



Neutral Citation Number: [2022] EWHC 1420 (Ch)

Case No: E30BM191

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (ChD)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 10 June 2022

HHJ WORSTER

(sitting as a Judge of the High Court)

Between :

(1) Jerroms Trafalgars Limited
(2) Jerroms Business Solutions Limited

Claimants

- and -

(1) John Barry Tilson
(2) Tasneem Qureshi
(3) Ann Roche
(4) Hayward Wright Limited

Defendants

Kathleen Donnelly (instructed by **The Wilkes Partnership**) for the **Claimants**
Katie Wilkinson (instructed by **Lewis Onions Solicitors**) for the **1st, 2nd and 3rd Defendants**
Shakil Najib (instructed by **Lewis Onions Solicitors**) for the **4th Defendant**

Hearing dates: 21-25th and 28th March 2022

Draft judgment 16 May 2022

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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HHJ WORSTER:

Introduction

1. This dispute involves two firms of accountants, the first Claimant (“Jerroms”) and the fourth Defendant (“Hayward Wright”). Jerroms Business Solutions Limited was added as the second Claimant for the purposes of security for costs only, and consequently all references to the Claimant or to “Jerroms” in this judgment are to the first Claimant. In 2018 the first, second and third Defendants (“Mr Tilson”, “Mr Qureshi” and “Ms Roche”) left their employment with Jerroms and went to work for Hayward Wright. At about the same time a considerable number of Jerroms’ clients transferred their work from Jerroms to Hayward Wright. The essence of the claim as pleaded is that these clients were solicited by the first to third Defendants during their employment with Jerroms, and/or after they left that employment using confidential information belonging to Jerroms. The claim against Hayward Wright was that there was a conspiracy to use unlawful means to injure Jerroms and that Hayward Wright was a party to that conspiracy. All the Defendants deny liability.

2. Proceedings were issued on 30 May 2018 with a view to obtaining interlocutory injunctions against Mr Tilson, Mr Qureshi and Ms Roche. They filed evidence, denying any wrongdoing, but did not oppose an order restraining them from using the client lists they were accused of removing from Jerroms. The matter was then stayed for the purposes of settlement discussions, but the parties were unable to reach agreement. Hayward Wright were added as the fourth Defendant in 2019, and the matter has proceeded to trial, delayed in part by the pandemic and the need for a hearing at which witnesses could give live evidence. The trial has been concerned with the claim for damages. Given the passage of time an injunction is no longer of any benefit to Jerroms.

3. As is often the case in claims of this nature, the Claimant had little in the way of direct evidence, and largely relied on documents, the combination of circumstance, and inference. Inevitably the evidence which arose from the cross-examination of the Defendants and their witnesses helped to identify the aspects of its claim which had merit, and those which did not. By the time it closed its case, it was apparent that the main focus was upon the actions of Mr Tilson, and a conspiracy between Mr Tilson and Hayward Wright, rather than upon the actions of Mr Qureshi and Ms Roche. Ms Donnelly did not concede the claims against Mr Qureshi and Ms Roche, and pursued the allegations that both had acted in breach of their duties of fidelity. But the conspiracy claim was limited to Mr Tilson and Hayward Wright, the direct solicitation claim against Mr Qureshi was not pursued, and it was recognised that the Court might not be satisfied that his translated into a substantial loss. That approach was both helpful and realistic.

4. The parties agree that the claim turns largely upon the facts. Jerroms called three witnesses. Neill Currie, a Director of Jerroms. Steven Haynes, a relatively junior member of its accountancy staff at the Kings Heath office, and Kevin Hayes, who had worked there for some years. Mr Tilson, Mr Qureshi and Ms Roche all gave evidence. I then heard from Alistair Hayward-Wright, a Director and the majority shareholder of Hayward Wright, Susan Atkin, another former employee of Jerroms, and two clients who transferred their instructions from Jerroms to Hayward Wright, Robert Mayling of MKG Food Products Limited (“MKG”) and Stuart White of Plastics Plus Limited. The evidence of Michael Thompson the caretaker at Jerroms’ Kings Heath office was agreed. The Defendants had also served an unsigned witness statement from John Bill. A signed copy was served during the course of the trial, but he was not called.

5. Both sides instructed an expert valuer to give evidence as to the value of the block of clients who transferred their business from Jerroms to Hayward Wright. Both experts were experienced chartered accountants specialising in providing forensic services such as this; Mr Taub for Jerroms and Mr Southall for the Defendants. They met and produced a joint report which identified the approach each took to the valuation of the block of clients who transferred their instructions. The underlying approach was similar, and having considered that joint report at the Pre Trial Review, the parties agreed (although Mr Najib somewhat hesitantly) that it was unnecessary to call the experts to give oral evidence at trial, and that the issues between them could be determined on their written evidence.

6. I refer to documents in this judgment by reference to their page number in the trial bundle. In addition the parties produced a spreadsheet of the clients in issue. This began life as an appendix to Mr Southall's report. The final version showed not only who the client was and the recurring fees they generated, but grouped together related clients and identified those for whom Mr Tilson had day to day responsibility. It also identified the clients who were "Tax only" (the claim for these Tax only clients was not pursued). In addition, and as part of his written submissions in closing, Mr Najib prepared a schedule of the letters in the bundle from clients of Jerroms who had transferred their instructions to Hayward Wright. These letters purport to explain why the clients were leaving Jerroms. Mr Najib's schedule sets out when the letters were sent and summarises why the clients said they were leaving. That schedule reflects the Defendants' secondary case, that regardless of anything they might have done, these clients would have left anyway.

The Law

7. The parties were in broad agreement as to the relevant legal principles. The areas of particular relevance are as follows:

- (i) the scope of the duties of good faith and fidelity owed to Jerroms by Mr Tilson, Mr Qureshi and Ms Roche;
- (ii) whether Mr Tilson was a fiduciary;
- (iii) whether particular client lists were such as to amount to confidential information;
- (iv) what amounted to solicitation of clients;
- (v) the ingredients of an unlawful means conspiracy; and
- (vi) the causation of loss.

The Claimant also relied on breaches of the Copyright and Rights in Databases Regulations 1997/3032 ("the Database Regulations), and Ms Donnelly and Mr Najib differed as to the circumstances in which the Court might draw inferences in a conspiracy claim. I will deal with each area in turn. References to the factual issues, and to names such as Trafalgars, and Greenhill Pate, will be well understood by the parties, and will become apparent from the treatment of the facts which follows.

8. Firstly the scope of the obligation of good faith and fidelity. The first to third Defendants accepted that terms of that nature were implied into their contracts of employment. The principles were summarised by Haddon-Cave J (as he then was) in the following well known passage from his judgment in *QBE Management Services (UK) Ltd v Dymoke* [2012] IRLR 476:

[169] *The general principles relating to employees duties of good faith and fidelity are settled and can be summarised in the following propositions:*

- (1) *It is indisputable that an employee owes his employer a contractual duty of 'fidelity', but how far it extends will depend on the facts of each case (per Lord Green MR in Hivac v Park Royal [1946] Ch 169 at 174).*
- (2) *The more senior the staff the greater the degree of loyalty, fidelity and diligence required (per Openshaw J in UBS Wealth Management (UK) Ltd v Vestra Wealth LLP [2008] EWHC 1974 (QB), [2008] IRLR 965 at paragraph 10).*
- (3) *The first task of the court is to identify the nature of the employee's obligations of fidelity and then to decide whether the employee's activities are in breach (per Moses LJ in Helmet Integrated Systems v Tunnard [2006] EWCA Civ 1735, [2007] IRLR 126 at paragraph 32).*
- (4) *The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate (per Moses LJ in Helmet Integrated Systems v Tunnard [2007] IRLR 126, at paragraph 28).*
- (5) *It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition (see British Midland Tool v Midland International Tooling Ltd [2003] EWHC 466 (Ch), [2003] 2 BCLC 523).*
- (6) *Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct (Sybron Corp v Rochem Ltd [1983] IRLR 253).*
- (7) *It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to his employer (see Faccenda Chicken Ltd v Fowler [1986] IRLR 69).*
- (8) *The court should ask whether the activities in which the employee is engaged affect his ability to serve his employer faithfully and honestly and to the best of his abilities (see Shepherds Investments Ltd v Walters [2006] EWHC 836 (Ch), [2007] IRLR 110 at paragraph 131).*

9. Ms Donnelly drew particular attention to the judgment of Openshaw J in the *UBS* case (see proposition 2 above). She relied on this passage from paragraph [10] of the judgment. The last sentence is of relevance to the position of Mr Tilson.

Every business is entitled to expect loyalty, fidelity and diligence from its staff. That is part of the bargain for which they are paid. It is only right that during the currency of their employment and for so long as is reasonable during the currency of their restrictive covenants thereafter, they should serve and respect the legitimate interests of their employer or former employer and their clients. The more senior the staff, the greater the remuneration and the greater the degree of loyalty, fidelity and diligence is required.

