



Neutral Citation Number: [2024] EWCA Civ 1233

Case No: CA-2023-000964

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Jonathan Hilliard KC (sitting as a Deputy High Court Judge)
[2023] EWHC 649 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 18 October 2024

Before :

LORD JUSTICE BAKER
LADY JUSTICE ANDREWS
LORD JUSTICE SNOWDEN

Between :

KIERAN CORRIGAN & CO LTD

**Claimant/
Appellant**

- and -

BASHIR TIMOL

**Defendant/
Respondent**

Jonathan Hill (instructed by **TLT LLP**) for the **Appellant**
Martin Budworth (instructed by **Lawbriefs Ltd**) for the **Respondent**

Hearing date : 5 June 2024
Further written submissions received on 13 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal raises the issue of whether a director can be personally liable for breach of confidence if he approves the marketing by his company of a tax planning structure which, unknown to him, has been developed by others at his company using confidential information which they originally obtained jointly from a third party.
2. In the instant case, the judge found that the director was not liable, because although he had received the confidential information at the outset, he had not been personally involved in the development of the tax planning structure and when he gave the go-ahead for it to be marketed, he concerned himself only with its commercial viability and not its technical features. He thus made his decision without reference to the confidential information and without being aware that the others had used it in the design of the structure.
3. The appellant company, which is owner of the confidential information, contends that once confidential information is received by a person in confidence, if that person subsequently authorises acts that involve the misuse of that information by others, liability is strict and cannot be avoided because the defendant does not know that the others were misusing the information.
4. Alternatively, the appellant contends that this Court should set aside the judge's factual findings and order a retrial on the basis that it has now discovered that the director did not disclose a number of documents that show that he was familiar with the technical details of the tax planning scheme, and had been put on inquiry that it had been developed using the appellant's confidential information before he approved the marketing of the scheme.

Background

5. The Appellant, Kieran Corrigan & Co Limited ("KCL") appeals against the decision of Jonathan Hilliard KC (sitting as a Deputy High Court Judge) (the "Judge") to dismiss claims for breach of confidence against the Respondent ("Mr. Timol"). The claims related to the alleged misuse by a company of which Mr. Timol was a director, of confidential information concerning a tax planning structure that KCL had devised.
6. The Judge's judgment contains an extensive narrative and analysis of the evidence and the law relating to the particular taxation provisions in issue. For the purposes of the appeal, a much more abbreviated summary will suffice.
7. KCL is an Irish company that provides accountancy and tax advice. Its principal is Kieran Corrigan ("Mr. Corrigan"). During 2012-2013, and in conjunction with an English tax barrister, Michael Sherry ("Mr. Sherry"), KCL devised a proposal for a tax saving structure using a UK limited liability partnership ("LLP") which would allow corporate investors in the LLP who would not normally involve themselves in research and development ("R&D"), to obtain enhanced corporation tax allowances from qualifying payments made by the LLP to sub-contractors engaged in R&D.
8. When KCL's proposal was sufficiently developed, it began to consider how to market it. At that stage Mr. Sherry suggested to Mr. Corrigan that he should talk to two tax advisers - Dominic Slattery ("Mr. Slattery") and Timothy Johnson ("Mr. Johnson") –

whom Mr. Sherry had previously worked with. At the time they were working for companies in the group headed by an English company, OneE Group Limited, which was also engaged in developing and marketing tax-planning products.¹

9. Mr. Timol was one of the directors and a minority shareholder of OneE Group Limited. Together with the other main shareholder, from about 2007 he had also been a minority shareholder in a pharmaceutical research company called Nemaura Pharma Limited (“Nemaura”). KCL’s proposal was thought by Mr. Sherry to be particularly suitable for use by companies in the pharmaceutical industry, and Mr. Sherry’s suggestion that Mr. Corrigan should talk to OneE Group was made in the knowledge of the link between the owners of OneE Group and Nemaura.
10. Mr. Corrigan had a preliminary meeting with Mr. Slattery in December 2013 and a further meeting was arranged for the early 2014. Prior to that further meeting, Mr. Corrigan and Mr. Slattery signed a Non-Disclosure Agreement (“NDA”) on behalf of KCL and OneE Group which required each party to keep confidential any confidential information that had been, or might be, disclosed by the other party concerning the development of future tax products.
11. On 4 February 2014 Mr. Corrigan met Mr. Slattery, Mr. Johnson and Mr. Timol. At that meeting, Mr. Corrigan provided the OneE Group attendees with a copy of draft instructions from KCL to Mr. Sherry that explained in some detail the proposed structure involving the use of a UK LLP to enable corporate investors to obtain enhanced sub-contractor R&D relief. Mr. Corrigan also made a presentation of his views on the key technical and commercial issues on sub-contractor R&D relief and how it would work.
12. At the meeting Mr. Corrigan indicated that he was contemplating a full joint venture between KCL and OneE Group under which KCL would be entitled to participate in all capital profits made by companies exploiting the proposed structure. It was explained to Mr. Corrigan that the executives of OneE Group had a private investment in Nemaura. Mr. Corrigan indicated that KCL’s structure could be used to introduce funds to Nemaura provided that he was fully informed as to the background and activities of Nemaura and the terms of the joint venture had been agreed.
13. After the 4 February 2014 meeting, the joint venture discussions between KCL and OneE Group continued, but did not come to any conclusion. Instead, Mr. Slattery and Mr. Johnson developed a tax structure for OneE Group which also involved the use of a UK LLP in connection with sub-contractor R&D reliefs and which was intended to be used in connection with Nemaura (the “Nemaura structure”).
14. The opportunity to invest through the Nemaura structure was subsequently presented by OneE Group to a number of potential investors at a meeting on 7 October 2014 at the Lowry Hotel in Manchester. One of the attendees reported the presentation to Mr. Corrigan. Mr. Corrigan took the view that OneE Group had used confidential information which he had provided at the meeting on 4 February 2014 in the development of the Nemaura structure. On 23 October 2014, Mr. Corrigan contacted Mr. Slattery to complain. That prompted Mr. Johnson and Mr. Slattery to obtain a

¹ Where it is not necessary for the purposes of this judgment to differentiate between the different companies in the group, I shall simply refer to OneE Group Limited and its subsidiary companies without distinction between them as “OneE Group”.

copy of the NDA from within OneE Group. Mr. Corrigan followed up with a further email on 28 October 2014 to Mr. Slattery expressing his concern about the Nemaura structure. A heated telephone call took place between Mr. Corrigan and Mr. Slattery on 30 October 2014, which was followed by further emails on 4 November 2014 in which Mr. Corrigan indicated that he would be seeking advice about the position.

