of those emails. The claimants argue that his decision was wrong in law and/or on the facts.

Core legal principles

2.
Before summarising the facts, I shall set out the basic legal principles relevant to this appeal. In addition to the authorities cited here, the parties referred to a number of other reported cases, some of which are considered later in this judgment.

3.
A fortnight after the hearing of this appeal, the Supreme Court handed down its judgment in Bloomberg LP v ZXC [2022] UKSC 5. The central issue in that case, as summarised in paragraph 1 of the judgment, was whether a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. The facts of the case were very different from those arising in this appeal and, although the judgment, which has attracted considerable comment, sets out the law relating to privacy in some detail, it does not herald any development in the legal principles applied by the judge in this case. Nevertheless, at our invitation, counsel helpfully prepared short supplemental written submissions on the Bloomberg decision, some of which have been included in the following summary.

4.
The modern law now recognises "two distinct causes of action, protecting two different interests: privacy and secret ('confidential') information" (per Lord Nicholls of Birkenhead in OBG Ltd v Allan [2007] UKHL 21 at [255]). The equitable right in the confidentiality of information was recognised by the Court of Chancery in the nineteenth century (Prince Albert v Strange (1849) 2 De.G & Sm.652). In contrast, the common law tort of misuse of private information is a modern creation, having been developed since the incorporation of the ECHR into our law.

5.
The tort was identified by the House of Lords in Campbell v MGN Ltd [2004] UKHL 22. At [20] – [21] Lord Nicholls of Birkenhead observed:

"20. …. Article 8(1) [of ECHR] recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others.

Article 10(1) recognises the importance of freedom of expression. But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.

21. Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

The two elements of the tort are therefore, first, whether there is a "reasonable expectation of privacy", that is to say whether the information is protected by article 8, and, secondly, whether any interference with the right was justified.

6.
As to the first element, Lord Hope in Campbell at [99] said:

"The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."

In Murray v Express Newspapers PLC [2008] EWCA Civ 44, [2009] Ch 481 at [36], this Court observed:

"the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

These so-called " Murray " factors have been applied in subsequent cases and endorsed by the majority in the Supreme Court in In re JR28 [2015] UKSC 42, [2016] AC 1131 and now in Bloomberg . In the latter case, the Court observed at [51] that the Murray factors were "not exhaustive" and added at [144]:

"it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight."

7.
As a general rule, or "legitimate starting point", certain types of private information will normally be regarded as giving rise to a reasonable expectation of privacy (including information about a person's health, private finances and personal communications and correspondence), whereas other types will not (including involvement in criminal activity): see Gatley on Libel and Slander (12th ed) at paragraph 22.5, cited in Bloomberg at [52] to [53]. But this is subject to important qualifications expressed in Bloomberg in these terms:

“67. First, the general rule or legitimate starting point is not a legal rule or legal presumption, let alone an irrebuttable presumption. The determination as to whether there is a reasonable expectation of privacy in the relevant information is a fact-specific enquiry.

68. Second, the general rule or legitimate starting point does not invariably lead to a finding that there was objectively a reasonable expectation of privacy in the information….

69. Third, the general rule or legitimate starting point does not obviate the need for the claimant to set out and to prove the circumstances establishing that there was objectively a reasonable expectation of privacy ….”

8.
As for the second element in the tort, the question is as summarised by Buxton LJ in McKennitt v Ash [2006] EWCA Civ 1714, [2008] QB 73 at [11]:

“in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise ….”

In carrying out that exercise, the approach is as summarised by Lord Mance in PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 108 at [20]:

“(i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see e.g. In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47 , para 17, per Lord Steyn….”

9.
The elements of a claim for breach of confidence were summarised by Megarry J in Coco v AN Clark (Engineers) Ltd [1968] FSR 415 at p419:

“three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in [Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203] on page 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

10.
In Imerman v Tchenguiz [2010] EWCA Civ 908, [2011] Fam 116, the claimant husband shared an office with his wife’s brother, the defendant. When the marriage broke down, the defendant, fearing the husband might conceal assets from the wife, accessed his computer and copied information and documents. The husband was granted an injunction restraining the defendant from disclosing the information to third parties, including the wife and her solicitors. In dismissing the defendant’s appeal this Court said at [69]:

“In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to

whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost."

Summary of facts

11.
This claim is one part of a series of linked proceedings between the claimants and some or all of the defendants. The trial was the second of four trials before the same judge. The first, concerning applications in bankruptcy proceedings against the claimants and liquidation proceedings in respect of a partnership between the claimants and a Mrs Lorraine Brehme, was the subject of an appeal to this Court in respect of which permission to appeal on one point has recently been given by the Supreme Court. The third and fourth trials, concerning a claim by the third defendant to recover possession of a property from the claimants and a separate claim by the claimants to evict the second defendant from another property, took place in the Autumn 2021 and reserved judgments were handed down on 25 February 2022 (after this appeal had been heard), dismissing the claimants' claim and allowing the third defendant's claim. The fifth and sixth claims, brought by the claimants against the second defendant and others in the employment tribunal, are listed for hearing later this year. All the proceedings so far have been characterised by complex factual disputes and extensive legal argument. Although the proceedings involve both Mr and Mrs Brake, it seems that Mr Brake played no material role in the business which gave rise to the various disputes. It is Mrs Brake and, in these proceedings, Dr Guy who are the principal protagonists.

12.
I do not propose to recite in any detail the complicated background to this case which is set out at length in the judgment under appeal, reported at [2021] EWHC 671 (Ch). The salient features are as follows.

13.
In February 2010, the Brakes entered into a partnership agreement with a limited partnership, Patley Wood Farm ("PWF"), whose principal was Mrs Brehme, for the purpose of a business providing luxury breaks and hosting weddings and similar events. The Brakes contributed a property in Dorset, West Axnoller Farm, including a substantial dwelling house called Axnoller House, which they owned subject to a charge securing bank loans. With funds provided by Mrs Brehme, the partnership acquired a neighbouring cottage the legal title to which was transferred to the Brakes and Mrs Brehme jointly. The partners fell out and in June 2013 following an arbitration the partnership was dissolved. In May 2015, after failing to pay costs relating to the arbitration, PWF instituted proceedings in the course of which the Brakes were declared bankrupt. Subsequently, in 2017, the partnership went into liquidation.

14.