10. The duty of good faith and fidelity also imports an obligation to give honest answers to an employer's questions; see Elias J in *Fulham FC v Tigana* [2014] EWHC 2585 QB at [99]. The example relevant to the facts of this case would be to give a false or misleading answer to the question such as – are you leaving to join a competitor? A senior employee may also breach the duty of fidelity by failing to inform his employer about the conduct of other members of staff; see Wyn Williams J in *Kynixa Ltd v Hynes* [2008] EWHC 1495 (QB). On the facts of that case, whilst it was held that three senior employees were not acting in concert to join a competitor, they came to know that the others had been approached and might also join. All were held to be in breach of the duty of fidelity on that basis. Wyn Williams J found as follows:

[283] ... once she knew of the fact that approaches had been made to the other Defendants as well as herself her duty of fidelity was such that she should have informed the Claimant of the approaches. Her failure to do so was, in my judgment a breach of her duty. A crucial aspect of the implied duty of fidelity is the concept of loyalty. The Third Defendant's actions were not consistent with that concept. I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility.

11. Openshaw J reached a similar conclusion on the facts in *Vestra*, at [24]:

... I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the company itself, the more so when they are themselves party to these plots and plans. It seems to me that that would be an obvious breach of their duties of loyalty and fidelity to UBS.

12. Secondly, was Mr Tilson a fiduciary? The fiduciary duties contended for are these:

- (a) to act in accordance with the best interests of his employer;
- (b) not to create a conflict between the interests of his employer and his personal interests;
- (c) not to solicit or entice away employees of Jerroms to a competitor;
- (d) to inform Jerroms that other employees were being solicited or enticed away by a competitor;
- (e) not to lie to his employer.

13. Ms Donnelly accepted that the issue was fact sensitive, and referred me to the following passage from the judgment of Elias J in *University of Nottingham v Fishel* [2000] ICR 1462 at 1493E-G:

...in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached ...

Indicative factors were identified by Eder J in *Otkritie International Investment Management Limited v Urumov* [2014] EWHC 191 (Comm), at [72]:

The touchstone is that a fiduciary is someone “who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence”: *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ. In the employment context, the courts typically look to the employee's contractual obligations and the circumstances of his employment, for example seniority, managerial responsibility, decision making autonomy, independence and the vulnerability of the employer, which may justify holding the employee bound by a duty of loyalty to the employer: *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; *Foster Bryant Surveying Ltd v Bryant* [2007] IRLR 425; *Crowson Fabrics Ltd v Rider* [2008] IRLR 288.

14. Ms Wilkinson submitted that Jerroms' pleaded basis for alleging that Mr Tilson was a fiduciary was limited to the allegation that Mr Tilson held a “senior role” within Jerroms; see paragraph 32 of the Amended Particulars of Claim. That submission accurately reflects what is pleaded at paragraph 32, but paragraph 32 is to be read in the light of the description of what Mr Tilson's role entailed as set out earlier in the pleading. Paragraph 4 of the Amended Particulars of Claim is in these terms:

Mr. Tilson was employed by Trafalgars as one of its two senior accounts managers. On a day to day basis, Mr. Tilson managed about half of Trafalgars' clients as to whom he had been entrusted with the management and the co-ordination of their accounts. By its very nature, this role involved Mr. Tilson dealing with existing and prospective clients, negotiating fee arrangements, exploring new business opportunities and a detailed familiarity with Trafalgars' basis of offering services to its clients and specific business strategies in relation to such clients. Consequently this gave Mr. Tilson extensive access to Trafalgars' confidential information.

15. Consequently I do not agree that Jerroms are limited to the allegation of seniority. Ms Donnelly relied in particular upon Mr Tilson's day to day contact with his clients, and his employer's consequent vulnerability. She accepted that this was not a big organisation like UBS, but it was Mr Tilson's relative seniority and influence within the structure of this business which gave rise to this relationship of trust and confidence.

16. I was not persuaded during submissions that Mr Tilson was a fiduciary, and I remain of that view. He was a senior employee in a small organisation, and the point Ms Donnelly makes about the vulnerability his role created for his employers vis a vis his relationship with clients is a good one. But he was not a Director of the company, nor was he at the level of a partner or a manager with overall responsibility for the Kings Heath office, he had no interest in the business, limited managerial responsibilities, no written contract of employment, was paid a reasonable but moderate salary, and was on four weeks notice. I am not satisfied that his responsibilities were such that he is to be seen as a fiduciary. That said, a finding that Mr Tilson was a fiduciary adds little of any great significance to this case.

17. There is no claim for an account of profits, and no evidence that Mr Tilson gained anything directly (other than employment with Hayward Wright) from his conduct. The essence of the claim against him is that he solicited clients when employed by Jerroms, and removed and then used confidential information belonging to Jerroms after he left, again for the purposes of soliciting clients. It is the loss from that conduct which Jerroms seek to recover. There are allegations that he lied to his employer about his intentions and that he failed to tell his employer that other employees intended to move to Hayward Wright. But

whilst they are of relevance to issues of credit and intention, they are not of themselves directly causative of a loss.

18. Thirdly, confidential information. The duty not to use an employer's confidential information is not disputed. The issue in this case was whether certain client lists were properly to be considered confidential information for these purposes. The starting point is the judgment of Neill L.J. in *Faccenda Chicken Ltd. v. Fowler* [1986] I.C.R. 297 at 308–309:

(3) *While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract: see Vokes Ltd. v. Heather, 62 R.P.C. 130 ; (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see Robb v. Green [1895] 2 Q.B. 315 and Wessex Dairies Ltd. v. Smith [1935] 2 K.B. 80 .*

19. That passage was relied upon in *Bullivant Ltd v Ellis* [1987] ICR 464. In that case the Court of Appeal held that a card index system, containing details and addresses of 325 consulting engineers, local authorities and architects, who had or could refer work to the employer, was confidential information, and the extraction of it a breach of contract. At 474H – 475B the Court considered the defendants' claim that such information could have been compiled from public sources, and so was not confidential:

The value of the card index to the defendants was that it contained a ready and finite compilation of the names and addresses of those who had brought or might bring business to the plaintiffs and who might bring business to them. Most of the cards carried the name or names of particular individuals to be contacted. While I recognise that it would have been possible for the first defendant to contact some, perhaps many, of the people concerned without using the card index, I am far from convinced that he would have been able to contact anywhere near all of those whom he did contact between February and April 1985. Having made deliberate and unlawful use of the plaintiffs' property, he cannot complain if he finds that the eye of the law is unable to distinguish between those whom, had he so chosen, he could have contacted lawfully and those whom he could not. In my judgment it is of the highest importance that the principle of Robb v. Green [1895] 2 Q.B. 315 which, let it be said, is one of no more than fair and honourable dealing, should be steadfastly maintained.

Jerroms' case is that its client lists, whether kept on a computer or kept up to date by hand, were the equivalent of a card index. The Defendants emphasise that to be liable, not only must the information have the necessary quality of confidence, but that it must have been imparted in circumstances which carried an obligation of confidence, and its use must be to the detriment of the owner of the information. Those are essentially issues of fact, and I deal with the question of whether the particular lists in this case amounted to confidential information for these purposes below.

20. Fourthly solicitation. Again the Defendants accept that whilst Mr Tilson, Mr Qureshi and Ms Roche were employees of Jerroms, they were bound by a duty not to solicit clients. Ms Wilkinson emphasised that the duty ceased once they had left that employment, and that they were then free to approach former clients. That much is not in dispute, although they

were not entitled to use Jerroms confidential information to do so. The issue of particular relevance was where to draw the line when answering the questions of clients who contacted the Defendants whilst they were employees.

21. Ms Donnelly referred me to the judgment of HHJ Simon Brown QC sitting in the High Court in *Baldwins (Ashby) Limited v Maidstone* [2011] EWHC B12. That was a case involving an express prohibition on solicitation, but the rationale would apply to an implied duty not to solicit. The Judge considered the meaning of solicitation and referred to the following passage from the New Zealand case of *Equico Equipment Finance Ltd v. Enright Employment Relations Authority*, Auckland, NZ (17th July 2009) with approval:

[26] *'MMs Enright's counsel refers the Authority to Black's Law Dictionary definition of a non-solicitation agreement as this:—*

"A promise in a contract for the sale of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company or (2) trying to lure customers away".

[27] *It is also submitted that if solicit means to entice, then appropriate synonyms for 'entice' include "tempt", "lure", "persuade", and "inveigle". I accept that solicit should be interpreted similarly.*

[28] *In Sweeney v Astle Stout J noted that 'solicit' was a common English word, and in its simplified form meant 'to ask' and that its other meanings included 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade'.*

[29] *The Employment Court in Deloitte & Touche Group-ICS Ltd v Halsall referred to Sweeney and also the Shorter Oxford Dictionary definition "to seek assiduously to obtain", "to ask earnestly or persistently for" and 'request' or 'invite'. More recently, the High Court in TAP (New Zealand) Pty Ltd v Origin Energy Resources NZ Ltd considered that solicit in its ordinary use "has connotations of impropriety or persistence" and then cited the definition from the Shorter Oxford Dictionary that had also been referred to in Deloitte .*

[30] *It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.*

[31] *In my view, "canvass" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or custom. I consider a degree of "influence" is required. There must be an active component and a positive intention'.*

22. I also note this from the speech of Lord Herschell in *Trego v Hunt* [1896] AC 7 @ 20:

It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other.