15. The Nemaura structure was implemented by OneE Group through a company called NPL FC Limited which was incorporated in December 2014. According to its accounts, NPL FC Limited had raised £33 million from investors by the end of 2015, rising to £77 million by the end of 2018.

The Claim and the Judgment on liability

16. Shortly before the end of the limitation period in 2020, KCL issued proceedings against OneE Group Limited, Mr. Timol, Mr. Slattery and Mr. Johnson. The claim alleged (i) breach of confidence, (ii) procuring a breach of the NDA, and (iii) an unlawful means conspiracy. Pursuant to an order of Master Clark, the trial before the Judge was as to liability only, with questions of relief and quantum to be decided at a second stage.
17. In his judgment, [2023] EWHC 649 (Ch) (the “Judgment”), the Judge made a number of important findings. The key factual finding was that the inspiration for OneE Group’s use of sub-contractor R&D relief in the Nemaura structure came from Mr. Corrigan and KCL, and was not something that the defendants arrived at for themselves: see the Judgment at [165]-[175].
18. The Judge then noted, at [178]-[179], the basic requirements for liability for breach of confidence which were summarised by Megarry J in Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at 47, namely,
 - i) the information must have the necessary quality of confidence about it;
 - ii) the information must have been imparted in circumstances importing an obligation of confidence; and
 - iii) there must have been an unauthorised use of that information to the detriment of the person communicating it.
19. In relation to the third element, the Judge added, at [190],

“[190]. A person who owes an equitable obligation of confidence is liable for acting in breach of that obligation even though he is not conscious of doing so: Primary Group (UK) Ltd v Royal Bank of Scotland plc [2014] EWHC 1082 (Ch) at [244], relying on the Court of Appeal decision in Seager v Copydex Limited [1967] 1 WLR 923.”
20. Applying the law to the facts, the Judge held, at [229]-[230], that a number of the elements of KCL’s structure that were conveyed to the defendants at the meeting on 4 February 2014 had the necessary qualities to amount to confidential information. In particular, these included the use of R&D sub-contractor relief, that this could be exploited using a structure that had an LLP at the top, and that if the LLP was

unconnected to the sub-contractor this would, if the LLP traded, attract enhanced relief on the sub-contractor payments without the need for such payments to be limited to certain categories of expenditure.

21. The Judge then held, at [246]-[247], that such confidential information was imparted to the three individual defendants in circumstances importing an obligation in confidence, most critically at the meeting on 4 February 2014, but also to Mr. Slattery and Mr. Johnson (but not Mr. Timol) in a number of subsequent emails. At [259], the Judge found that the confidential information was also passed to OneE Group Limited on or around 4 August 2014 through Mr. Slattery, who became a director of that company on that date.
22. At [263], the Judge further held that the fact that the information was imparted to the individual defendants whilst they were acting as servants and agents of OneE Group companies did not absolve them from owing equitable duties of confidence individually.
23. Finally, and most importantly for the purposes of this appeal, the Judge turned to consider whether the confidential information was misused by the defendants. At [265], he summarised KCL's complaints,

“[265]. [KCL] alleges that the Defendants breached their equitable duty of confidence in six respects, namely when they (a) developed the Nemaure structure, (b) disclosed the Nemaure structure at the October 2014 conference and distributed the documents at the conference and, it is inferred, on other occasions, (c) provided information regarding the Nemaure structure at other events and on other occasions, (d) disclosed the Nemaure structure to legal advisors when taking advice on its efficacy, (e) disclosed the Nemaure structure to insurers, and (f) implemented the Nemaure structure and conducted fundraising using it.”

24. As to (a), the Judge held that Mr. Slattery and Mr. Johnson both misused the confidential information in developing the Nemaure structure in May and June 2014, including in preparing instructions to tax counsel. The Judge held that this was done without the consent of KCL, and in a manner which was inconsistent with the purpose for which the information had been communicated, since there had been no agreement on fees between KCL and OneE Group and that Mr. Slattery and Mr. Johnson ought to have known that.
25. The Judge held that OneE Group misused the confidential information in relation to (b) and (c) and that Mr. Slattery (but not Mr. Johnson) was responsible for that. He held that both Mr. Johnson and Mr. Slattery misused the confidential information in respect of (d) but that they did so on behalf of another group company and not on behalf of the defendant OneE Group Limited. The Judge rejected the claim under (e) as there was no evidence of disclosure to insurers. And finally, as to (f), the Judge held that OneE Group Limited and Mr. Slattery were involved in the misuse of the confidential information in relation to both fundraising (marketing) and implementing the Nemaure structure, and that Mr. Johnson would also have been involved in implementation, but not in fundraising.

26. The Judge then turned to Mr. Timol's role in relation to (a) to (f). At [279] -[282], he decided that Mr. Timol was not liable for any of the matters complained of.
27. The Judge found, at [279], that Mr. Timol's expertise was commercial and not legal, but that he would have understood in broad terms the structure being put forward by Mr. Corrigan at the meeting on 4 February 2014. He continued,

“[279]. ... Mr. Timol accepted in evidence that he would have been part of the team of people who would decide whether a particular product should be offered, so I accept the Claimant's submission that he would have been involved in signing off the decision to implement and market the Nemaura Structure. I do not consider that he would have needed to sign off the work done from May 2014 to obtain Counsel's opinion. Rather, as he explained in his evidence, he would have had brought to him potential projects, they would have been explained to him in very broad terms, and he would have wished to check that those bringing them to him were satisfied that they were robust.

280. Mr. Hill put to him in cross-examination that Mr. Timol would not have known of how Nemaura was, prior to the creation of the Nemaura Structure, actually claiming R&D relief itself, and Mr Timol accepted that he would not profess to know the details of how the relief was claimed ... His evidence was that the way the Nemaura Structure would have been put to him was that “it is technically viable, it works as per the legislation and it is something that would pass muster” ... I accept that evidence, which to my mind is consistent with the fact that he would not previously have got into the detail of how Nemaura was claiming R&D relief previously. Given this, I do not consider that [Mr. Timol] should have realised that the Nemaura structure contained significant confidential information provided by [KCL]. It was not put to him or suggested that he would have been told explicitly that this was the case, and if it was not, then I do not consider that he should have guessed that.”