Meanwhile, the bank which had lent money secured on the farm appointed receivers who, in July 2015, sold it to a newly-incorporated company, Sarafina Properties Limited ("Sarafina"), ostensibly owned by a woman called the Hon Saffron Foster, who was, it is agreed, a friend of Mrs Brake. At that point, PWF, concerned that Mrs Foster was merely a nominee for the Brakes and that the partnership's remaining goodwill might be diverted to Sarafina, obtained an injunction against the Brakes prohibiting them from providing services to the company for six months. Once that injunction expired, Mrs Brake resumed working in the business. In 2016, she met the first respondent Dr Guy who offered to buy the business. In February 2017, Sarafina was sold to Chedington, an investment company for Dr Guy, and its name changed to AEL. The draft contract put forward on behalf of Chedington had included standard warranties relating to intellectual property rights, but these were removed by Mrs Foster's solicitor and not included in the final signed agreement.

15.
For a while, the Brakes continued to be employed by AEL running the wedding and rental accommodation business but relations broke down and in November 2018 they were dismissed. This led to the Chancery Division proceedings by AEL against the Brakes to recover possession of the farm and to the claims in the employment tribunal by the Brakes against AEL.

16.
In January 2019, the Brakes' trustee in bankruptcy entered into a transaction with the liquidators of the partnership to acquire rights in the cottage and a second transaction to transfer those rights to the second defendant. The Brakes alleged that the trustee and Chedington acted collusively and unlawfully in carrying out those transactions and, in February 2019, the Brakes started insolvency proceedings with the aim of unwinding the disputed transactions and re-establishing their pre-existing rights in the cottage under s.283A of the Insolvency Act 1986. It is unnecessary to recite the history of those proceedings which is set out in detail in the judgment of this Court at [2020] EWCA Civ 1491, [2021] Bus LR 577, part of which is now, as stated above, the subject of a further appeal.

17.
Having summarised the broader background, I turn to describe the facts specifically relating to the claim in these proceedings.

18.
The axnoller email domain was originally registered at Mrs Brake's request in 2010 but was not used for several years. Instead, different email accounts were used by the business. During the partnership dispute in 2012-13, Mrs Brake engaged an IT provider called Allen Computer Services Ltd ("ACS"), run by a Mr Allen, to look after the email accounts and website. In 2014, ACS and Mrs Brake entered a confidentiality agreement for a period of five years. The judge found that the agreement was "entirely geared towards the confidential business information of Mrs Brake alone."

19.
In August 2015, shortly after the farm had been sold to Sarafina, Mrs Brake asked ACS to set up a new Microsoft Exchange account for the business with Fasthosts Internet Services ("Fasthosts"). The invoice was initially settled by credit card but ultimately paid for by Sarafina. Fasthosts created five accounts in the axnoller domain, called enquiries@axnoller.co.uk , alo@axnoller.co.uk , andy@axnoller.co.uk , saffron@axnoller.co.uk , and rebecca@axnoller.co.uk . The enquiries account was intended for general business use and the others were for the use of, respectively, Mrs Brake, Mr Brake, Mrs Foster, and an employee in the business, Ms Rebecca Holt. Prior to that, the business had used Google mail accounts. The judge found that the axnoller.co.uk domain had been previously

created by Mrs Brake and that the email address enquiries@axnoller.co.uk had been in existence for some time, but

“whereas the address enquiries@axnoller.co.uk , if it pointed anywhere at all, would have previously pointed to a Google mail account, from now on it pointed to a Microsoft Exchange account with a mailbox on the Fasthosts server” [77].

Although Mrs Brake asserted that the Google mail account using the address had been in use from 2011, almost no evidence about its use was adduced in these proceedings.

20.
For the first six months after the new accounts were set up, Mrs Brake was prohibited by the injunction in the partnership proceedings from using the enquiries account. During that period, it was principally used by Ms Holt and another employee, Simon Windus. Thereafter, Mrs Brake was the principal user of the account, although Mr Windus also had access to it and used it for business purposes. It is agreed that, despite having an email account in her own name (alo@axnoller.co.uk), Mrs Brake used the enquiries account to send and receive personal emails. The account was protected by a password which, according to Mrs Brake, was known only to Mrs Brake and Mr Allen.

21.
When the Brakes were dismissed by AEL in November 2018, Dr Guy instructed Mr Allen to change all the passwords to the Fasthosts accounts so that the Brakes were no longer able to use them. Later that day, Mrs Brake emailed Mr Allen saying

“the only thing I was going to get you to do is to take my personal stuff off the business accounts.”

As the judge noted, she did not at this stage make any claim to ownership of the axnoller domain. Mr Allen duly changed the passwords, made backups of the various accounts, and migrated the contents of the alo@ and andy@ accounts to a portable format for the Brakes to take away.

22.
With regard to Mrs Brake’s personal emails on the enquiries account, Dr Guy made various suggestions, for example offering her access to the account subject to undertakings about commercially sensitive information. None of those suggestions were accepted by Mrs Brake. In the following months, Dr Guy authorised various persons to have access to the enquiries account in relation to the actual or potential litigation against the Brakes. The persons to whom disclosures were made included lawyers acting for the respondents, a press agent advising the respondents in connection with allegations against Dr Guy in the national press, the Brakes’ trustee in bankruptcy, and Mrs Brehme.

23.
It was not until 23 August 2019, after extensive exchanges of correspondence dealing with other proceedings between the parties, that the Brakes’ solicitors asserted that Mrs Brake was the owner of the axnoller domain and the other axnoller email accounts. Ten days later, the claim form in these proceedings was issued. In the amended particulars of claim, it was alleged that, despite the purchase of the business by Sarafina in 2015, Mrs Brake retained and used the axnoller email accounts as her own, that all the information in the enquiries account was private and confidential to the Brakes except as to Mrs Brake’s use of it as an agent for AEL, and that the Brakes had reasonable expectations of privacy and confidentiality. It was asserted that the defendants had procured ACS to

break its confidentiality agreement with Mrs Brake, infringed the claimants' data protection rights, breached their confidence and misused their private information.

24.
On 28 November 2019, at a hearing before Mr John Jarvis QC sitting as a deputy judge of the Business and Property Court, an interim injunction was granted restraining the Guy Parties from disclosing or publishing or making further use of documents in the enquiries account save for the purposes of preparing for proceedings, and in respect of the documents identified by the Brakes as private pursuant to a review process authorised in paragraphs 13 to 17 of the order which, so far as relevant to this appeal, provided that:

(a) the Guy Parties would provide the Brakes with a full copy of the account;

(b) six weeks later the Brakes would provide the Guy Parties with an itemised list of the documents in the account said to be private;

(c) the Guy Parties would then conduct a review of the list and confirm to the Brakes in respect of each document whether they did or did not agree that their copies of the document should be destroyed;

(d) within seven days the Guy Parties would destroy all copies in their possession of documents they had agreed should be destroyed and the Brakes would destroy all copies in their possession of documents from the account other than those they had identified as private;

(e) the Brakes would have liberty to apply to court for an order that the Guy Parties destroy all copies of any documents which the Brakes had identified as private but the Guy Parties had not agreed to destroy.