23. Fifthly, unlawful means conspiracy. Haddon-Cave J provided a helpful summary in *QBE @* [197]-[199]:

[197] The basic tenets of an actionable conspiracy to injure are set out in Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271 at paragraph [108] per Nourse LJ: ‘... A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.’

[198] So long as each individual conspirator knows the central facts and entertains the same object it is not necessary that all conspirators join the agreement at the same time (Kuwait Oil at paragraph 132). The requirement for knowledge includes ‘blind-eye’ knowledge (see Bank of Tokyo v Baskan Gida [2009] EWHC 1276 (Ch); [2010] Bus LR D1 at paragraphs 837–840).

[199] The defendants must intend to injure the claimant. However, the ‘intention’ element of the tort is satisfied if injury to the claimant is the inevitable consequence of the benefit to the defendant. As Lord Nicholls said in his ‘explanatory gloss’ to the general rule at paragraph 167 of OBG (supra):

‘Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant’s gain and the claimant’s loss are, to the defendant’s knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.’

The central issues of fact in relation to liability on this aspect of the case are whether there was a combination of the nature alleged, and the issue of Mr Hayward-Wright’s knowledge of Mr Tilson’s unlawful acts.

24. Sixth, the important issue of causation. There are no issues of law as such, the question is one of factual causation. The claims against the first to third Defendants are in contract, and the conspiracy claim pursued against the first and fourth Defendants in tort, but it was not argued that there was any substantial difference in the approach I should take. In contract a claimant may recover loss only where the breach of contract was the “effective” or “dominant” cause of that loss. It need not be the sole cause, but the courts are to use their common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the loss claimed.

25. Mr Najib also framed the issue in terms of whether the breach was the cause of the loss or merely the occasion for it. That approach was considered in the recent decision of the Court of Appeal in *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300. The claim in that case was for the misuse of confidential information and conspiracy to injure by unlawful means, although on very different facts to those in this case. Mr Najib referred me to judgment of Arnold LJ at [154] where he says this:

The second question is one of causation. The unlawful means must have caused loss to the claimant, rather than merely being the occasion of such loss being sustained. As I see it, this is the best explanation of the courier service/pizza delivery example: in that example the claimant's loss is caused by customers (who may be presumed not to appreciate that the defendant is systematically breaking the law and some of whom may prefer the defendant's service for other reasons) choosing to place their orders with the defendant, and so the unlawfulness is the occasion for the loss rather than the direct cause of it.

Whilst this is no doubt correct, Arnold LJ is considering a different issue. In this case, the very act of solicitation (if proven) is unlawful of itself because of the Defendants' duties to the Claimant. In the *Racing Partnership* case (or in the case of the speeding pizza deliveryman) the unlawfulness is the consequence of some other factor.

26. Finally as to the law, the Database Regulations. Whilst the issue is covered in the skeleton arguments from Ms Donnelly and Ms Wilkinson, it was not referred to in the course of argument. That is no doubt because it adds little or nothing to the claims in contract. I deal with it here as briefly as I can. There are two aspects of significance. Firstly the meaning of database for the purposes of the protection provided by the regulations. The factual issue is whether a list compiled by Mr Tilson which began as a print out of the Greenhill Pate client list in 2010, and was annotated by him during the course of his employment was caught by the regulations. The second factual issue is whether Jerroms' database rights were infringed.

27. Regulation 13(1) provides that:

(1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

"Investment" includes any investment, whether of financial, human or technical resources. The definition of "database" provided for by the Copyright, Designs and Patents Act 1988 section 3A(1) (as inserted by Regulation 6 of the Database Regulations) is ... *a collection of independent works, data or other materials which: (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means.*

28. In *Fixtures Marketing Ltd v OPAP* (Case C-442/02) [2004] ECR I-10549 the CJEU considered the definition of a database under Directive 96/9/EC (which the Database Regulations implement) and gave it "*a wide scope, unencumbered by considerations of a formal, technical or material nature*"; see at [20]. Regulation 14(2) provides that where a database is made by an employee in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary. Consequently the lists that Mr Tilson and Ms Roche regarded as personal because they were made or adapted by them, would not be outside the scope of the regulations simply because Mr Tilson and Ms Roche were the authors or adaptors.

29. What amounts to an infringement of those rights? Regulation 16(1) and (2) of the Database Regulations provides that:

(1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or reutilises all or a substantial part of the contents of the database.

(2) For the purposes of this Part, the repeated and systematic extraction or reutilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents.

The issue on infringement appears to relate to the question of whether the client lists were used at all, rather than there being an argument as to whether the use was sufficiently substantial.

The Facts

30. In 2001, two chartered accountants, John Bill and Chris Pate, incorporated Trafalgar Accountancy and Tax Limited (“Trafalgars”). Their practice traded from the offices in Kings Heath in Birmingham, where Mr Pate had previously been trading as Greenhill Pate, his father’s practice. He had a number of long standing employees and a number of longstanding clients. The employees included Mr Tilson, who had joined in 1994, Sue Atkin who had started in 1992, and Ms Roche, who had worked at Kings Heath since 2000. Mr Qureshi joined Trafalgars not long afterwards in 2003.

31. Jerroms has a number of offices, including one in Shirley, which is not far from Kings Heath. In 2014 Jerroms was looking to expand, and purchased the assets of Trafalgars from Mr Bill and Mr Pate. It is not necessary to consider the detailed terms of the purchase, but the following points are of some significance. Firstly Jerroms took on Trafalgars’ staff on their existing terms and conditions. Secondly they purchased Trafalgars’ client base for 70% of its annual value. Mr Currie of Jerroms described that as “an excellent deal”. Thirdly, Mr Bill and Mr Pate were retained as consultants for a period of time. And finally Jerroms took a lease of the Kings Heath office for 10 years with a five year break. Those offices were owned by Mr Bill and Mr Pate, and were described as a pension fund. Jerroms continued to operate the Kings Heath office as well as its Shirley office, but indicated that in time the intention was to amalgamate the two under one roof. Hence the break clause. By the same token, the impression given to the staff was that Jerroms would continue to operate from the Kings Heath office for at least the first five years of the lease.

32. In 2015 Mr Pate was taken seriously ill and stopped work. He passed away the following year. When Mr Pate fell ill, Mr Currie began to take a more active role in the management of the Kings Heath office. Mr Bill too was unwell for a few months in 2016. He returned to work later that year, but was gradually reducing his hours; something the agreements made in 2014 had envisaged. He continued working for Jerroms at Kings Heath until March 2018.

33. The office at Kings Heath was on three floors. On the ground floor there was reception, the boardroom, and the payroll department. Ms Roche was the payroll manager, and was assisted by Janet Gunter and Lisa Dearing. Ms Roche’s evidence was that she had 89 payroll clients. On the 1st floor there was a large L shaped office where most of the accounts staff worked. These included Mr Tilson and Mr Qureshi. Mr Tilson was one of two senior accounts managers. Mr Tilson managed about half the accounts clients of Trafalgars and would have had regular contact with them. The other senior accounts manager was Angela Hayward. Mr Tilson and Ms Hayward had a team of four supporting them. The team tended to split between the two managers, and included Kevin Hayes, John Hayes, Chris Gilbert, Steven Haynes (who joined as a trainee in 2014) and a junior called Laura. Mr Gilbert retired in 2017. Mr Qureshi was the small business manager, and he too worked in the L shaped office and was assisted by the team I have referred to. At the end of the L shaped office was Mr Bill’s office, next to which was the gents toilet (the relevance of which will become

apparent). On the floor above was the administration, the tax department, and an office which was used by Mr Currie.

34. The Trafalgars' staff had no written contracts of employment. There were some statutory statements of terms and conditions confirming salary, hours of work and matters of that sort, but none of the Defendants signed a contract which restrained them from dealing with customers of the practice after their contracts of employment had ended. Mr Tilson received a draft contract from Jerroms in 2015 which included a restraint of that sort, but he never signed it. The absence of any post contractual restraint in any of the contracts of the staff of Trafalgars is a significant feature of the case. Jerroms have to rely upon the terms implied by law. It became apparent that the absence of a post termination restraint was not as unusual as it might have seemed. Mr Hayward-Wright's evidence was that following the receipt of advice from an external human resources adviser, new contracts were introduced for the staff at Hayward Wright in October 2021. The terms included (in Mr Tilson's case at least) some post contractual restraints. But the position prior to that was that the normal terms for his staff did not include such a provision.

35. Jerroms and Trafalgars used two different software systems. Trafalgars used one called IRIS, and Jerroms one called CCH. Jerroms decided to move to one system, and that was to be CCH. The problem was that not all the information on IRIS could be transferred onto CCH. In particular, the client contact telephone numbers had to be entered manually, and that was an enormous task. By December 2017 all the staff had been told to use CCH, but IRIS was retained so that the staff could have access to information which had yet to be manually transferred onto CCH.