28. The Judge then turned to consider what Mr. Timol might have been told when he approved the marketing and implementation of the Nemaura structure. He said, at [281],

“[281]. There is no documentary evidence of what he would have been told ... Therefore, I must work from what I can safely infer from the circumstances, taking into account my view of his witness evidence generally. He would have signed off the decision six months after the meeting with Mr. Corrigan, in circumstances where he had not been involved on the tax side in developing the proposals, and I accept his evidence that his interest would have been in ensuring that the structure was likely to be a commercial success rather than the precise way that it worked from a tax perspective as long as it

was considered robust by those with tax expertise in [OneE Group]. Therefore, I do not consider that he misused confidential information in signing off the structure. It was submitted by [KCL] that he should have asked sufficient questions to be able to tell that it had been based on Mr. Corrigan's idea, but I do not consider that it was incumbent on him to probe the details of the tax treatment or how they had been arrived at given his role lay on the commercial side."

29. The Judge went on at [282] to reject a further argument advanced by KCL. It is that decision which is the subject of Ground 1 in the Notice of Appeal. The Judge said,

"[282]. It was also argued by [KCL] that given that Mr. Timol received confidential information at the 4 February 2014 meeting, he would be liable for signing off the use of the Nemaura structure because it contained or had been based on [KCL's] confidential information, even if he should not have realised that the structure was linked to [KCL's] confidential information, on the basis that liability for misuse is strict once the defendant should have known that the information was imparted to him in circumstances of confidence. I reject that argument. To found liability, there must be use by the defendant of the information given to *him* in confidence. By signing off the Nemaura structure, Mr. Timol was not using the information given to him *personally* at the 4 February 2014 meeting. He was unwittingly signing off the use of confidential information that had been given to others and used to develop the Nemaura structure. It is the fact that a defendant should know that particular information given to him is imbued with confidentiality that should cause him to treat that information as such. That is why liability is strict if that information is then used contrary to the purpose for which it was provided."

(italics in the original)

30. The Judge then addressed the question of liability for unlawful means conspiracy and procuring a breach of contract. He found that Mr. Slattery, Mr. Johnson and OneE Group Limited were liable for the tort of unlawful means conspiracy. KCL had, in closing, indicated that such claim was not pursued against Mr. Timol on the basis that he had no intention to injure KCL. The Judge also found that it was only Mr. Slattery who was liable for the tort of inducing a breach of the NDA.
31. The Judge finally turned to the question of whether the defendants were jointly liable for breach of confidence. He found that Mr. Slattery, Mr. Johnson and OneE Group Limited were jointly liable, but that Mr. Timol was not, because he did not realise that the Nemaura structure had been developed using KCL's confidential information: see [306] of the Judgment.

The quantum phase

32. The quantum phase of the litigation took the form of an inquiry as to damages before HHJ Cadwallader between 14-16 May 2024, shortly before the hearing of the appeal before us. Mr. Timol did not appear, and was not represented, at the inquiry. However, pursuant to an undertaking recorded in order made by Master Clark in December 2023, he undertook to be bound by any finding made at the inquiry.
33. On 16 August 2024, HHJ Cadwallader handed down his judgment: see [2024] EWHC 2146 (Ch). He assessed damages on the basis that KCL would have negotiated with OneE Group and obtained a deal for a share of the gross receipts derived by OneE Group from the marketing and implementation of the Nemaura structure, less introducers' fees. The Judge assessed the likely share that KCL would have received as 40% of receipts less introducers' fees of £8.7 million and so awarded damages of £3.48 million against Mr. Slattery, Mr. Johnson and OneE Group Limited.

The Appeal

34. KCL's first ground of appeal relates to the Judge's finding in [282] that Mr. Timol was not primarily liable for breach of confidence. KCL's argument is that since Mr. Timol was at the meeting on 4 February 2014, he had personally received the confidential information that was provided by KCL and he knew that all the defendants had acquired that information in confidence. KCL submits that Mr. Timol should have been found liable as a primary wrongdoer because his mental state when subsequently giving the go-ahead for the marketing and implementation of the Nemaura structure was irrelevant. In particular, KCL contends that it should have made no difference whether or not Mr. Timol realised that the Nemaura structure embodied the confidential information. KCL contends that this is the law as stated in Seager v Copydex Ltd [1967] 1 WLR 923 ("Seager"), affirmed in Vestergaard Frandsen v Bestnet Europe [2013] UKSC 31 ("Vestergaard") at [24].
35. KCL's second ground of appeal was against the Judge's finding in [306], that Mr. Timol was not jointly liable with Mr. Slattery, Mr. Johnson and OneE Group Limited. However, that Ground 2 became unsustainable following the decision of the Supreme Court given on 15 May 2024 in Lifestyle Equities CV v Ahmed [2024] UKSC 17. In that decision, the Supreme Court made it clear that knowledge by a defendant of the essential features of the commission of a tort by the primary tortfeasor is necessary before the defendant can be made liable as an accessory on the basis that they shared a common design. That would not be so if Mr. Timol did not know that the Nemaura structure had been developed using KCL's confidential information. KCL therefore did not pursue Ground 2 at the hearing before us.
36. Instead, in May 2024, KCL applied to amend its Notice of Appeal to add an additional Ground 3 in the event that its appeal failed on Grounds 1 and 2. That proposed new Ground 3 was that the Judge's factual finding that Mr. Timol neither knew, nor ought to have known, that the Nemaura structure had been developed using KCL's confidential information was wrong and/or unjust due to a serious procedural irregularity.
37. In its application, KCL contended that documents which show that Mr. Timol was told that Mr. Corrigan was complaining that KCL's information had been misused in the development of the Nemaura structure, in breach of the NDA, and which also show that he had much greater awareness of the technical details of the Nemaura

structure than the Judge found was the case, had wrongly not been disclosed by any of the defendants prior to the trial. Those documents came to light when they were disclosed in November 2023 during the quantum phase of proceedings by Mr. Johnson (who no longer instructs the same solicitors as the other defendants).

38. KCL contends that the newly disclosed documents were highly relevant and would probably have had an important influence on the result had they been available for use at the trial. It contends that had they been available for cross-examination of Mr. Timol, the Judge would have found that Mr. Timol either knew, or ought to have known, that the Nemaure structure had been developed using KCL's confidential information when he approved the implementation of the structure. KCL contends that we should admit the new documents on the appeal, set aside the Judge's decision in relation to Mr. Timol and order a retrial.
39. On Ground 1, Mr. Timol essentially supports the Judge's decision for the reasons that he gave. In particular he contends that the Judge's finding that he did not use the confidential information when approving the marketing of the Nemaure structure is fatal to the claim against him.
40. On Ground 3, Mr. Timol resists the application to amend the Grounds of Appeal. He accepts that the documents to which KCL refers should have been disclosed before the trial, but denies that they were deliberately withheld. He contends that KCL had the new documents for about six months before making its application to amend, and has given no good explanation for its delay. Mr. Timol also submits that the new documents are in any event of insufficient probative value to pass the test for the admission of new evidence on appeal, and that they would not have changed the Judge's conclusion that his conscience was clear when he approved the implementation of the Nemaure structure.