In his judgment, the deputy judge stressed that he was dealing with an interim application and was not making any final findings of fact.

25.
In their defence, so far as relevant to this appeal, the Guy Parties denied that the axnollor domain and accounts had belonged to Mrs Brake. They denied that there were any confidential documents in the enquiries account whilst admitting there were "a small number of emails" on the account of a "personal nature". They denied that there was any reasonable expectation of privacy or duty of confidentiality, or that there had been any breach of privacy or breach of any duty of confidentiality. They further averred that, after the Brakes' dismissal, AEL had discovered what was described in the pleading as an "Unlawful Scheme". Specifically, it had allegedly been discovered that Sarafina had been used as a front or nominee to acquire the farm at undervalue, in breach of court orders and the Brakes' fiduciary duties as partners and to the prejudice of the partnership's creditors; that Sarafina had then been used to run the business and draw income for the Brakes in breach of court orders and to hide assets from the trustee in bankruptcy, and that, when Chedington had acquired Sarafina, the Brakes had paid themselves the proceeds of sale save for £100,000 which was paid to Mrs Foster. In the premises, they further denied that (1) any emails evidencing wrongdoing on the part of the Brakes were confidential against the Guy Parties; (2) that confidentiality and privacy could be asserted over any emails evidencing matters of legitimate interest to the Brakes' trustee in bankruptcy or the partnership's liquidators; or (3) that any emails evidencing or sent in furtherance of the Unlawful Scheme were confidential or private. Subsequently in the proceedings, the arguments summarised above relating to the so-called Unlawful Scheme have been known as "the iniquity defence".

26.
The matter was listed for a further case management hearing before the trial judge on 31 July 2020. He directed that all issues in the claim except the iniquity defence be listed for trial with a time estimate of three days and that, at that hearing, he would in addition consider a preliminary issue raised by the Brakes, namely whether, as a matter of law on the facts pleaded, the iniquity defence was available to the Guy Parties. The reasons for this division were recited in the order. In short, it was stated that the iniquity defence would only arise if the Brakes succeeded in establishing that there had been a reasonable expectation of privacy and/or a duty of confidence and a breach of privacy and/or of the duty of confidentiality. Since the parties were agreed that the iniquity defence would take many more days to try, the judge concluded that a split trial would be a better use of scarce resources.

27.
The review mechanism directed by the deputy judge on 28 November 2019 was duly implemented, albeit in a way that led to disputes between the parties. Two statements were filed by the defendants' solicitor, Harry Spendlove, summarising the review and analysing the emails in the enquiries account. As described below, the outcome of the review and the categorisation of the contents of the account featured in the judgment. In addition, a further document, a separate list of issues, was agreed between the parties and put before the judge. One issue raised was whether any of the documents in the enquiries account were private and confidential to the Brakes and, in particular, whether certain categories of documents were private or confidential to the Brakes. The sixteen identified categories included ten which the claimants argued were manifestly private, including the Brakes' correspondence with friends and family, legal advisers, accountants, medical practitioners, school teachers, and the trustee in bankruptcy.

28.
The trial took place over five days in November 2020. At the same hearing, the judge separately considered submissions on the "preliminary" issue whether the iniquity defence was available as a matter of law. Both judgments were reserved and delivered on 25 March 2021. In the "preliminary issue" judgment, (reported at [2021] EWHC 670 (Ch)), [2021] 4 WLR 71, it was held that the claimants had not shown that the "iniquity defence" put forward by the defendants could not succeed as a matter of law. That decision does not form part of this appeal and, save for one matter considered at the end of this judgment, it is unnecessary to say anything further about it.

The judgment

29.
The trial judgment, which as stated above is reported at [2021] EWHC 671 (Ch), extended to 305 paragraphs over 88 pages. For the purposes of the appeal, the important points can be summarised as follows.

30.
The judge's decision turned principally on his assessment of the evidence, both written and oral. He adopted the approach of relying principally on the contemporaneous documents ("as being more objective"), but added [24]:

"Oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses."

He found the evidence given by Mrs Brake to be unreliable, observing [28]:

“as a whole I distrusted her evidence, except where it was corroborated from an independent source”

adding that, where there was a conflict of evidence, he preferred that given by Dr Guy or Mr Spendlove, the defendants’ solicitor who, as described above, had carried out the review of the disputed emails. The judge said that he accepted Dr Guy as a witness of truth.

31.
At the heart of the judgment are a series of factual findings.

(1) Although the email address existed earlier, the enquiries account was created by Mr Allen in August 2015 and did not contain any earlier emails: [74].

(2) When the enquiries account was set up by Mr Allen, it was paid for by Sarafina, not by Mrs Brake: [75].

(3) The domain and email accounts belonged to Sarafina and were included in the sale of the company to Chedington in 2017. They did not belong to Mrs Brake: [204] to [205], [213].

(4) The enquiries account was the main business email address for the business: [78].

(5) Mrs Brake never had sole or exclusive use of the enquiries account: [110].

(6) Although the account was password protected, it was Sarafina and subsequently Chedington who were entitled to the password. Sarafina was entitled to “the keys to that account” from the outset at a time when Mrs Brake was prohibited from taking any part in the business and once Chedington became the proprietor of the business “those who held the keys to the company’s secrets were bound to cede them to the new owners on request”: [240].

(7) Neither Mrs Brake nor anyone else told Dr Guy that the domain and email accounts were excluded from the sale of Sarafina. Dr Guy believed he was buying them with the business. Mrs Brake had changed her evidence about this and knew that what she had said was not true: [104] – [108]. Accordingly, to the extent that she had retained any rights in relation to the domain or email accounts, she would be estopped from asserting them against the defendants: [208], [213].

(8) After her dismissal on 8 November 2018, Mrs Brake made no claim to ownership of the domain or email accounts until August 2019, shortly before the start of these proceedings: [145].

(9) The defendants wanted to remove Mrs Brake’s personal emails from the enquiries account “as quickly as possible”. They had no interest in or desire to read the emails and “bent over backwards to accommodate Mrs Brake, consistently with their business needs and the data protection rights of third parties, but for some reason Mrs Brake was unwilling to agree to any of the offers.” The defendants’ actions in this regard were “appropriate and reasonable, both in the making and in the withdrawing of offers of access, especially in light of the fact that the claimants at that stage had made no claim to the ownership of the enquiries account”: [125].

(10) Mrs Brake had been distressed and embarrassed by the disclosure of her personal emails, but not to the extent that she claimed. Dr Guy and his advisers had acted “with an appreciation of the sensitivity of what they were doing and a desire to respect the rights of others, including Mrs Brake”: [158]. This was, “at best, a case of limited damage to the claimants. In the restricted contexts in which disclosures have been made, I consider that no reasonable person of ordinary sensibilities would be substantially offended”: [160]. The claimants had suffered no compensable loss:[163]. The claim was therefore confined to injunctive relief, including the destruction of documents.