36. Trafalgars had something over 4,000 accounts clients, although many were linked. To take one example, MKG were a major client of Mr Tilson's. As a consequence Trafalgar also did the accounts work for a number of associated companies, for its managing director Mr Mayling and for other directors and members of the Mayling family. In all there were 13 other clients linked to MKG. Trafalgar also did MKG's payroll. The spreadsheet of the clients I refer to above shows the clients who were linked in this way.

37. Hayward Wright's business began in about 2007. Mr Hayward-Wright is a Director and the majority shareholder. The business grew and became a direct competitor of Jerroms. In 2013-14 Mr Hayward-Wright met with Mr Bill and Mr Pate to discuss the sale of Trafalgars, but their discussions did not progress and Jerroms bought the practice. In 2017 Mr Bill approached Mr Hayward-Wright once more to see if his firm would be interested in renting the Kings Heath office when Jerroms vacated it. Mr Hayward-Wright said not, and matters were left at that.

38. However, a few months later Mr Bill made contact with Mr Hayward-Wright again and told him that he had given his contact details to Mr Qureshi. Mr Qureshi's evidence was that he had become unhappy with his work after the purchase of Trafalgars by Jerroms in 2014. His evidence was that he needed some flexibility in his work. He had spoken to Mr Currie about becoming a sub-contractor or going part time and he said that Mr Currie had appeared to listen. But it seemed to Mr Qureshi that nothing was being done, and in April 2017 he told Mr Currie that he wanted to leave. The timing is not entirely clear, but it seems that it was at around this time that Mr Qureshi spoke to Mr Bill, who put him in touch with Mr Hayward-Wright. He also mentioned that because he was the person who knew how to produce reports from IRIS, he was often interrupted by staff who were trying to get information from IRIS and needed his help.

39. Mr Qureshi met with Mr Hayward-Wright in September 2017. The upshot of their discussions from Mr Qureshi's point of view was that he agreed to become an employee of Hayward Wright at a time to be determined. There are some emails in the bundle between Mr Hayward-Wright and Mr Qureshi at [419]-[421] which give an indication of the nature of their arrangement. Mr Qureshi says that he is looking to work 3 or 4 days a week. He tells Mr Hayward-Wright that his clients pay their bills and that he provides a quality service, Mr Hayward-Wright is looking for some offices (and was hoping to take on the offices from which Trafalgar was operating), and Mr Qureshi is asking about when he is likely to start because he would like to give enough notice. In the exchange on 26 October 2017 Mr Hayward-Wright is saying that it is likely to be after January 2018.

40. In October 2017 Mr Currie told the staff at Kings Heath that Jerroms intended to close the Kings Heath office and move to its offices in Shirley. This was about two years sooner than the staff had thought. It was announced without there having been any consultation and caused some considerable upset amongst the staff. Mr Qureshi was troubled by the fact that this was contrary to the assurance given in 2014 that the practice would continue in Kings Heath for 5 years, and that it had been announced suddenly. Indeed that seems to have been a matter of concern for all the staff I heard from. Mr Qureshi had already decided to leave, but moving to Shirley added an hour a day to his commute. Ms Roche lived five minutes from the Kings Heath office. She needed a parking space, and there was none available at Shirley. The alternative for her was a bus journey which took an hour. Mr Tilson was unhappy because he had worked at Kings Heath for 20 years, and he did not believe that his terms of employment required him to move.

41. I have no doubt that the move to Shirley was a topic of lively conversation in the Kings Heath office. It was bound to be. The first to third Defendants would have spoken to each other about it, and to other members of the staff as well. Mr Qureshi had already spoken to Ms Roche about his intention to leave Jerroms; indeed his evidence is that he was open about it. So that when Ms Roche voiced her unhappiness about the move to Shirley following the announcement in October 2017, it would have been natural for him to tell her that he intended to move to Hayward Wright. That he did so is put beyond doubt by the fact that in November 2017 Mr Qureshi drove Ms Roche to see Mr Hayward-Wright at his offices in Redditch. When he was giving evidence, he was careful not to say too much about what Ms Roche told him about the result of her meeting. His evidence was that she had not decided whether to retire or carry on working. But the probability is that she would have told him about her discussions with Mr Hayward-Wright. There is no email chain between Mr Hayward-Wright and Ms Roche from this time in the bundle, but given that Ms Roche subsequently took a job with Hayward-Wright, I am satisfied that the outcome of their discussions in November 2017 would have been positive. At the very least Mr Hayward-Wright would have been holding out the prospect of employment for Ms Roche, and Ms Roche would have been indicating her interest in moving from Jerroms to work for his practice.

The 11 December 2017 emails

42. On 11 December 2017 at 13.28 Mr Qureshi sent an email from his Jerroms email address to Ms Roche at her Jerroms email address. The subject was blank, and there was no message. There were two attachments. "jlb.pdf" and "crp.pdf". These attachments represented the entire client list of the Kings Heath office, some 4,000 plus clients. The documents themselves are at [1732]-[1920] and are headed "Greenhill Pate client list". The first attachment is a list of Mr Bill's clients, and the second Mr Pate's. Between them they give the names and addresses of the clients, many with the contact phone number and year

end. Three minutes later Ms Roche sent the attachments to her private email address. The case against Mr Qureshi and Ms Roche is that there was no proper reason for Ms Roche to send an electronic copy of the full client list to her private email address. She did the payroll, and had some 89 clients. She had no need for the full client list. The inference the court is asked to draw is that Mr Qureshi and Ms Roche had a discussion at about this time and decided that this client list would be very useful when they moved to Hayward Wright, and that they should extract a copy. Both Mr Qureshi and Ms Roche deny any such thing. There is no direct evidence that this list was ever sent to Hayward Wright, or used by Hayward Wright. There is no allegation that Ms Roche directly solicited clients, and the allegation that Mr Qureshi did so was not pursued. What is alleged is a breach of the duty of fidelity, albeit not one which has caused any loss. The allegation was more potent when the question of an interlocutory injunction was being considered, and Jerroms were seeking orders to prevent these Defendants from using this list.

43. Ms Donnelly points to a number of facts from which the court is invited to draw the necessary inferences. Firstly the emails themselves. They are without heading or message. The suggestion is that this is so they do not stand out. Moreover, the lack of a message is also said to be suspicious. If there was a proper purpose the likelihood is that the email would include some reference to why these lists were attached. Secondly, the timing of the emails. In the event Mr Qureshi and Ms Roche did not hand in their notice until March 2018, but in December 2017 Mr Qureshi was expecting to move to Hayward Wright in the next month or two, and Ms Roche probably had much the same intention. Or to put it the other way, neither of them intended to stay at Jerroms for very much longer.

44. Thirdly, there is the question of why Mr Qureshi sent Ms Roche this list at all, and why she then sent it to herself at home. The evidence from Mr Qureshi and Ms Roche on this important issue is not as clear as it might be. The first time the issue was raised with them was in the letters sent to them by Jerroms' then solicitors dated 4 April 2018 [369][375]. The letter to Mr Qureshi referred to the making and emailing of this list as the first item under the heading "Your unlawful actions". The letter to Ms Roche referred to it as the first item under the heading "Your actions". Mr Qureshi replied on 6 April 2018. At [387] he explained why he printed the list, referring to the problems with IRIS and CCH. He did not say in terms why he sent it to Ms Roche, nor does it appear that he knew that she had sent it home. Indeed the letter asks rhetorically why he is responsible if Ms Roche sent the information to her personal email. In her reply of 6 April 2018 [390] Ms Roche said that she worked from home from time to time and it was entirely normal for her to send information to her home email address. She did not have access to her work email at home.

45. At paragraph 12 of his first witness statement [127] signed on 5 June 2018, Mr Qureshi explains why he sent the client list to Ms Roche. He recalled that Ms Roche's department made more requests for information from this client list than anyone else, so he sent it to Ms Roche so that she had ready access to the information she needed to carry on her usual duties as payroll manager. At paragraph 10 of her first witness statement [133] also signed on 5 June 2018 Ms Roche gives her explanation:

Mr Qureshi sent the list to me at my request as I found it difficult to access the information I needed to complete payrolls in the CCH system and the IRIS system. Mr Qureshi asked me to update the list he sent to me for payroll clients and to keep it for staff reference. This was necessary in December 2017 because the deadline for self-assessment was the 31 January and Mr Qureshi was being bothered for client information.

She says that she sent it home so that she could do the work from home and meet the deadlines. Her evidence was that when she saw how big a list it was she realised that the task was beyond her and did nothing more with the list.

46. In his second witness statement signed in September 2020, Mr Qureshi says that he had been unaware that Ms Roche had forwarded a copy of the email with the client lists to her personal email until he read her first witness statement, but said that given the nature of the update of the client list she was to undertake, he could appreciate why she would require to work on this remotely. When asked about whether he had asked Ms Roche to update the list (as Ms Roche said he had) he said that he had not asked her to update the list for payroll clients. When that was put to Ms Roche, she modified her evidence by saying that Mr Qureshi had not asked her to do it, but that she had suggested it and he had agreed with her. The explanation put to Mr Currie on behalf of Mr Qureshi and Ms Roche was different again. It was that Ms Roche needed the client list to mark up which clients were her payroll clients. It may be that this was an over simplified version of what Ms Roche was saying, but if that was the purpose it seems unlikely. Ms Roche knew who her payroll clients were, and she had her own list of them. There was little point in having a list of 4,000 clients, however up to date it was, when all that was needed was the list of 89 payroll clients. In her third witness statement signed in September 2020, Ms Roche said that the only copy she made of the client list was the printed copy she attached to the notice board in her office, and that she left it there.