Ground 1

Analysis

41. As indicated above, KCL relies upon Seager and Vestergaard to contend that the Judge should have found Mr. Timol primarily liable for breach of confidence when he approved the marketing of the Nemaure structure.
42. In Seager, the claimant invented and patented a carpet grip. He negotiated with the defendant company over more than a year with a view to the defendant marketing that grip. In the course of the negotiations, the claimant suggested to two representatives of the defendant company (Messrs. Boon and Preston) the design of an alternative grip with different features (including in particular a domed, V-shaped prong or "V-tang") which would be cheaper to produce. He suggested that the alternative design should be called "Invisigrip". The representatives of the defendant company realised that this information had been given to them in confidence.
43. After the negotiations had concluded, the defendant company patented a carpet grip which had the same features as the alternative suggested by the claimant and which they also named "Invisigrip". The defendant company also engaged two individuals at a second company (Messrs. Sudbury and Turl) to produce the new grip. The trial judge dismissed the claim against the defendant company for breach of confidence,

mainly on the basis that the information conferred was not of sufficient significance to be confidential. That decision was reversed by the Court of Appeal.

44. In the Court of Appeal, in the course of setting out his summary of the facts, Lord Denning MR stated, at page 931A-B,

“(viii) Copydex say that their alternative grip was the result of their own ideas and was not derived in any way from any information given to them by Mr. Seager. They say also that the name of “Invisigrip” was their own spontaneous idea.

(ix) I have no doubt that Copydex honestly believed the alternative was their own idea; but I think that they must unconsciously have made use of the information which Mr. Seager gave them. The coincidences are too strong to permit of any other explanation.”

45. Lord Denning MR summarised the law at page 831F,

“The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.”

46. He then applied the law to the facts, stating, at page 932B-E,

“Applying these principles, I think that Mr. Seager should succeed. On the facts which I have stated, he told Copydex a lot about the making of a satisfactory carpet grip which was not in the public domain. They would not have got going so quickly except for what they had learned in their discussions with him. They got to know in particular that it was possible to make an alternative grip in the form of a “V-tang,” provided the tooth was sharp enough and strong enough, and they were told about the special shape which would produce this result. The judge thought that the information was not significant. But I think it was. It was the spring-board which enabled them to go on to devise the “Invisigrip” and to apply for a patent for it. They were quite innocent of any intention to take advantage of him. They thought that, as long as they did not infringe his patent, they were exempt. In this they were in error. They were not aware of the law as to confidential information. They were not at liberty to make use of any confidential information he gave them without paying for it.”

47. Salmon LJ delivered a concurring judgment in which, at pages 935G-936B, he acquitted the defendant company of any conscious plagiarism (in the sense of going through a deliberate process of trying to recall what the claimant had said and trying to replicate it). However, he stated, at page 936B-C,

“Nevertheless, the germ of the idea and the broad principle of the domed, V-shaped prong was, I am certain, implanted in their minds by the plaintiff at the confidential interview of March 13, 1962, and afterwards subconsciously reproduced and used, if only as a spring-board, to forestall the plaintiff with “Invisigrip.” This is no reflection upon their honesty, but it does infringe the plaintiff’s rights. ”

48. Winn LJ agreed, stating at page 939G-H,

“To my own mind it appears that the proper conclusion to be drawn from all the material before the court, not by any means primarily from the direct evidence, is that the plaintiff did explain his “Invisigrip” idea to Mr. Boon and Mr. Preston; that they absorbed what he told them; and were able to recall enough from their memories to indicate to Mr. Sudbury and Mr. Turl what they wanted them to produce. In doing so, they did not, I think, realise that they were infringing a duty of confidence: I think that they did infringe it. ”

49. In Vestergaard, the defendant, Mrs. Sig, was a sales and marketing employee of the claimant company who resigned to set up a competing business with another ex-employee. Together with various corporate defendants, they were sued personally for misuse of the claimant’s confidential information concerning the techniques for production of long-lasting insecticide netting. That information was stored on a database maintained by the claimant. The trial judge held Mrs. Sig liable, but that decision was reversed by the Court of Appeal, whose decision was upheld by the Supreme Court.

50. After summarising the facts, at [22]-[24], Lord Neuberger (with whom the other members of the Supreme Court agreed) commented,

“22. It would seem surprising if Mrs. Sig could be liable for breaching Vestergaard’s rights of confidence through the misuse of its trade secrets, given that she did not know (i) the identity of those secrets, and (ii) that they were being, or had been, used, let alone misused. The absence of such knowledge would appear to preclude liability, at least without the existence of special facts. After all, an action in breach of confidence is based ultimately on conscience. As Megarry J said in Coco v AN Clark (Engineers) Ltd [1969] RPC 41, 46, “[t]he equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust”.

23. The classic case of breach of confidence involves the claimant’s confidential information, such as a trade secret, being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential – see e.g. per Lord Goff in Attorney-General v Guardian Newspapers Ltd (No.2) [1990] 1 AC 109, 281. Thus, in order

for the conscience of the recipient to be affected, she must have agreed, or must know, that the information is confidential.

24. The decision in Seager v Copydex ... was an entirely orthodox application of this approach. The plaintiff passed on to the defendants a trade secret about his new design of carpet-grip, and although the defendants realised that the secret was imparted in confidence, they went on to use that information to design a new form of carpet-grip, which they marketed. What rendered the case unusual was that the defendants (i) did not realise that they had used the information, as they had done so unconsciously, and (ii) believed that the law solely precluded them from infringing the plaintiff's patent. However, neither of those facts enabled them to avoid liability, as, once it was found that they had received the information in confidence, their state of mind when using the information was irrelevant to the question of whether they had abused the confidence."

51. In my judgment, these authorities make clear that both receipt and use of confidential information *by the defendant* is essential if he is to be made primarily liable for breach of confidence. That is apparent from the statement of principle by Lord Denning MR in Seager, namely,

"The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that *he* who has received information in confidence shall not take unfair advantage of it. *He must not make use of it* to the prejudice of him who gave it without obtaining his consent."

(my emphasis)

52. I consider that the law in this respect is correctly stated in Snell's Equity (34th ed.) at 9-018,

"A duty of confidence is breached only if A misuses the information in relation to which B has a reasonable expectation of confidence or privacy. Misuse, of course, can be established only where A has made some use of information, and A may claim, for example, that a particular idea or concept was developed by A independently of any information acquired from B. It is necessary for B to specify the particular information, and the particular way in which it has been misused."