32.
The judge set out in some detail the evidence and submissions about the contents of the enquiries account as revealed in the review carried out by the defendants' solicitor, Mr Spendlove. He noted that very few of the emails had been put to Dr Guy or Mr Spendlove in evidence, or drawn to the attention of the court. He recorded that Dr Guy had "accepted in a general sense (but without reference to any documents) that, if the emails were not AEL business emails, they were private emails". But he held that the claimants had failed to prove their case.

33.
On the categories of document as identified by Mr Spendlove, the judge, at [190], reached the following "factual conclusions":

"The parties have agreed that (i) 33,528 of the 62,524 emails in the enquiries account are business emails and the claimants make no claim to them, and (ii) 5,511 emails (subject to reasonable expectation of privacy) are private to the claimants, and the defendants have agreed to delete them. As to the remainder, (iii) the 11,197 emails (9,500 according to Mrs Brake) in the third category have not been shown to be private or confidential as against the defendants. Finally, (iv) as to the 7,798 emails in the residual category, the first subcategory of 3,149 are not private to Mrs Brake, whereas the second of 4,849 (but subject to the question of reasonable expectation of confidentiality or privacy) are prima facie private to her, but are also subject to the possible application of the iniquity defence. For the sake of clarity, I repeat that the other accounts, with addresses "alo@" and "andy@", were never disclosed to nor accessed by the defendants."

34.
With regard to the claim for breach of confidence, applying the principles as summarised in Coco v AN Clark, the judge noted from the review carried out by the defendants' solicitor that, at most, only a minority of emails might be said to have the necessary quality of confidence. As to the second element – whether the information was imparted in circumstances which gave rise to an obligation of confidence – he found at [232]:

"at the time that the defendants looked at the contents of the account, from November 2018 onwards, for their own business purposes, there was nothing to put them on notice of any imparting of information in circumstances of confidence. Mrs Brake chose to put her own emails into the company's business email account, instead of using her own private email accounts (of which she had several). Dr Guy accepted in evidence that he would have expected some private use to be made by staff of a work email account, but that is not the same as accepting an obligation to keep any information thereby stored confidential. Consequently, even to the extent that any documents claimed by Mrs Brake to be confidential to her (but not so accepted by the defendants) were in fact confidential to her, they were not imparted to the defendants in circumstances imposing a duty of confidence. Accordingly, the claim in breach of confidence must fail."

35.
The judge then considered submissions on reasonable expectation of privacy. He accepted that Mrs Brake had originally set up the axnoller domain, that the account was password protected, that only Ms Holt and Mr Windus had been given access to it, that in consequence Mrs Brake controlled it, that she had used it to send personal emails before, after Chedington acquired the business, and that Dr Guy knew or expected this to be the case. But he rejected the submission that the way that the account had been set up, protected and operated gave Mrs Brake a reasonable expectation of privacy and confidence. The fact that Mrs Brake had set up the domain was irrelevant because "any

reasonable person would understand and accept that the email accounts for a particular business would ordinarily pass with that business, and not remain with the person who originally set it up" [239]. The fact that she held the password was irrelevant because "once Chedington became the proprietor of Sarafina and its business, those who held the keys to the company's secrets were bound to cede them to the new owners on request" [240]. If Mrs Brake "chose to use [the enquiries account] for her personal emails, rather than one of her personal email accounts, she knew that she did this in an account belonging to someone else that was used by others she worked with" [241].

36.
At [246] to [266], the judge considered some submissions made to him on the case law on privacy, including a series of decisions from the European Court of Human Rights cited by the claimants. At [262] to [266], he compared and contrasted the decision in Simpkin v The Berkeley Group Holdings PLC [2017] EWHC 1472 (QB), [2017] 4 WLR 116, cited by the defendants.

37.
The judge then expressed his conclusion on reasonable expectation in these terms:

"267. Overall, taking into account all the circumstances of this case, my conclusion is that Mrs Brake did not have a reasonable expectation of privacy in emails that she received on and sent from the enquiries account. That means that the claim in breach of privacy must fail in any event, even without recourse to the other defences put forward (some of which I have upheld).

268. However, even if I were wrong about the reasonable expectation of privacy generally, on the facts that I have found, the only documents which would be private would be the 5,511 already agreed to be destroyed, and the 4,849 which (if there were a reasonable expectation of privacy) would still be potentially subject to the iniquity defence, and therefore not liable at this stage to be the subject of an order for destruction. In relation to those documents, there would have to be a trial of the iniquity defence. In relation to other documents, there would need to be the second stage of the enquiry into the cause of action in privacy, namely, the balancing exercise, which must focus intensely on the facts…."

38.
In the light of his findings that there was no obligation of confidence nor a reasonable expectation of privacy, the judge observed that it was strictly speaking unnecessary for him to address the question of any misuse of any private or confidential information, but he proceeded to do so "in case the matter should go further". He held it was difficult to see how the claimants had suffered "any appreciable damage" in relation to the documents that the defendants had agreed were private and should be destroyed, and no decision could be reached at that stage in relation to the disputed documents that remained subject to the inequity defence. The judge concluded that it was not misuse of confidential information or breach of privacy to pass the information, in confidence, to a lawyer or other professional adviser for purpose of obtaining advice and that, in the circumstances it had not been wrong for the defendants to pass copies of the emails to lawyers or the press agent. Copies of emails had been passed to the trustee in bankruptcy without any court order being obtained under s.366 of the Insolvency Act 1986, but the judge held [284]:

"Consistently with the policy behind section 366, that trustees in bankruptcy should have the maximum available information about the bankrupt's estate, in order to protect the interests of creditors in the bankruptcy, and taking a realistic view of the resources available to trustees in bankruptcy, I hold that it is not a breach of privacy or confidence for third parties on request from a

trustee in bankruptcy to supply that information which the court would have ordered to be supplied if an application had been made."

He added that the supply of information to Mrs Brehme that was relevant to her claim in the liquidation of the partnership fell into the same category.

39.
The judge stated that if, contrary to what he had held, the claimants had established a claim and compensable loss, the fact of having established publicly that the defendants had been wrong, together with an award of £5,000 plus costs, would be sufficient. Having addressed other matters not relevant to this appeal, the judge then went through the list of issues. In answer to issue 12, the judge simply said that none of the documents in the enquiries account were private and confidential to the Brakes, adding "but the defendants have agreed to delete 5,511 as private, subject to reasonable expectation of privacy". He did not address the 16 categories of document specified in the list.

40.
The judge considered and rejected the claim for breach of the confidentiality agreement between Mrs Brake and ACS. The claim for compensation under data protection laws was not pursued at the trial. Neither issue has been raised on this appeal.