47. The fourth matter which Jerroms point to as grounding the inference that the full client list was extracted for some improper purpose is the failure to make disclosure of Ms Roche's personal email account. The Claimant's concern, initially at least, was that she had sent a copy of the client list to Hayward Wright. The email Ms Roche sent home fitted in with that concern. That was no doubt heightened by the evidence Ms Roche filed in reply to Jerroms' application for an interlocutory injunction in June 2018. Ms Roche's position was that she was unable to give disclosure of her personal email account because her home computer had crashed on 20 April 2018 and (as she put it at paragraph 20 of her first witness statement) "*any information held on this computer has been irretrievably lost*". The timing might be seen as convenient. Ms Roche produced a repair report from PC World which confirmed that there had been problems with her computer [1186] but (as the Claimant pointed out at trial) her emails would have been held by her email provider, and it appears that she made no attempt to obtain access to them. Ms Wilkinson relied on the fact that Jerroms had made no application for specific disclosure; but that is not the point. The duty to give disclosure (here Model D) was on Ms Roche. With the benefit of the legal advice Ms Roche has had throughout, it is to be expected that this point would have been considered. That unsatisfactory position was then compounded by Ms Roche's evidence that she had deleted the email in December 2017 when she saw that the task of updating was beyond her. That account did not sit easily with what she was saying about providing a copy if she was ever able to obtain access to her emails.

48. Ms Donnelly's submission is that the client lists were extracted for an improper purpose. The question is whether the evidence is such that I should draw that inference. Inferences are to be drawn from the facts, and I take account of the evidence as a whole when undertaking that task. It is easy to see why Jerroms makes the case it does. There should have been some evidence to show what had happened (if anything) to the electronic copy of the client lists, and the absence of that evidence adds weight to Jerroms' case. My conclusions on this aspect of the case take account of the evidence as a whole, but it assists the structure of the judgment to set them out at this stage.

49. I have set out the matters Jerroms rely upon above, and Mr Qureshi and Ms Roche stand by their evidence on the topic. Ms Roche faces a number of other allegations, and I make some findings against her below, but this is the only allegation now made against Mr Qureshi. His evidence from the start was that he did not know that Ms Roche had sent the client list home. I accept that evidence. Ms Donnelly made some criticisms of his evidence, but generally he was a helpful witness who gave his evidence in an open way. Mr Qureshi had not sought to hide his intention to leave Jerroms, and when the time came he told Mr Currie where he was going. That openness is consistent with the impression he made as a witness. He had a loyalty to his fellow members of staff, and to Ms Roche in particular, but I find it hard to accept that he would have done anything which he knew to be wrong.

50. The email Ms Roche sent home had been picked up by a sweep of the relevant email accounts by Jerroms' IT manager on 21 March 2018. There is no suggestion that Mr Qureshi sent himself a copy of these lists. Nor is there any direct evidence that a copy was ever provided to Mr Hayward-Wright, although I appreciate that Jerroms' case would be that care was taken to ensure that no trail was left. Perhaps more significantly, it does not appear that this list was used by Hayward Wright at any stage.

51. Nor is it alleged that Mr Qureshi solicited clients. In his witness statement he had said that when clients had contacted him after the announcement of the closure of the Kings Heath office, he had told them that he would be moving to Shirley and would be dealing with their matters. He confirmed that in cross examination, saying that he was being loyal to the firm. However when he was being asked about a different matter, he volunteered the fact that some of the clients who contacted him had asked if he would give them a discount if they moved with him. Ms Donnelly submits that this is an example of Mr Qureshi being less than frank in his earlier evidence. I am not persuaded of that. I am satisfied that there is an explanation for his apparently contradictory evidence. In the course of cross examining Mr Currie, Ms Wilkinson suggested to him that he had told Mr Qureshi that he could tell customers that he was leaving. Mr Currie agreed that he had. As I understood it, this would have been after Mr Qureshi had resigned. It is his conversations with clients at this point which Mr Qureshi is referring to in his second set of answers. The fact that Mr Qureshi asked for permission to tell his clients that he was leaving tallies with the view I formed of him; indeed had he intended to do anything underhand it is unlikely that he would have bothered to ask for permission. But having asked for and been given permission, he was able to answer his client's questions when they called. It is also of note that when he was asked for a discount, he told them no. That is not the answer of a man who was actively encouraging his clients to leave Jerroms and follow him. If anything what he said was a discouragement. No doubt that informed Ms Donnelly's decision to withdraw the allegation that Mr Qureshi had solicited clients.

52. It is convenient to set out my findings on this aspect of that matter at this stage. So far Mr Qureshi is concerned, I have no real hesitation in finding that he did not extract this client list for an improper purpose. The evidence about why the list was sent to Ms Roche's personal email is confused, but Mr Qureshi did not know that was what Ms Roche had done. Mr Qureshi was not someone who was comfortable with anything underhand. Even in the final weeks, Mr Currie's view was that Mr Qureshi was playing "with a straight bat". I agree with that assessment. His openness with his employer is telling. Ms Roche acted on her own when taking a copy of her payroll list, and in conjunction with Mr Tilson when removing the MKG and Plastics Plus files. But despite her friendship with Mr Qureshi, and the fact that they discussed their plans, there is nothing which satisfies me that they were engaged in wrongdoing together. Nor (on the balance of probability) am I satisfied that Ms Roche breached her contract by dealing with this client list. The evidence about why the list was

sent home is not entirely convincing, and Ms Donnelly makes the most of the combination of circumstance and evidential inconsistency to mount a highly plausible case. But there is no evidence that this list was ever used by Ms Roche for some improper purpose, nor would it have been of any great use to her. Her clients were the payroll clients, and if she was going to bring any clients with her, it would have been them.

The resignations

53. In early 2018 Mr Bill was aware that a number of Jerroms staff at Kings Heath were unhappy about the move to Shirley. No doubt he was also unhappy about losing the rent from his tenant. Mr Currie's evidence is that Mr Bill had told him that he thought that Mr Qureshi would not want to move to Shirley and would leave. He says this at paragraph 24 of his witness statement [96]:

John felt that if Tas left, a number of his small business clients might follow him.

Mr Bill suggested to Mr Currie that when Jerroms left Kings Heath they might leave Mr Qureshi and his assistant behind and sell him and his clients to Hayward Wright. With Mr Currie's agreement, he set up a meeting between Jerroms and Hayward Wright to discuss the proposal, but Mr Currie did not attend the meeting. Mr Currie and his fellow directors decided that they had bought Trafalgars with a view to growing their business, and so they were not interested in selling part of it. Nothing more came of that initiative, but it helps to understand how the parties were thinking at that time. Mr Bill did not give evidence, but it is apparent that he played a part in the transfer of staff to Hayward Wright. The fact that at this stage he was seeking to facilitate a sale of Mr Qureshi's clients suggests that there was (at that stage anyway) no grand plan to steal them.

54. Mr Hayward-Wright's evidence is that in late February/early March 2018 he received calls from Mr Tilson, Ms Roche, Ms Atkin and Mr Haynes. There is nothing in the way of documentary records of these conversations, but it seems that it was Mr Bill who gave them Mr Hayward-Wright's contact details. That is consistent with Mr Bill's involvement to this point. Mr Bill's consultancy with Jerroms came to an end in March 2018 as well, and the timing fits, both with the failure of the talks in January 2018, and with the impending move from Kings Heath to Shirley. The date for the move had been put back, but it seems that it was around this time that it was firmed up. On 5 March 2018 Jerroms sent a letter to its clients informing them of the closure of the Kings Heath office and the move to Shirley. The letter is not in the bundle, but the office was due to close on 29 March 2018, and the letter most likely told the clients that was the case.

55. It is not possible to be precise about timings, but it is apparent from such documents as there are that by 15 March 2018 Mr Hayward-Wright had agreed terms with Mr Tilson. That was the day on which Mr Hayward-Wright emailed his HR adviser to ask that a letter of offer and a contract be prepared for Mr Tilson at a salary of £48,000 pa [426]. The offer letter setting out the terms of employment as a Client Manager is dated 16 March 2018, and identifies a start date of (Monday) 16 April 2018 [428]. It was on 16 March 2018 that Mr Tilson tendered his resignation from Jerroms giving the necessary 4 weeks notice. Mr Currie asked Mr Tilson what he intended to do. Mr Tilson told him that he had no settled plans, and that he had a couple of options. I find that by this time Mr Tilson had decided to take up the offer with Hayward Wright. The coincidence of the offer letter and his resignation is the clearest evidence of that. This was a deliberate lie intended to keep his employer in the dark about what was to happen.