53. What Seager and Vestergaard also show, however, is that *provided that the defendant is actually using the confidential information*, it is not essential that he should appreciate that that is what he is doing, or that what he is doing amounts to a legal wrong. As Lord Hodge crisply put it, in giving the decision of the Privy Council in Paymaster (Jamaica) v Grace Kennedy Services [2017] UKPC 40 at [41], "conscious plagiarism is not a necessary component of a claim for breach of confidence".

54. In Seager, the defendant company was liable because (through its representatives) it had received the confidential information and it had used the information to develop and patent its new carpet grip. That is the context in which Lord Denning MR held that “they must unconsciously *have made use of* the information”, and Salmon LJ referred to the representatives as having “subconsciously *reproduced and used*” the information (my emphases). The fact that the company’s representatives did not appreciate that they were using the confidential information that they had previously been given, or thought that the law did not prohibit them from doing so, was no defence.
55. Likewise, in the second half of [24] of his judgment in Vestergaard, Lord Neuberger said that the defendant company “did not realise *that they had used* the information, as they had done so unconsciously”, and that “once it was found that they had received the information in confidence, their state of mind *when using* the information was irrelevant to the question of whether they had abused the confidence” (my emphases).
56. In Vestergaard, Lord Neuberger also emphasised that the conceptual underpinning of liability for breach of confidence is conscience. That naturally focusses attention on the knowledge of the recipient that the information in question was required to be kept confidential. But it also focusses attention on whether it is the recipient or someone else who has done the acts alleged to amount to a breach of confidence. At least so far as primary liability is concerned, unless there are special circumstances, it is difficult to see how one person’s conscience can be affected by the independent actions of others.
57. As I see it, therefore, the key distinction between the Judge’s findings in relation to Mr. Timol and the Court of Appeal’s findings in relation to the defendant company in Seager, is that in Seager, the court found that the defendant company did make use of the confidential information which the claimant had given to its two representatives in confidence. The representatives may not have consciously realised that they were making use of the confidential information, or that they were not entitled to do so, but the only possible conclusion on the evidence was that they had in fact used the information in the design of the defendant company’s new carpet grip.
58. In contrast to those factual findings in Seager, the Judge’s findings were that Mr. Timol was a commercial man who was not personally involved in the technical development of the Nemaura structure, and that he did not use KCL’s confidential information when deciding to approve the Nemaura structure for implementation and marketing. The Judge’s crucial finding as to Mr. Timol’s actions in signing off the Nemaura structure was in [281], namely,

“I accept his evidence that his interest would have been in ensuring that the structure was likely to be a commercial success rather than the precise way that it worked from a tax perspective as long as it was considered robust by those with tax expertise in [OneE Group]. Therefore, I do not consider that he misused confidential information in signing off the structure.”

59. Although Mr. Hill sought to suggest that Mr. Timol must in fact have brought some technical understanding of the key features of the Nemaura structure into his decision to sign off the marketing and implementation, and that this would therefore have amounted to a “use” by him of the confidential information that KCL had given him at the meeting on 4 February 2014, I do not consider that such an argument can succeed given the Judge’s findings in [281].
60. I accept that the Judge’s explanation at [282] of his decision to reject KCL’s argument could have been better expressed. As indicated above, the Judge stated,
- “[282]. To found liability, there must be use by the defendant of the information given to *him* in confidence. By signing off the Nemaura structure, Mr. Timol was not using the information given to him *personally* at the 4 February 2014 meeting. He was unwittingly signing off the use of confidential information that had been given to others and used to develop the Nemaura structure. It is the fact that a defendant should know that particular information given to him is imbued with confidentiality that should cause him to treat that information as such. That is why liability is strict if that information is then used contrary to the purpose for which it was provided.”
61. The syntax and the Judge’s deployment of italics - especially in the second sentence - is somewhat confusing. There was no dispute that Mr. Timol had personally received confidential information at the meeting on 4 February 2014: see the Judgment at [264]. The emphasis should have been placed on the fact that in signing off the Nemaura structure, Mr. Timol was not using the information that he had been given at the 4 February 2014 meeting. He was unwittingly signing off the use by the defendant company of confidential information that had been used by Mr. Slattery and Mr. Johnson to develop the Nemaura structure. For the reasons that I have given, that is not enough to found primary liability for breach of confidence, and the fact that the Judge may not have expressed himself as clearly as he might is not, of itself, a basis for this court to interfere. As has often been said, the reasons for a judgment will always be capable of having been better expressed, even in a reserved judgment: see Piglowska v Piglowski [1999] 1 WLR 1360 at 1372.
62. For these reasons, I would dismiss the appeal under Ground 1.

Ground 3

The fresh evidence

63. After the Judge had delivered his Judgment in March 2023, there was a consequential hearing in May 2023 at which the Judge set a timetable for the quantum phase of the proceedings. In the course of preparation for that phase, Mr. Johnson changed solicitors. His new solicitors subsequently wrote to KCL’s solicitors on 9 November 2023 disclosing a significant number of documents that had not previously been disclosed by the defendants (the “New Documents”). The explanation given for their non-disclosure was that, prior to the trial on liability, Mr. Johnson had only been able to conduct a keyword search of his “live” mailboxes and that he had not conducted a keyword search of two copies of his mailboxes which he

had downloaded before leaving OneE Group. It was said that for the quantum phase of the litigation Mr. Johnson had reviewed every email in the downloaded copy mailboxes and had come across the New Documents.

64. KCL contends that the New Documents were relevant to the issues in the trial on liability and should have been disclosed. Mr. Timol accepts that the documents should have been disclosed, but he denies that he deliberately withheld them. His evidence is that they were inadvertently missed, he suspects because he conducted keyword searches on his laptop which may not have been fully synced with OneE Group's cloud-based server.
65. The relevance of the New Documents is said by KCL to be two-fold. First, they are said to show that, contrary to his evidence at trial, Mr. Timol was told about KCL's complaint that OneE Group had misused its confidential information at or about the time Mr. Timol gave his approval to the Nemaura structure being marketed and some months before it was implemented. Second, the New Documents are said to show that far from simply being interested in the commercial viability of the Nemaura structure, Mr. Timol was much more familiar with the detail and technical aspects of the Nemaura structure than his evidence at trial suggested.
66. KCL contends that, taken together, the New Documents show that, when Mr. Timol was considering whether to approve the marketing and implementation of the Nemaura structure, he was, at very least, on inquiry as to whether it had been developed using KCL's confidential information, and this would be sufficient to make him liable for breach of confidence.
67. At trial, Mr. Timol was asked about his recollection of complaints from Mr. Corrigan. He said that he could not recall any such complaints,
- “Q. Do you recall having been told about any complaints made by Mr. Corrigan or anyone indeed about the Nemaura structure at around the time it was being launched?
- A. I cannot recall that, I am afraid.
- Q. Or in the middle of 2015?
- A. No, I cannot. I cannot recall any dealings I have had with Mr. Corrigan. I do not believe I have ever addressed him directly in communication by phone call or e-mail. I may have been cc'd in on things, but I have no recollection, I am afraid, of any of these interactions with Mr. Corrigan.”
68. In this respect, the most significant New Documents are said to be an exchange of emails between Mr. Slattery and Mr. Johnson in late October 2014, to which Mr. Timol was copied. Each of the emails in the chain was headed “Kieran Corrigan”.
69. On 27 October 2014, Mr. Slattery sent an email to his PA, asking for a copy of the NDA. When he received it, he forwarded it to Mr. Johnson attached to an email which stated,