41.
At a further hearing on 13 April 2021, the judge considered a number of consequential issues, including an application for permission to appeal. On 19 April 2021, he handed down a further judgment in which inter alia he dismissed that application. On 4 May 2021, the claimants filed notice of appeal to this Court. Permission was granted by the single Lord Justice on 3 September 2021.

The appeal

42.
The claimants put forward four grounds of appeal:

(1) The judge's decision that they had no reasonable expectation of privacy in relation to any of the emails on the enquiries account was wrong in law and/or untenable on the facts.

(2) He adopted an approach to the determination of whether the claimants had a reasonable expectation of privacy on a basis that was wrong in principle and on the facts.

(3) His conclusion that the claimants' personal/private emails on the enquiries account lacked the "necessary quality of confidence" and/or that the defendants owed no duty of confidence in relation to them was wrong.

(4) Further and alternatively, his alternative findings, on matters arising if there had been a breach of privacy and/or confidence, in particular his conclusions as to the access which the defendants had allowed others to have, and his approach to damages, were wrong and/or unwarranted.

For this appeal to be allowed, the claimants must succeed on at least one of the first three grounds and on ground four.

43.
In support of these grounds, Ms Heather Rogers QC leading Mr Jonathan Price advanced the following submissions.

(1) As the judge noted, the defendants accepted that 5,511 emails were private to the claimants and the defendants were not entitled to them. On any proper analysis, the claimants had a reasonable expectation of privacy in relation to those private emails. The fact that the defendants had agreed to destroy them did not make them irrelevant to the claim. On the contrary, this amounted to a recognition that there was an expectation and that it was reasonable. The judge failed to explain how, without seeing specific documents, he was able to find that there was no reasonable expectation of privacy even in relation to those emails admitted by the Guy Parties to be private.

(2) The judge also wrongly failed to recognise that the claimants had a reasonable expectation of privacy in relation to any of the other emails identified by Mr Spendlove as not AEL business emails, including the 4,849 emails recognised by the judge as being private on their face.

(3) Instead of proceeding on the basis of Mr Spendlove's review, the judge ought to have analysed the question of reasonable expectation to privacy by reference to the categorisation of emails set out in the agreed list of issues. That was the only practicable way to proceed, and had the judge adopted it he ought to have concluded that the emails identified were private. Categories 1 to 10 were, on the face of it, manifestly private and confidential unless shown otherwise. The judge should have concluded that there was a reasonable expectation of privacy in relation to all emails falling into those categories without needing to look at them. One obvious example was emails concerning personal health matters in respect of which there is plainly a reasonable expectation of privacy: McKennitt v Ash, supra. In her supplemental submissions, Ms Rogers cited the judgment in Bloomberg at [72]:

"There can of course be exceptions even in relation to information concerning the state of an individual's health, but generally, details as to an individual's health are so obviously intimate and personal that a consideration of all the circumstances will result in that information being appropriately characterised as private under the stage one test unless there are strong countervailing circumstances."

(4) The judge's decision that there was no reasonable expectation of privacy flew in the face of the evidence. Dr Guy admitted that in a general sense emails in the enquiries account that were not business emails were private. It was accepted that those emails included private correspondence with friends and family, with legal advisers (including privileged communications), accountants and medical professionals and that the account was password protected. Mrs Brake had asked for these emails to be removed and, as the judge found, suffered distress and embarrassment knowing that they had been disclosed to other people

(5) He wrongly treated the question of "ownership" of the enquiries account, and/or a legal entitlement to ask for the password, as decisive factors against the claimants when he should have focused on the facts as to how the parties had acted in relation to the account. Mrs Brake held the password and had effective control of the account.

(6) There was no or no reasonable basis upon which to conclude that the limited access to the enquiries account by two other individuals (Ms Holt and Mr Windus), with the knowledge and consent of the claimants, undermined the claimants' reasonable expectation of privacy.

(7) The judge had wrongly disregarded the European case law cited on behalf of the claimants. In contrast, his reliance on Simpkin v The Berkeley Group Holdings PLC was misguided and amounted to an error of law. On a proper analysis, the case supported the claimants' arguments. In that case there had been compelling factors which led the judge to find that there was no reasonable expectation of privacy. Those factors were not present here.

(8) He failed to pay proper regard to the findings of the deputy judge at the interim hearing. On a proper analysis, the essential distinction was, as found by the deputy judge, between AEL business emails (in relation to which the claimants had no reasonable expectation of privacy) and non-business emails, including private, medical, family and other personal information (in relation to which the claimants had a reasonable expectation of privacy).

(9) His conclusion that the emails lacked the necessary quality of confidence and/or that the defendants owed no duty of confidence in relation to them was wrong for the same reasons as his conclusion that there was no reasonable expectation of privacy.

(10) His alternative findings on the basis that there had been reasonable expectation of privacy or confidence were wrong. The decision in Imerman requires a party who has access to confidential (and therefore private) information to provide justification and none had been provided by the defendants in this case. Unless this issue was determined now in the claimants' favour, its determination would require consideration of the iniquity defence and the necessary intense focus of the competing rights and interests. The judge did not explain how the claim could be dismissed at this stage. He was in no position to make a finding that disclosure to the Guy Parties' advisers was not unlawful. Such disclosure constituted "self-help" contrary to the principle in Imerman. Furthermore, the fact that a trustee in bankruptcy or Mrs Brehme might have been able to obtain disclosure by court order, which might have been subject to various checks and controls, did not justify voluntary disclosure of private and confidential information to those persons.

44.
The defendants' case in response to this appeal, presented by Mr Andrew Sutcliffe QC leading Mr William Day, is based on two principal contentions. The first, which they describe as their "overarching" submission, is that the enquiries account was set up and operated in circumstances that gave rise to no reasonable expectation of privacy or confidentiality on the part of the appellants as against the respondents. The account belonged to AEL, its costs were paid by the business, and it was primarily used as the company's business account. Access was given to three AEL employees, including Mrs Brake. The fact that Mrs Brake chose to use it for personal correspondence was merely a by-product of her employment. Any reasonable person would have realised that the enquiries account was not a confidential or private space.