56. The documents and the timing of events also suggest that whilst the staff may have talked to each other about their plans to leave Jerroms and go to Hayward-Wright, they were not negotiating as a group. Mr Tilson appears to have reached agreement by 15 March 2018. But Mr Qureshi had his discussions with Mr Hayward-Wright in 2017, and Ms Roche had at least sounded out the position in late 2017. Mr Qureshi's resignation appears to have been timed to ensure that he did not move to Shirley rather than as a reaction to receiving his written offer. He tendered his resignation on 19 March 2018 giving notice to 16 April 2018, but his offer letter from Hayward Wright is dated 26 March 2018, and his contract (at £32,000 pa) is dated 3 April 2018 [455]. Mr Haynes was still in discussion with Mr Hayward-Wright in the second half of March 2018. On 25 March 2018 Mr Hayward-Wright wrote to him referring to their discussions the previous week, and offering to support his training [434]. The offer letter and draft contract as a trainee accountant on £21,000 pa followed on 29 March 2018 [435] but Mr Haynes decided to stay at Jerroms. The offer to Ms Roche is dated 26 March 2018 [447]. She resigned the next day. Her evidence was that the timing of the offer and her resignation were a coincidence, but I find that very hard to believe.

57. In addition to Mr Tilson, Mr Qureshi and Ms Roche, Ms Atkin was offered and accepted a job with Hayward Wright. She too had been concerned about the move to the Shirley office, and she too had spoken with John Bill, who had put her in touch with Mr Hayward-Wright. Whilst Mr Tilson, Mr Qureshi and Ms Roche were looking to stay local to Kings Heath, Sue Atkin lived in Redditch, and from her point of view the attraction of Hayward Wright was that they had an office in Redditch. Her evidence was that she met Mr Hayward-Wright on 28 March 2018. He was only able to offer her 4 days a week, but made her an offer there and then. The next day she resigned. She undertook personal tax work and had little or nothing to do with Mr Tilson, Mr Qureshi and Ms Roche.

58. The first to third Defendants all deny that they were asked by Mr Hayward-Wright to solicit Jerroms clients, and Mr Hayward-Wright's evidence is that none of the offers of employment he made to Jerroms staff were conditional upon bringing any clients or contacts with them. Ms Atkin also denies being asked to bring clients with her (or to that effect). Ms Atkin joined Hayward Wright and gave evidence for the Defendants, but Mr Haynes remained at Jerroms, and he gave evidence for the Claimant. He made no suggestion that Mr Hayward-Wright had asked him to solicit clients. Mr Najib and Ms Wilkinson made some play of this. Ms Donnelly made the point that he was a trainee at the time, and so would not have the sort of client connections that made that question worth asking. But the Defendants' point is of some merit. Mr Haynes was thinking of leaving, and it would have been natural for him to be included in conversations with the other staff who were of the same mind. Yet it seems that no one said to Mr Haynes that they were taking clients with them or that they had been asked to do so by Mr Hayward-Wright.

Mr Tilson

59. What Mr Haynes does say in his witness statement is that from around mid January 2018, Mr Tilson would "take himself off" into Mr Bill's office for approximately two hours a day. Mr Haynes sometimes heard snippets of conversation because Mr Tilson did not always shut the door, and spoke loudly. On a number of occasions he heard him say that he was leaving Jerroms at the end of March and was away on holiday for two weeks but would be in contact when he got back and was settled. He also heard Mr Tilson say to Mr Qureshi on various occasions that he had told this or that client that he was leaving and that he would be in contact with them once he was settled into his new job. He also refers to hearing Mr Tilson on the telephone telling someone that he was going to take some records to the "new place"

and saying to someone that he was increasing his charges for Jerroms work so that the new place would look cheaper.

60. Mr Tilson denies these conversations, but overall I prefer the evidence of Mr Haynes. Ms Williamson's best point was that (on Mr Haynes evidence) Mr Tilson sometimes left the door to Mr Bill's room open, and spoke with a loud voice, so that if he was intending to hold a conversation in secret, he was not doing a very good job of it. But Mr Haynes was doing his best to assist the court, and was a generally reliable witness, whereas Mr Tilson was not. Mr Haynes was challenged not only about the fact of these conversations, but their timing. As to the latter, he appeared to agree that this use of Mr Bill's room increased in the last weeks of Mr Tilson's employment. The probability is that contact with clients was prompted by the letter of 5 March 2018 announcing the closure of the Kings Heath office, and this increased use of Mr Bill's room tallies with Mr Tilson's receipt of a job offer from Hayward Wright in mid March 2018.

61. In addition to these contacts, the case against Mr Tilson is that he removed two client lists from Jerroms and used them when he was at Hayward Wright. The two lists are:

- (i) Mr Tilson's annotated list of clients ("the annotated list"); [1170]-[1185];
- (ii) the Excel spreadsheet of client contact details, which Mr Tilson admitted taking, but has not disclosed.

Ms Donnelly's cross examination of Mr Tilson in respect of the annotated list in particular demonstrated that Mr Tilson had acted in a manner which breached his duties of loyalty and good faith, and that he was not a truthful witness.

62. The annotated list is a print out of the Greenhill Pate clients. The document indicates that it was printed out in 2010. Mr Tilson kept it in his desk drawer at Jerroms and used it regularly in his work. There is obviously nothing wrong with that; indeed it indicates that this was a useful document for Mr Tilson to have. He knew a lot of his clients well, but he still needed to have some of their details on a list. The list is arranged by year end, so that the clients with a year ending in January come first (in alphabetical order) followed by February, and so on. The printed list has the internal ID number, the year end and the client name. Mr Tilson has added to it over the years, with company numbers obtained either from Companies House or IRIS and clients he took on after 2010. Next to each he has written the years he has prepared their accounts; so for example for MKG "10/11/12/13/14/15/16/17". This was his check that the accounts had been filed at Companies House. When first asked Mr Tilson did not accept that this list would be useful to a competitor, although he accepted that it would take some considerable time to create from scratch.

63. Mr Tilson was asked whether he considered the annotated list with the information he had added to it over the years was confidential to the Claimant. His response was:

I think its my document, because I created it – that's my interpretation of it

He accepted that he had created it for the purposes of his employment, and that he took it with him when he left. He was asked whether that was to use it in his new employment with Hayward Wright. After a pause there was this exchange:

A: I took it because [I] always had it as a reference point

Q: You took it to use it in your new employment

A: As my personal record, yes

64. A little later in the questioning, Ms Donnelly reminded Mr Tilson that he had made an Affidavit saying that he had no electronic copies of this annotated list, and that he had handed it to his solicitors on 31 May 2018; [2025-6]. He confirmed that what he had said in his Affidavit was true. He was then taken to an email he sent to Mr Hayward-Wright on 11 June 2018 [601]. This attached a list of clients and year ends at [602]-[614] printed from Excel. It had the clients from the annotated list, including those printed on the original list in 2010 and those later added in handwriting by Mr Tilson, arranged by year end in the same way. Mr Tilson initially denied copying this list from the annotated list, saying that he had done it himself (in other words without reference to the annotated list). It was put to him again that he had copied the annotated list.

A: I don't think I have, I don't remember

Q: You still had the annotated list when you went to Hayward Wright

A: Yes

Q: Why create this from scratch when you have the annotated list – you did it and you know its true

A: I might have

Q: You did and you know you did

A: I might have, but it was my personal list

65. His attention was then drawn to some further annotations on the list which he had not dealt with in his witness statements or in his evidence to this point. On the left hand side next to each client was a number. Ms Donnelly took Mr Tilson through a number of examples. She then took Mr Tilson to some of the invoices Jerroms had submitted to these clients for work in the previous year. These tallied with the annotations. Ms Donnelly continued:

Q: In the evidence you filed in these proceedings you never explained those annotations

A: No

Q: Its obvious what they are

A: Yes the fees

Q: Why not explain that

A: I didn't know it was on there – I never looked at it

That last answer was untrue. The cross examination continued:

Q: This annotated list you had since 2010 and you marked on when you completed accounts

A: Yes

Q: You didn't write the fees on every year

A: No

Q: You added these fees just before leaving the Claimant's employment

A: Yes

Q: That is confidential information isn't it

A: Yes, but I would have known what the fees were anyway

Mr Tilson then accepted that he would not have remembered all of the fees without writing them down, and that the reason for writing them down was so that he could invoice his services for Hayward Wright competitively by reference to these fees.

66. In closing it was suggested on Mr Tilson's behalf that he had given honest evidence about this matter. It may be that the final position is true, but it had to be dragged out of Mr Tilson by some skilful cross examination. It is clear evidence of conduct which breaches Mr Tilson's duty of fidelity. The list as he had used it at Jerroms was confidential information per *Faccenda Chicken*. I do not accept that Mr Tilson thought it was his and so he could take it with him. This was confidential information about his employer's clients, and it belonged to his employer. Mr Tilson knew that. The position is put beyond doubt by the annotation of the fees for the previous year. That was a deliberate step taken in preparation for his leaving Jerroms and offering services to the same clients for a competitor.