“The attached may be an issue for us. I suspect that if we can prove that we developed the Nemaura R&D without his documentation then we are ok. This is the case, but can we prove it? Further, did Kieran actually provide us with any documentation via email? We should first address the above points and then have an informal chat with Foot Anstey as I can see this getting legal!”

70. Mr. Johnson responded on 28 October 2014,

“We instructed counsel on CT planning involving LLPs and Nemaura Pharma months before we even heard of Kieran Corrigan. Unfortunately we did not mention R&D relief in the instructions however I would argue we were on that road anyway. The only reason we didn’t progress this at the time was because we shifted attention to PGS.

So the elements that Kieran may argue he brought to us that we can’t prove we would have done without him are:

1. R&D relief - I think it would be extremely difficult for him to argue that this is his IP as it is a very well established statutory relief.

2. Loan consortium to LLP to get enhanced relief. I would argue that our knowledge in this area (from Rehberg) existed without Kieran.

Finally I confirm that Kieran did send his instructions to us by email at one stage.”

71. Mr. Slattery then replied on 31 October 2014, suggesting that they should discuss the matter with Foot Anstey (OneE Group’s solicitors).

72. KCL also places particular reliance on an email which was sent on 24 November 2014 to a Mr. Mohammed Zubair Butt, who was the chair of the Al-Qalam Shariah Scholars Panel. The email indicated that OneE Group was still in the process of developing the Nemaura structure, and its aim appears to have been to obtain advice about whether the Nemaura structure would be compliant with Shariah law. The email was expressly approved (with slight editing) by Mr. Timol. As sent, that email stated,

“You may recall our discussions on the previous corporate LLP structure (“Rehberg”) that OneE offered as an investment to its corporate clients. I have attached the email exchange from February for reference.

We are now in the process of developing a new structure which will be very similar to the previous structure with some amendments. I have attached a diagram of the structure and explain the changes from the previous structure as follows:

1. Trade of LLP: the trade will be carrying out R&D to exploit patented drug delivery platforms using specific drug molecules (Insulin is the first). Should the R&D be a success there will be a purchase of the exploitation rights which will give rise to a profit in the LLP. The owner of the patented technology is Nemaura Pharma Ltd who are a company owned by Faz, Bashir and others.
2. Funding of Funding Co: OneE Group companies will lend money to the “Funding Co” for a transactional fee but no interest, This will be repaid within a couple of days to OneE.
3. Funding Co will loan funds to the LLP for a fixed fee. This money will then be pooled with our corporate clients and then spent by the LLP and paid to a Sub-Contract Co. Sub-contract Co will use these funds in 3 ways:
 - i. To make a loan to Funding Co who will use those funds to pay OneE
 - ii. To make referral payments to OneE (exactly the same as the way with the Rehberg transaction)
 - iii. To pay to Nemaura Pharma to carry out Research and Development.
4. Ownership: Funding Co and Sub-Contract Co will both be owned by the same shareholders as Nemaura and hence the LLP’s involvement is simply to ensure that the corporate LLPs can also invest into the structure and also claim tax relief on the payment made by the LLP. The loans (and fees/interest thereon) will be payable to the entities in the structure that have common ownership.”

73. KCL contends that, taken together, these emails show that, contrary to his evidence at trial, at or around the time that Mr. Timol gave his approval to the marketing of the Nemaura structure, and before it was implemented, Mr. Timol was told that Mr. Corrigan was complaining that the Nemaura structure had been developed using the contents of the documentation that he had provided in February 2014, in breach of the confidentiality obligations in the NDA. KCL points out that Mr. Johnson also identified the two particular aspects of the Nemaura structure that he thought (correctly) would form the heart of KCL’s complaint – (i) the use of R&D relief and (ii) a consortium making loans to the LLP to obtain enhanced relief. These aspects then featured prominently in the explanation of the Nemaura structure to Mr. Butt in the email of 24 November 2014, which Mr. Timol approved.

The law on fresh evidence and retrials

74. The discretion to admit the New Documents on appeal pursuant to CPR 52.21(2)(b) is to be exercised in accordance with the overriding objective. In Hamilton v Al Fayed

(No.2) [2001] EMLR 15 at [11], Lord Phillips MR stated, when addressing the difference between the pre-CPR and post-CPR law on new (fresh) evidence,

“... We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. ... That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless, remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective.”

75. The old, pre-CPR, cases to which Lord Phillips MR referred include the well-known case of Ladd v Marshall [1954] 1 WLR 1489, which indicated that new evidence should only be admitted on appeal if (1) it could not have been obtained with reasonable diligence for use at trial, (2) the evidence is such that, if given it would probably have had an important influence on the result of the case (though it need not be decisive), and (3) it must be apparently credible (though it need not be incontrovertible).

76. In Hamilton v Al Fayed, Lord Phillips MR also addressed, at [26], the approach to be taken by the Court of Appeal when ordering a retrial,

“A new trial should be ordered when the interests of justice so demand. Where a party has behaved fraudulently, been guilty of procedural impropriety or some other irregularity has affected the fairness of the trial the vital question to be asked is whether there is a real danger that this has influenced the outcome. If there is, a retrial should normally be ordered. If there is not, the interests of justice require that the decision should stand.”

77. Mr. Budworth contended that Lord Phillips MR’s approach understated the requirements for the admission of new evidence on appeal. He submitted that new evidence that might lead to a retrial could only be admitted on appeal if that was “imperative in the interests of justice”. In support of that submission he relied upon Ras Al Khaimah Investment Authority v Azima [2021] EWCA Civ 349 (“Ras Al Khaimah”) at [110], where this court (Lewison, Asplin and Males LJ) stated,

“110. This court’s power to receive fresh evidence is to be found in CPR Part 52.21(2). The general principles on which that power are exercised are in essence those established by Ladd v Marshall [1954] 1 WLR 1489, viz (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive and (3) it must be apparently credible. In an ordinary civil claim satisfaction of these criteria is a necessary but not a sufficient condition for the

reception of fresh evidence: Khetani v Kanbi [2006] EWCA Civ 1621. If these criteria are met, the appeal court has a discretion to exercise. In deciding how to exercise that discretion this court held in Transview Properties Ltd v City Site Properties Ltd [2009] EWCA Civ 1255 at [23]:

“The interests of the parties and of the public in fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice.””