45.
The defendants' second argument is that the claim fails on specificity. Even if the appellants had succeeded on their general case at trial, the judge could not have made the order sought because there was no evidential basis on which he could find that the emails were private or confidential. As the judge observed when refusing permission to appeal ([2021] EWHC 949 (Ch) at [12]):

"…the claimants' problem is that at trial they did not take me through the individual documents, or even the categories of documents in the enquiries account, to demonstrate that the claimants had a reasonable expectation of privacy in relation to them. They had the burden of proof, and did not discharge it"

46.
The defendants draw attention to what they describe as the changed basis for the Brakes' allegations of reasonable expectations of privacy and confidentiality. Their principal argument before the judge had been that Mrs Brake had set up the axnoller domain, that the email accounts belonged to her, and that Dr Guy knew that they were not included in the business he was acquiring. These allegations were rejected by the judge who "distrusted" Mrs Brake's evidence. The Brakes have not sought to

overturn any of the primary factual findings. The evaluation of whether there was a reasonable expectation of privacy is a fact-sensitive exercise, having regard to all the circumstances of the case including those identified in Murray. The judge's evaluation was supported by the evidence. He was entitled to accept Guy Parties' case that the 5,511 emails were destroyed because they recognised that they were personal, not because the Brakes had any reasonable expectation that they would be kept private. Once it is accepted that the mere fact that an email account contains some personal information is not conclusive of whether all or any of its contents are subject to a reasonable expectation of privacy, but that the evaluation is instead to be considered in all the circumstances, it is difficult to see how the judge's decision within his multi-factorial analysis to give greater weight to some factors over others can be challenged on appeal. The defendants submit that the Brakes' attack on the judgment is ultimately an exercise in island-hopping.

47.
Mr Sutcliffe submitted that the claimants' argument that the judge ought to have adopted a binary approach distinguishing between business and non-business emails, with all of the latter treated as protected by a reasonable expectation of privacy and a duty of confidence, is both wrong in principle and unsupported by the evidence. The claimants' alternative argument – that the judge ought to have analysed the emails by reference to the 16 categories suggested in the list of issues – cannot be maintained given their failure to identify sufficient documents falling within those categories. If, as they assert, that was the only practicable way to proceed, that reinforces the defendants' submission that the claimants failed to discharge the burden of proof.

48.
The defendants contend that the decisions of the European Court cited by the claimants do not assist their appeal. It is not disputed that they demonstrated that, in principle, article 8 may extend to emails sent from an employer's account, but they did not decide that article 8 always applied to such communications or that personal emails sent from such accounts always give rise to a reasonable expectation of privacy or an obligation of confidence. Each case will turn on its own facts. The defendants submit that, if any analogy is to be made with any previous authority, it is with Simpkin for the reasons given by the judge.

49.
As for the alleged misuse, the judge was entitled to have regard to the fact that there was only a limited disclosure of the information and no wider publication and to conclude that in each case the disclosure was not unlawful. Whereas in Imerman the defendant had broken into the claimant's email account, in this case the enquiries account belonged to the company and the company was entitled to disclose emails to its advisers before deciding what steps to take. Although the disclosures to the trustee in bankruptcy and to Mrs Brehme had been to third parties for their own purposes, the judge was entitled to conclude that it was justified in all the circumstances.

Discussion and conclusion

50.
It is important to note the restricted scope of this appeal. There is no challenge to the findings of fact. Instead this appeal is concerned simply with the question whether the law was correctly applied to the facts as found. Mr and Mrs Brake invite this Court to review the judge's evaluation of the evidence which led him to conclude that they had no reasonable expectation of privacy in respect of the contents of the enquiries account and that the information was not imparted to the Guy Parties in circumstances which gave rise to an obligation of confidence.

51.
It is of course well established that the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance. An appeal court will not interfere with findings of fact by trial judges unless compelled to do so: Fage UK Ltd v Chobani UL Ltd [2014] EWCA Civ 5, Re Sprintroom Ltd [2019] EWCA Civ 932. This applies "not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them": per Lewison LJ in Fage at [114]. In making his decisions "the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping": ibid at [115].

52.
In Browne v Associated Newspapers Ltd [2007] EWCA Civ 295, [2008] QB 103, a case involving a claim for breach of confidence and/or misuse of private information, this Court at [45] stated that:

"the approach which should be adopted on an appeal of this kind is not, we think, in dispute. Although the exercise upon which the judge was engaged was not the exercise of a discretion it was similar in that it involved carrying out a balancing exercise upon which different judges could properly reach different conclusions. In these circumstances it is now well settled that an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach …."

In PJS v News Group Newspapers Ltd [2016] UKSC 26, Lord Mance at [20] observed that the balancing exercise involved in the second stage of a claim for misuse of private information was

"certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention".

53.
In those circumstances, the Brakes face a very substantial hurdle in seeking to overturn the judge's decision on this appeal. In my judgment, they have fallen well short of surmounting it.

54.
The burden of proving that there was a reasonable expectation of privacy rested on the claimants. Only two of the 3,149 tranche of emails were produced to the judge by the claimants. He was not prepared to accept on the basis of those two emails alone that there was a reasonable expectation of privacy in relation to that tranche. That finding was manifestly open to him on the evidence. As he explained when refusing permission to appeal, the claimants had not taken him through the individual documents, or even the categories of documents in the enquiries account, to demonstrate that they had a reasonable expectation of privacy in relation to them and had therefore failed to discharge the burden of proof.

55.
On appeal, the claimants attempted to get around this difficulty by seeking to reverse the burden of proof. It was argued that the judge failed to engage with the 16-point categorisation of the emails set out in the list of issues and that, had he done so, he ought to have concluded that the emails falling into the first ten categories in the list were prima facie private so that a reasonable expectation of privacy attached to them unless the contrary was proved. There is no merit in this argument. As the Supreme Court has now confirmed, the fact that certain types of personal information are as a general rule treated as private does not give rise to any legal presumption: Bloomberg at [67]. As this Court held in Murray, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. The content of the emails was only one

factor to be considered addressing that issue. It was entirely a matter for the judge to decide how to proceed and his analysis by reference to Mr Spendlove's review cannot be criticised in this Court. There was no obligation on the judge to follow the categorisation suggested in the list of issues, particularly as the claimants failed to present their case in a way which allowed him to adopt that approach. The claimants complain that the judge failed to explain how, without seeing specific documents, he could find no reasonable expectation of privacy. But the burden of proof was on them to establish that there was a reasonable expectation of privacy. There was no presumption of privacy which the defendants were required to rebut.

56.
I do not accept the claimants' primary contention that Mr Spendlove's identification of 5,511 of the emails in the enquiries account as "private" necessarily gave rise to a reasonable expectation of privacy as against the defendants, or that the defendants' agreement to destroy those emails amounted to a recognition of such an expectation. As the judge explained when refusing permission to appeal at [2021] EWHC 949 (Ch) at [10]:

"The problem for the claimants was that I had made findings of fact on the evidence, including that the defendants did not accept that the emails in the enquiries account were private to the claimants, and that, although some of the emails concerned were of a personal nature, the claimants did not enjoy a reasonable expectation of privacy in those emails."

Equally, I do not accept the claimants' assertion that there was a binary division of the emails so that those that were not business-related were of necessity private and confidential.