67. The second list was an Excel spreadsheet of clients Mr Tilson had prepared when he was employed at Jerroms. This was for his own easy reference. Mr Tilson accepted that he took that with him to Hayward Wright and used it there. He accepted that it was a very useful document. It included names, telephone numbers and email addresses of client contacts, some of which were available from public sources, and some of which were not; mobile telephone numbers being the particular example of information which was not publicly available.

Q: So this is an address book for your clients

A: Yes for my use yes

Q: In the past where someone might have kept a card index; you've created an Excel [spreadsheet]

A: Yes

Mr Tilson's case was that he had added the names and details of some of Hayward Wright clients to this list. His reason for refusing to disclose this list was that in its updated form it included confidential information belonging to Hayward Wright. The fact that Mr Tilson relies on the argument that this new information is confidential to Hayward Wright makes a nonsense of his failure to acknowledge that the information already on the same list was confidential to his former employers. He did, however, accept in cross examination that it contained information which was confidential to Jerroms.

68. In his Defence Mr Tilson denied that he had used this spreadsheet since commencing his employment with Hayward Wright. But in cross examination he was driven to change that. Mr Tilson said that he had used the information to fill in the new client forms for the old Jerroms clients once they had joined Hayward Wright because it saved him time. I do not accept that this was the limit of the use he made of that list and the confidential information it contained.

69. In addition, there are two direct examples of Mr Tilson misleading Jerroms about his conduct at around this time. Firstly, when Mr Tilson handed in his notice on 16 March 2018, Mr Currie asked him directly about his plans. Mr Tilson told him that he had no settled plans and that he had a couple of options. That was not true. As I have indicated, I am satisfied that by this stage Mr Tilson had decided to go to Hayward Wright. There is no evidence that he

applied for work elsewhere. The purpose of Mr Tilson's reply to this question was (as Mr Currie surmises) to throw him off the scent.

70. The second example involves Mr Tilson's contact with important clients. On 21 March 2018 Mr Currie went to the gents toilets on the first floor of Jerroms offices. These were next to Mr Bill's office, and the soundproofing was poor. Mr Currie heard it go "very quiet" in Mr Bill's office. As he opened the toilet door he caught a glimpse of Mr Tilson going into the accounts office, so he checked the last number dialled facility on Mr Bill's phone. It was the number for Mr Mayling of MKG. The next day he asked Mr Tilson about the stocktake at MKG and whether he had spoken to Mr Mayling recently. Mr Tilson said that he had not spoken to Mr Mayling for ages. In his witness statement of 5 June 2018 Mr Tilson admits that he was not telling the truth about his contact with Mr Mayling, and that he had been speaking to him on 21 March 2018. His explanation for not telling Mr Currie the truth was that it would have been embarrassing to tell Mr Currie about the conversation, which he says was about MKG doing their own stock take. I fail to see what was embarrassing about the position. I am left to conclude that once again Mr Tilson had something to hide and was looking to throw Mr Currie off the scent.

71. Given the circumstances and the other findings I make as to Mr Tilson's conduct at around this time, I find that the reason for not disclosing to Mr Currie that he had been talking to Mr Mayling was that he was speaking to him about transferring his work to Hayward Wright. Mr Mayling's evidence is that he had spoken to Mr Tilson on 16 March 2018 and was told he was leaving Jerroms. He said that he asked Mr Tilson where he was going, and was told that he was considering a position with Hayward Wright. He asked Mr Tilson if Ms Roche and Ms Atkin were also leaving and that he was told it was likely. Mr Mayling spoke with Mr Hayward-Wright on 20 March 2018, and they met on 26 March 2018. Given that chronology, the telephone call on 21 March 2018 was most likely about the outcome of the call the day before.

The Payroll files

72. It is here that Ms Roche's role becomes relevant once more. Ms Roche's last day at Jerroms was 29 March 2018, and she completed the payrolls for the month before she left. However, whilst still employed, she took home the payroll files for MKG and Plastics Plus. Her evidence was that Mr Mayling of MKG and Mr White of Plastics Plus both asked her to do that independently of each other. The explanations she gave for that were confused and unconvincing. She claimed that the files would not be needed because they were for the previous tax year, and that Mr Mayling asked her to take them home to get rid of them. The concern seems to be that the files held confidential information. However, when Mr Mayling gave evidence, he claimed that the files were to be taken home by Ms Roche for reasons of safety, and to ensure payroll production. He was then "cross examined" on behalf of Ms Roche and (in effect) agreed with the suggestion that the files were taken home for reasons of safety because Ms Roche's office would be left empty.

73. Maintaining the company payroll was important for an employer such as MKG. It needed to be sure that its staff were paid on time. The payroll function was one which (logically) went with the engagement of an accountant, and if MKG was intending to change accountant, the payroll would move with it. I am satisfied that Ms Roche took the file home because she knew that MKG was intending to move from Jerroms to Hayward Wright, and that the timing meant that completing the payroll for MKG's 89 employees before the end of April would be tight unless she had the file. That is rather confirmed by the fact that Ms Roche did complete the payroll for MKG on time. Even though her first day at Hayward

Wright was 24 April 2018, she was able to email the payroll out to MKG for approval that day [487]. The reason for taking the payroll file home with her was obvious. The fact that Ms Roche tried to cover up that reason adversely affects her credibility, and tends to confirm that she knew that MKG was moving its business to Hayward Wright.

74. Ms Roche also took the Plastics Plus payroll file home with her. Her evidence was that Mr White, the Director of Plastics Plus, asked her to do that. Why should he do that? Again the only sensible reason is that he had decided to move his business to Hayward Wright and wanted to be sure that the April payroll was completed on time. Indeed he emailed Mr Tilson on 25 April 2018 asking him “*How is the payroll going?*” [493]. Mr Tilson’s reply is revealing:

Have forwarded to Ann. She started officially yesterday so can contact her direct

Ms Donnelly submits that the use of the word “officially” suggests that Ms Roche had been working on the matter unofficially before that point. Given how quickly she completed the work after joining Hayward Wright, that must be correct. Her evidence was that when she left Jerroms she had not decided whether to join Hayward Wright. Given that she took these payroll files home with her, I find that she had.

75. The fact that Ms Roche took these two payroll files home with her is no coincidence. MKG and Plastics Plus were Mr Tilson’s two most lucrative clients. Given the evidence of his contacts with these clients, the probability is that it was he who coordinated these arrangements, endeavouring to ensure that there was a smooth transfer of work. Ms Roche played her part, but Mr Tilson was the prime mover.

76. The fourth Defendant called both Mr Mayling and Mr White to give evidence at trial. The effect of Mr Mayling’s evidence was that Mr Tilson did not solicit his work, and that he only decided to transfer to Mr Hayward-Wright’s firm having met him. In essence he was saying that it was Mr Hayward-Wright who won his business. Given that Mr Mayling went to the trouble to meet Mr Hayward-Wright, I can accept that had he taken against Mr Hayward-Wright he may not have transferred his work. But the point only goes so far. Mr Tilson’s conduct was that of a man with something to hide. I have no real doubt that he solicited Mr Mayling’s custom. Mr Mayling’s avoidance of that issue in answer to my questions was confirmation of that. The approach Mr Tilson took is in stark contrast to Mr Qureshi’s openness. The evidence about the customer lists shows the intent. The phone-calls taken in Mr Bill’s room, the lie to Mr Currie about his contacts with Mr Mayling, the attempt to explain that away on the basis of some embarrassment, and the surreptitious removal of the payroll files, all support the inference that he had solicited Mr Mayling’s business. Neither Mr Tilson nor Mr Mayling would admit as much, but Mr Tilson’s evidence lacks credibility, and Mr Mayling is caught in a difficult position. The evidence is quite sufficient for me to draw the necessary inference.

77. Mr White also denied that Mr Tilson had attempted to solicit his business. I find that hard to accept given Mr Tilson’s approach to the matter. Mr White and Mr Tilson spoke on 14 March 2018 when Mr Tilson asked for the call to be put through to Mr Bill’s room [351]. Mr Tilson’s evidence was that he might have told Mr White that he was considering a move to Hayward Wright but that he would have said no more. Again I find that hard to accept given the nature of Mr Tilson’s other conduct. Mr White’s evidence supports Mr Tilson’s position. He says that it was not until the beginning of April 2018 that he knew anything about Mr Tilson and Ms Roche leaving Jerroms, and that it was a matter of grave concern that he was not able to get hold of them at that time. His evidence is that he first spoke to Mr Tilson and learned about these matters when Mr Tilson was on holiday, in other words after

he was suspended on 5 April 2028. That cannot be right. At some point prior to Ms Roche leaving Jerroms on 29 March 2018, he had asked her to take the Plastics Plus payroll file home with her. The only credible explanation for that request was the one I identify above. It means that Mr White must have known that Ms Roche and Mr Tilson were leaving Jerroms well before he says he did. Ms Donnelly put Mr White's support of Mr Tilson's story on the basis of a misguided loyalty to Mr Tilson. A sense of loyalty was understandable, but I was not able to accept Mr White's evidence that Mr Tilson had not solicited his business.