78. Mr. Budworth also referred to Dale v Banga [2021] EWCA Civ 240 at [42]-[43]. That case demonstrates that where it is contended on an appeal that fresh evidence shows that a judgment was obtained by fraud, the Court of Appeal can either determine that the issue should be resolved within the existing proceedings, or require the party alleging fraud to bring a new action to set aside the judgment for fraud. In deciding whether to adopt the former course, the Court of Appeal will decide, as a threshold question, whether the fresh evidence is capable of showing that the judge was deliberately misled and whether that dishonesty was causative of the judgment being obtained in the terms that it was. If satisfied on that threshold question, the court will then determine whether, in all the circumstances, it would be appropriate to make an order remitting the issue of fraud to be determined by the first instance court. Mr. Budworth submitted that the approach of the Court of Appeal to a request for a retrial where it is not alleged that the new evidence was dishonestly withheld from the trial judge, could not be any less rigorous.
79. For my part, although expressed in different language, I do not detect any real difference of principle between the approach of Lord Phillips MR in Hamilton v Al Fayed and that in Transview Properties as endorsed in Ras Al Khaimah. Both emphasise that the Court of Appeal will not admit new (fresh) evidence on appeal unless that evidence would probably have had an important influence on the result in the court below. I consider that to be synonymous with there being a real danger that the result below would have been different. The cases also show that in exercising its discretion the Court of Appeal will be concerned to strike a balance between the need for finality in litigation and the need for the judicial process to achieve the right result.
80. In striking that balance between the desirability for finality and achieving the right result, the Court of Appeal will take into account all the circumstances. So, for example, it may take into account the reasons for the new evidence coming to light and the conduct of the parties generally. If, as in the instant case, the reason why the new evidence was not available at trial was as a result of a failure by the successful party to disclose it in accordance with their obligations under the CPR prior to the trial, the arguments for the new evidence to be admitted in the interests of justice are likely to be stronger than if the evidence has become available from an independent source. The Court of Appeal may also take into account any delay in making the application, its proximity to the appeal hearing and whether the party facing the application is able to deal with it properly. As indicated in Transview Properties, the court can also take into account the general nature of the litigation and the burden on the parties of ordering a retrial.

81. I also do not think that this approach is significantly different or requires to be modified by reference to Dale v Banga. That case concerned the question of what should be done by an appeal court where it is contended that fresh evidence, which does not go directly to the issues in the case, shows that the trial judge was deliberately misled. Dale v Banga concerned the attestation of a will and the case turned on the credibility of witnesses. The fresh evidence was said to show that a crucial witness that the judge had believed actually had a propensity to forge documents and act dishonestly in other aspects of his life. In such a case it is self-evident that the Court of Appeal would have to be satisfied, as a threshold question, that the fresh evidence was capable of supporting a pleading that the witness had deliberately misled the judge, and that such deception was causally linked to the result of the trial.
82. Although necessarily expressed in different terms, I do not consider that the approach to the threshold question identified in Dale v Banga is more rigorous than the requirement in Ladd v Marshall that new evidence which does go directly to the issues in the case under appeal should be apparently credible and would probably have had an important influence on the result.
83. I would also note that the approach to the exercise of the discretion whether to order the trial of the fraud issue by the lower court was said in Dale v Banga to be a broad one, to be exercised in light of all the circumstances. In my view that corresponds to the residual discretion whether to admit new evidence if it would lead to a retrial, as identified in Ras Al Khaimah.

Analysis

84. Applying these principles to the instant case, there was no dispute between the parties that the New Documents satisfied the first and third Ladd v Marshall criteria. The New Documents were not available to KCL before trial, and their authenticity is not disputed. The main issue between the parties was as to the satisfaction of the second Ladd v Marshall criterion, and, assuming that it was satisfied, whether this was a case in which it was appropriate to admit the new evidence and order a re-trial.
85. On the second Ladd v Marshall criterion, KCL contends that had the Judge been aware of the New Documents, he would not have held, at [281] and [282] of his Judgment, that there was no reason for Mr. Timol to have guessed or inquired as to whether the Nemaura structure had been based on KCL's confidential information. KCL submits that the New Documents clearly show that Mr. Timol was at very least put on inquiry as to whether the Nemaura structure had been developed using KCL's confidential information. It contends that had Mr. Timol made proper inquiries, it would have been obvious where the key features of the Nemaura structure came from, and hence that his conscience was affected by his failure to make such inquiries.
86. Mr. Timol disputes this. In his evidence in opposition to the application to adduce the New Documents on appeal, he states that he can say "with some confidence" that he did not read the email exchanges between Mr. Slattery and Mr. Johnson in late October 2014, "because there is no suggestion [that they] generated any reply from me or further email traffic to me on the point as such". Mr. Timol also comments that even if he had read the emails, the best that he could have done would have been to ask Mr. Slattery and Mr. Johnson whether there was anything in KCL's complaint.

Mr. Timol contends that he would have been reliant on them, and that since it was obvious that they thought that Mr. Corrigan was wrong, they would have told him so. Mr. Timol thus asserts that in these circumstances, even if he had “given the green light” to the implementation of the Nemaura structure with the knowledge that there was a complaint “lurking in the background”, the Judge would have been right to conclude that his conscience was not affected so as to make him liable for breach of confidence.