57.
This was the company's business account designed to receive enquiries from customers or potential customers about the company's services. When it was first set up, Mrs Brake was not entitled to use it at all because she was subject to the injunction in the partnership proceedings. When the injunction prohibiting her working for the company lapsed after six months, she shared the email account with two other employees, neither of whom used it for personal correspondence. The fact that Mrs Brake did not have exclusive use of the account but shared it with others is plainly relevant to the question whether there was a reasonable expectation of privacy. It is clear from emails adduced in evidence and shown to this Court during the appeal hearing that other employees replied to business emails sent to Mrs Brake via the enquiries account.

58.
In submissions in reply, Ms Rogers on behalf of the claimants endeavoured to argue that, in determining whether the fact that Mr Windus had access to the enquiries account was relevant to the question of a reasonable expectation of privacy, the judge ought to have had regard to the fact that he was a close friend of Mrs Brake. So far as I can see, this was not how the case was argued before the judge. In any event there is no merit in the argument. It is clear that Mr Windus used the account for the company's business purposes. His relationship with Mrs Brake is irrelevant.

59.
Although Mrs Brake was in possession of the password for the account, it belonged to the company. The purpose for the password was to protect the company's secrets, not Mrs Brake's. She held the password, not in a personal capacity, but as an employee of the company. Ms Rogers' submission that Mrs Brake had effective control of the account is inconsistent with the judge's findings. AEL also had access to the account through ACS who were engaged by the company to administer the account and had the authority to reset the password as they did after Mrs Brake was dismissed.

60.
I do not accept the claimants' submission that the judge treated the question of ownership of the email account and/or the right to ask for the password as decisive factors. He was, however, entitled to treat them as important factors in determining whether there was a reasonable expectation of privacy and/or a duty of confidentiality. As the judge noted in dismissing permission to appeal, he had not treated the defendants' ownership of the domain and email accounts as decisive but rather as part of the context in which the question of expectation arises.

61.
Within the enquiries account, the personal emails were not stored separately and were not marked as personal or private. It would not be apparent to anyone accessing the account that an email was personal until they started to read it or at least read the name of the addressee. Within the wider axnoller domain, however, there were other addresses in the names of certain individuals including Mr and Mrs Brake in which personal emails could be stored separately from the business enquiries account. It is highly significant that, at the same time as the enquiries account was set up as the business account, separate accounts in the names of claimants and others were also created. Where a business enquiries email account and a separate email account in the employee's name are set up at the same time, the obvious inference is that the latter is subject to a reasonable expectation of privacy but the former is not.

62.
It is true that the conclusions reached by the deputy judge when granting the interim injunction were different from the findings made at trial. The deputy judge concluded that the enquiries account was confidential to Mrs Brake and under her total control. But the deputy judge was careful to remind himself that he was dealing with an interim application, that his conclusions were only "interim", and that it was inappropriate for him at that stage to make any findings of fact. The judge's findings were reached after a full trial in which he had considered the totality of the evidence. The deputy judge's conclusions at the interim hearing carry no weight in this appeal.

63.
Before the judge, and before this Court, the claimant cited three decisions of the European Court of Human Rights concerning the private use by employees of a business email account of the employer – Halford v United Kingdom [1997] IRLR 471, Copland v United Kingdom (2007) 45 EHRR 37, and Barbulescu v Romania (Application no. 61496/08) [2017] IRLR 1032. Those authorities clearly establish that communications from business premises may fall within the notion of private life under Article 8. An employee making a private communication from business premises or using business facilities may have a reasonable expectation of privacy. In Copland, this was expressly, and unsurprisingly, extended to the individual's use of email. In Barbulescu, it was held that an employer's express ban on using company resources for personal purposes and monitoring of internet use "cannot reduce private social life in the workplace to zero." But the question whether there was a reasonable expectation of privacy will turn on a careful and detailed analysis of all the facts and circumstances. The facts and circumstances of the three ECtHR cases were significantly different. No assistance is derived from a detailed analysis of those decisions or a comparison with the facts of the present case.

64.
In turn, the defendants relied on a domestic authority, the decision of Garnham J in Simpkin v The Berkeley Group Holdings PLC [2017] EWHC 1472 (QB), [2017] 4 WLR 116 in which the court held that a private document drafted by an employee on his work computer and sent from his work email

account to his private email account did not give rise to a reasonable expectation of privacy in the document as against his employer. Amongst the factors which Garnham J took into account in arriving at that decision were that the employee had signed a copy of the company's IT policy which made it clear that emails sent on its IT system were the company's property; that the document was created in the course of his employment using company software and information; that the document, which was neither password protected nor segregated from work documents, had been saved to a folder stored on the company's server; that the contents of his email account also appeared in his personal assistant's email account, and that the employee was well aware that he was not entitled to privacy in using the company's IT systems. I have summarised the findings in that case because in the present case the judge did compare and contrast them with those arising in the present case, in a way which the claimants say was inaccurate. I do not agree, however, that his consideration of this decision led him astray. He described the two cases as analogous but I do not interpret this as adding any significant weight to the fundamental basis for his decision which was rooted in his assessment of the facts of this case. The key point which I derive from Garnham J's judgment in Simpkin (in particular at [31]) is that a claimant must demonstrate a reasonable expectation of privacy, or that the document is confidential, against the defendant. In the present case, the claimants have conspicuously failed to demonstrate a reasonable expectation of privacy or confidence against the Guy Parties arising out of Mrs Brake's use of the business enquiries account.

65.
Although the claimants' action included a claim for breach of confidence, they relied on the same set of facts and arguments in support of both claims. The Supreme Court has confirmed that misuse of private information and breach of confidence are distinct causes of action resting on different foundations and protecting different interests: see Bloomberg at [45]. In these proceedings, the claim for breach of confidence adds nothing to the case. The claimants have put forward no argument before this Court which persuades me that the judge was wrong to conclude that the personal information in the enquiries account was not "imparted in circumstances imparting an obligation of confidence." The fact that this Court reached a different conclusion on different facts in Imerman is of no assistance to the claimants in this case.

66.
In reaching his decision that there was no reasonable expectation of privacy, the judge applied the principles set out in Murray. In reaching his decision that the defendants were under no duty of confidentiality with regard to the emails, the judge simply applied the principles in Coco v Clark to the facts as he found them. The claimants have not identified any flaw in his approach.

67.
I therefore conclude that the judge was entitled to find that there was no reasonable expectation of privacy or confidentiality as against the defendants, that the claimants have failed to establish the first three grounds of appeal and that their appeal must therefore be dismissed.