87. For my part, I have no doubt that the New Documents satisfy the second Ladd v Marshall criterion. They plainly go to the very heart of the case against Mr. Timol and had they been available at trial, they would probably have had an important influence on the result.
88. The basis upon which the Judge decided that Mr. Timol was not liable for breach of confidence turned upon his factual findings in [279]-[281] of the Judgment. As set out above, the Judge’s view was essentially that Mr. Timol was a commercial man who had only a very broad understanding of the Nemaura structure, and that when he approved its marketing and implementation, he did no more than check that those who had developed it were satisfied that it was robust from a tax perspective.
89. It is readily apparent that the Judge reached his conclusions on very limited evidence about Mr. Timol’s involvement in matters. Mr. Timol’s witness statement for trial was very short and did not deal with the issue of how he had approved the marketing and implementation of the Nemaura structure. His cross-examination was also relatively short, and Mr. Hill was undoubtedly restricted in what he could properly put to Mr. Timol by the lack of any relevant documents. That is illustrated, for example, by the exchange which I have set out in paragraph [67] above concerning complaints by Mr. Corrigan that KCL’s confidential information was being misused. Mr. Timol stated that he could not recollect such complaints, and Mr. Hill was unable to pursue the matter further.
90. That situation was also reflected in the Judgment. The Judge’s acceptance, in [280], of Mr. Timol’s evidence that he did not have a detailed knowledge of the way the Nemaura structure worked was based upon his oral evidence; and the conclusion that Mr. Timol should not have realised that Nemaura structure contained KCL’s confidential information was based upon a combination of the fact that Mr. Hill had not put to Mr. Timol that he had been explicitly told that was the case, and the Judge’s assessment of Mr. Timol’s limited role.
91. At [281], the Judge reiterated that there was no documentary evidence of what Mr. Timol had been told, and that he was therefore limited to what he could safely infer from the circumstances and his view of Mr. Timol’s evidence generally. Having accepted Mr. Timol’s evidence that he would merely have been interested in ensuring that the structure was a commercial success rather than understanding the precise way it worked from a tax perspective, the Judge held that it was not incumbent upon Mr. Timol to probe the details of the Nemaura structure or how it had been arrived at.
92. Whilst the New Documents are not, in and of themselves decisive, if they had been available at the trial, I consider that they would inevitably have changed the course of the evidence and the approach of the Judge in the Judgment. In particular, Mr. Hill would have been able to put the emails between Mr. Slattery and Mr. Johnson of 27

and 28 October 2014 to Mr. Timol in cross-examination as the basis for a contention that from this time onwards he was, at very least, on inquiry that the Nemaura structure had been developed using KCL's confidential information. Mr. Slattery and Mr. Johnson would also doubtless have been quizzed upon those emails and whether they had any further communication with Mr. Timol about Mr. Corrigan's complaints.

93. Had the letter of 24 November 2014 to Mr. Butt been available, Mr. Hill could also have put to Mr. Timol that it showed (albeit in the context of an inquiry as to compliance with Shariah law) that he had a detailed understanding of the mechanics of the Nemaura structure, and of the requirements for investors to obtain tax relief. That additional evidence would plainly have required the Judge to adopt a more granular approach to Mr. Timol's involvement in the decision to approve the marketing and implementation of the Nemaura structure and to his state of knowledge of the basis upon which it had been developed.
94. I cannot, of course, determine whether or not Mr. Timol's explanation that he did not read or follow up on the email exchanges between Mr. Slattery and Mr. Johnson would have been accepted by the Judge, or whether, even if it was, an omission by Mr. Timol to read the relevant emails would be sufficient to avoid a duty to inquire. Nor can I determine whether, if Mr. Timol was put on inquiry by the emails, it would have been sufficient for him simply to accept assurances from Mr. Slattery and Mr. Johnson as he now suggests.
95. But what is evident, is that these matters would have been central to how the Judge resolved the claim against Mr. Timol. In these circumstances, I have no doubt that it would be appropriate in all the circumstances to exercise this court's discretion under CPR 52.21(2)(b) to admit the New Documents on the appeal.
96. I also consider that it would be just and appropriate to allow the appeal and order a retrial of the claim against Mr. Timol on the basis that the decision of the Judge was unjust because of a serious irregularity in the proceedings in the High Court within the meaning of CPR 52.21(3)(b). In saying that, I of course do not intend in any way to criticise the Judge, but there is, to use Lord Phillips MR's words, a real danger that the unavailability of the New Documents influenced the outcome of the trial. In that regard, and for the reasons that I have outlined, I consider that it is a factor of some real weight that the reason that the New Documents were unavailable at trial was that Mr. Timol (and the other defendants) had not disclosed them.
97. In reaching that conclusion I also bear in mind, of course, that the parties have already been through a trial, and that they should not lightly be forced to go through a retrial. However, two factors significantly reduce the burden that this will place upon the parties.
98. The first is that the retrial will be focussed only on liability as regards Mr. Timol. It therefore ought to be possible to focus the issues to be retried on the relatively limited issues of (i) Mr. Timol's involvement in the process of approving the marketing and implementation of the Nemaura structure and (ii) what he knew or ought to have discovered about the use of KCL's confidential information in the Nemaura structure following the complaints made in that regard by Mr. Corrigan. It will not be necessary to retry the many other issues that were decided by the Judge and which have not been challenged on appeal.

99. Secondly, although KCL and the other defendants have now litigated the quantum issues and have had the judgment of HHJ Cadwallader on them, there will be no need for those issues to be relitigated between KCL and Mr. Timol, because Mr. Timol had the opportunity to participate in that hearing and he agreed to be bound by the result.
100. I also take into account the point urged upon us by Mr. Budworth, that there was a significant delay between the disclosure of the New Documents by Mr. Johnson to KCL in November 2023 and KCL making its application in May 2024 to amend its notice of appeal and to adduce those documents on the appeal. However, I do not consider that this is a weighty factor or a good reason either to refuse to admit the New Documents on appeal or to decline to order a retrial.
101. Whilst a party should always endeavour to make an application to amend its grounds of appeal and adduce new evidence at the earliest reasonable opportunity, KCL has explained that the delay was largely due to the unavailability of funding, in part caused by the failure of the other defendants to pay the costs orders made against them and the need to fund the trial on quantum. Whether or not KCL could or should have given greater priority to its application to this court, as I see it, the real issue is whether the proximity of the making of the application to the appeal hearing caused any prejudice to Mr. Timol.
102. In that regard, although KCL's application was made relatively shortly before the appeal, I do not consider that Mr. Timol was materially disadvantaged. The New Documents cannot have come as a surprise to Mr. Timol. He was a party to the most significant of the New Documents, and he would not have been required to conduct any significant inquiry of third parties to understand them or to put them into context. Moreover, Mr. Timol did not suggest that he needed an adjournment to be able to investigate any identified matter or to deal with the New Documents in his evidence in opposition, and Mr. Budworth was able to address argument fully on the points at the hearing.

Disposal

103. For these reasons, I would dismiss the appeal on Ground 1, but allow KCL's application to admit the New Documents and allow the appeal on Ground 3.
104. The issue of liability between KCL and Mr. Timol ought to be remitted to the High Court to be retried. To that end there should be a case management conference to give directions. The parties should endeavour to agree the basis upon which such retrial should take place in light of the unchallenged findings made by the Judge in his Judgment and identify the issues to be determined. I would add (although this is not essential) that if it were possible to arrange for the case management hearing and the retrial to take place before the Judge, so much the better.

Lady Justice Andrews:

105. I agree.

Lord Justice Baker:

106. I also agree.