68.
Having concluded that there was no reasonable expectation of privacy or confidentiality as against the defendants, the judge observed that, if he was wrong, he was not in a position to carry out the second stage of the enquiry into the cause of action in privacy because he assumed that the required balancing exercise, which would "focus intensely on the facts", should be considered alongside the "iniquity defence" at the second trial. Nonetheless, "in case the matter should go further", he proceeded to consider whether there had been any misuse of any private or confidential information. He found that that the defendants' limited publication to their advisers and to the trustee in

bankruptcy and Mrs Brehme was neither a breach of confidence nor misuse of private information, for the reasons given in the judgment. He concluded at [160] (in a passage substantially repeated at [289]):

“This is, at best, a case of limited damage to the claimants. In the restricted contexts in which disclosures have been made, I consider that no reasonable person of ordinary sensibilities would be substantially offended.”

69.
This finding was unquestionably open to him on the evidence before him at the hearing. On the other hand, I have some concerns about whether he was in a position to determine definitively that there had been any misuse of confidential or private information without addressing the “iniquity defence”. The disclosures to the defendants’ advisers, and to the trustee in bankruptcy and to Mrs Brehme, were substantially connected with their concerns about Mrs Brake’s alleged fraudulent conduct. In evaluating whether, for example, it was a breach of privacy or confidence to supply information to a trustee in bankruptcy without a court order, it may be relevant to consider what conditions might have been attached to any court order which in turn might have been determined by the matters which were alleged to give rise to the iniquity defence. Accordingly, there may be some merit in the arguments advanced in support of the fourth ground of appeal.

70.
I appreciate the judge’s motivation for separating the “iniquity defence” but it is to my mind at least doubtful whether he was right to do so. As this Court observed in Murray, supra, the circumstances of the case to be taken into account when determining whether there was a reasonable expectation of privacy include “the nature of the activity in which the claimant was engaged”. If the activity included unlawful conduct, for example using a business email account to perpetrate fraud on the employer or the employer’s business associates, that is likely to be relevant both (1) to whether there was a reasonable expectation of privacy and/or duty of confidence and, if there was, (2) to whether there was a breach of privacy and/or confidence. As Lord Hope of Craighead said in Kinloch v HM Advocate [2012] UKSC 62, [2013] AC 93 at [21], when giving the judgment of the Court dismissing an appeal by a man who claimed that unauthorised police surveillance had breached his article 8 rights,

“[t]he criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life he was entitled to keep private.”

In Axon v Ministry of Defence [2016] EWHC 787 (QB), [2016] EMLR 20, Nicol J observed at [64]:

“misconduct is not just relevant to the balancing of interests under arts 8 and 10 (Lord Nicholls’ second question in Campbell) but is also material as to whether the Claimant had a reasonable expectation of privacy in information about that conduct ….”

There is support for this in the Supreme Court’s discussion of reputational damage in the judgment in Bloomberg at [122] to [123].

71.
In the judgment in the present case at [237], the judge seemed to accept this principle:

“if you know you are doing something wrong, it may not be reasonable for you to have an expectation that information about that wrongdoing will be kept private. But the court cannot decide that without first examining whether there is any evidence about wrongdoing for the claimant to know about. Yet (in this case) the facts needed to try the 'iniquity defence' have not been found at the first stage: they

are reserved for the second, should that be needed. In my judgment, if the court decides that the claimants otherwise have a reasonable expectation of privacy in relation to the account, it cannot yet make a final decision in relation to these documents, said to be relevant to wrongdoing. It can decide only provisionally, subject to the further decision at stage 2 on the facts, if that proves necessary."

But this is at odds with an observation in his other judgment delivered on the same day, (the "preliminary issue" judgment) at [40] that

"the 'iniquity' defence does not come into play at the stage of considering whether there was a reasonable expectation of privacy, so that the information was private, but only at the subsequent stage of considering whether there was any justification for the use made or proposed to be made."

72.
For my part, I agree with his analysis at [237] in the main judgment and disagree with the statement at [40] of the preliminary issue judgment. If you know you are doing something wrong, it may not be reasonable for you to have an expectation that information about that wrongdoing will be kept private. Misconduct is relevant to the question whether a claimant has a reasonable expectation of privacy as well as to the balancing exercise if he does.

73.
If, however, my Lord and my Lady agree with my analysis on the principal issue that the judge was entitled to find that there was no reasonable expectation of privacy or confidentiality as against the defendants, the decision to split the issues has not created a problem in this case because this Court will uphold the judge's decision without reference either to the alternative finding or to the serious allegations of misconduct made against Mrs Brake which comprise the "iniquity defence".

74.
For the reasons given above, I would dismiss the appeal.

LADY JUSTICE ASPLIN

75.
I have had the opportunity of reading the judgments of Baker and Lewison LJJ in draft and agree with them both.

LORD JUSTICE LEWISON

76.
I agree. In Bloomberg the Supreme Court distinguished between two stages. We are principally concerned with stage 1. The applicable test at stage 1 is whether, objectively, there is a reasonable expectation of privacy. Although I have expressed the test in that way, that formulation is incomplete. Private and non-private is not necessarily a binary category. Moreover, material may be private as regards some recipients or publishers of the information and not against others. It is not possible, in my view, simply to read across decisions about publication of material in national newspapers to the very different circumstances of this case.

77.
In Bloomberg at [49] the Supreme Court affirmed the formulation of the test by Lord Hope:

"Whether there is a reasonable expectation of privacy is an objective question. The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity." (Emphasis added)

78.
It follows, in my judgment, that the nature of the information, the extent of publication and the identity of those to whom publication is made are all highly relevant at stage 1. Some information may be private as regards some people but not against others. A person communicating highly private information to their solicitor, for example, may not have any reasonable expectation that the information would be kept private as against a paralegal working on the matter. A suspect under investigation may have no reasonable expectation that their identity will not be disclosed to a forensic scientist. It all depends on the facts and the overall circumstances. That is why Garnham J was correct in Simpkin to consider whether the document in issue was confidential as against the defendant. Whether it would have been confidential as against anyone else is irrelevant.

79.
In addition, in Bloomberg the Supreme Court confirmed at [55] that:

“The effect on the claimant must attain a sufficient level of seriousness for article 8 to be engaged.”

80.
The judge was well aware both of the manner in which the emails in issue were created, the medium on which they were stored, the persons who had access to the relevant email account; and the limited use that the Guy Parties made of the emails. He said at [160] that:

“In the restricted contexts in which disclosures have been made, I consider that no reasonable person of ordinary sensibilities would be substantially offended.”

81.
Faced with that finding, Ms Rogers QC was driven to submit that that finding was perverse. But for all the reasons that Baker LJ has given, I consider that the judge was entitled to find on the evidence that, objectively, Mrs Brake had failed to prove that she had a reasonable expectation of privacy as against the Guy Parties in relation to the disputed emails. If there were any doubt about the matter, that finding would dispose of the claim.

82.
I, too, would dismiss the appeal.