78. There is one further piece of evidence which shows Mr Tilson making arrangements to move work to Hayward Wright at about this time. Mr Hayes gave evidence that about a week before the closure of the Kings Heath office, he was outside the back of the office having a cigarette when he was approached by Mr Tilson. Mr Tilson told him that Keystone Wood, who were a client of Jerroms, were "*coming with us*". At that stage Mr Hayes says that he "*didn't really know what was going on with Barry and the others ...*" but by saying that Keystone Wood were coming with us, he assumed that he meant they were moving their work away from Jerroms and transferring it to Mr Tilson's new employers. Mr Hayes did the management accounts for Keystone Wood, and his wife worked for the company, so it would have been apparent that there would have been a natural desire for the client to retain Mr Hayes. Mr Tilson asked whether Mr Hayes would be prepared to continue to do the management accounts on a private basis (the assumption being that the other accountancy work would go with Mr Tilson). Mr Hayes said no to Mr Tilson. That evidence was challenged, but I accept it. It fits in with the other evidence I have heard about Mr Tilson's activities in the final days of his employment with Jerroms. Mr Hayes accepted that he had no liking for Mr Tilson, but his evidence was modest in scope and entirely plausible. In the event Keystone Wood did not transfer their business, and Mr Hayes still does their management accounts.

The letters from clients withdrawing instructions

79. It was after the resignation of Mr Tilson that Jerroms started to receive letters from clients saying that they were withdrawing their instructions. There are three features of these letters which Jerroms point to as being supportive of its case. The first is that there is said to be a "wave" of such letters following the resignation of Mr Tilson. The suggestion is that this ties in with the evidence of Mr Tilson contacting clients in the weeks that followed and doing so from Mr Bill's office rather than from the open plan office. The inference is that he was seeking to persuade these clients to follow him to Hayward Wright. Secondly, that many clients failed to mention in their letters that instructions were being transferred to Hayward Wright. This is said to be odd, because normally clients will want to find a new accountant to do their work before parting company with the old one, and to tell the old accountants where they are to transfer the papers. The inference is that these clients had been asked not to mention Hayward Wright (just as Mr Tilson was keen not to say that he was moving there) so as not to tip off Jerroms that they had been solicited. Thirdly, some of the expressed reasons for moving are said to be ridiculous; the inference being that the clients were not able to give the real reason.

80. Some of these letters were put to Mr Currie in cross examination. The first is dated 19 March 2018 and is from a Mr and Mrs Shepherd [720] who live in Hampshire. The letter is copied to Mr Bill and Ms Dearing. It says this:

As your clients it is not suitable to relocate us to your head office in Shirley.

Therefore we wish to terminate your services to us on Thursday 29 March 2018, the day you state you will be relocating.

Please be sure to leave at Trafalgar House all papers, files and records that pertain to us.

We thank you for the work you have done for us in the past.

The letter was identified by Jerroms as a prime example of clients providing arbitrary excuses for withdrawing instructions, and failing to mention who their new accountants would be. The rhetorical question was why Mr and Mrs Shepherd would be worried about a move of a few miles within the suburbs of Birmingham from Shirley to Kings Heath, when they lived in Hampshire. When I heard that evidence I did wonder why that should be.

81. The spreadsheet of clients who moved to Hayward Wright provides some assistance here. Firstly, the spreadsheet links Mr and Mrs Shepherd to their business, Saunders Shepherd and Co, which accounted for the majority of the relevant fees. Mr and Mrs Shepherd lived in Hampshire, but Saunders Shepherd was a local business. Secondly, and more importantly, it appears that Mr Bill was a non executive director or officer of the company. Indeed Mr Currie thought that they were clients of Mr Bill. That no doubt explains why the letter was copied to Mr Bill, and may also explain the curious request to leave their papers at Trafalgar House. Thirdly, the spreadsheet indicates that they did not transfer their business to Hayward Wright until December 2018. Read in the light of those matters, this may be a letter which objects not so much to the move from Kings Heath to Shirley, but to the parting with Mr Bill and his premises. It illustrates the dangers of reading too much into evidence when it is contained in a short letter and the maker is not called to give evidence and answer questions.

82. The next letter referred to was the undated letter from PR Pearce Ltd at [722]. Again the reason given for terminating instructions was said to be the closure of the Kings Heath office. PR Pearce give an address in Northfield, and whilst the distances are not great, Kings Heath is more convenient for Northfield than Shirley. But once again there is a more significant point. PR Pearce were not a client of Barry Tilson, and (as far as I can see from the spreadsheet) did not move to Hayward Wright. Consequently the real value of this letter is that it is an example of a client who would not have been approached by Mr Tilson, who did not go to Hayward Wright and who may not have had much farther to travel, but who terminated their instructions because of the office move. On the face of it a move of a few miles may not seem much of a reason, but it appears to have been what motivated this client.

83. One of Mr Najib's central themes when he cross examined Mr Currie about these letters, was that it was hardly surprising that clients who had used the same people to do their accounts for many years, would want the same people to carry on doing their accounts. They would have built up a degree of trust in those people, and would be loyal to them, rather than to Jerroms. Mr Currie very reasonably accepted that there was nothing unusual in that. Indeed it seems to me that it would be a powerful point in the mind of a long standing client. These are not big corporate businesses employing major firms of accountants who have a team for this and a team for that. These clients are relatively small, and in some cases medium sized businesses run by their Directors, or individuals, or (to take a memorable example) organisations like the local cricket club at Studley. The personal contact would be important. Whilst that gave someone like Mr Tilson a degree of influence, it is important not to lose sight of the fact that it would be entirely understandable if clients like these followed the person they trusted.

84. Some of the letters say this in terms. The first one in Mr Najib's schedule is from a Mr Godwin dated 23 April 2018 [733]. This would have been written after receiving the letter of 13 April 2018 which Jerroms sent to Mr Tilson's clients notifying them that he was leaving

and that their work would be undertaken by another member of Jerroms staff from the Shirley office [2196]. Mr Godwin says this:

I'm sorry to hear about Barry leaving you and have spoken to him at length. Having been associated with [him] for many years, I have decided to let him remain as my accountant ...

Mr Godwin was not called, so I only have his letter. But he is not seeking to hide the fact that he has spoken to Mr Tilson about the matter ... *at length*... or that he is following him. There is nothing on the face of the letter which satisfies me that it has been procured by Mr Tilson or that it follows a script.

85. This letter was written before the letters obtained by the first to third Defendants in response to the injunction application. Many of the letters from this group (written in the early days of June 2018) also say that the clients wanted Mr Tilson to do their accounts; see for example the letter at [580]-[586]. I assume that the writers were asked to confirm that they had not been solicited and to say why they had moved to Hayward Wright. Ms Donnelly submits that I should not give these letters any weight. I agree that they are to be considered with a degree of caution, but I do not discount them. They reflect an understandable client loyalty. The fact that these people were willing to get involved at all is some indication of that. That loyalty was not simply to Mr Tilson. A good number of the letters refer to staying with Ms Atkin, and there is no suggestion that she was involved in soliciting clients. Other clients wrote letters saying that they wanted Mr Qureshi to continue to act for them, and one to the fact that Ms Hayward, the other senior manager at Kings Heath, had left (which she did later in 2018).

86. Taking these letters in context, I am unable to draw the inferences Jerroms contends for. The “wave” of letters may be the result of a plan, but may also be the response of clients to Jerroms’ letters of 5 March and 13 April 2018. I agree that it is odd that most fail to refer to Hayward Wright, but the reality is that these clients were following the individuals. It goes too far to say that these letters were the result of an orchestrated plan, and the letter from the Shepherds shows that it can be dangerous to read too much into something like this. The apparently ridiculous reason for moving was at the forefront of Jerroms’ case in opening, but on analysis the letter turns out (if anything) to support what the Defendants have been saying.

Findings on liability – Mr Tilson, Mr Qureshi, Ms Roche

87. I find that Mr Tilson solicited the business of MKG and Plastics Plus whilst he was employed by Jerroms. These were his two most valuable clients. He lied about the telephone call with Mr Mayling, which indicates some guilty knowledge, and the fact that the payroll files for both these clients were secured confirms that Mr Tilson was doing something concrete to solicit their business. Whether this is characterised as encouragement, or enticement, there is an active component and a positive intention. To paraphrase Lord Herschell, I am perfectly certain that his conduct in relation to these clients fell on the wrong side of the line.

88. The fact that Mr Tilson was prepared to act in this way in relation to some clients makes it more likely that he would have been willing to act in similar ways in relation to others. MKG and Plastics Plus were the most valuable clients, and if Mr Tilson was going to take any active steps to solicit clients, it is to be expected that it would be his most valuable. There is also the positive evidence from Mr Hayes that Mr Tilson was looking to move Keystone Wood’s work, and taking active steps to accommodate its desire to retain the services of Mr Hayes. But there is no other direct evidence of soliciting clients beyond the

increased use of Mr Bill's office for telephone calls to clients. Ms Donnelly used Mr Tilson's evidence in his witness statement against him on this issue. Mr Tilson confirmed that the circumstances of his telephone call with Mr Mayling were similar to all other conversations he had with clients in March 2018. Given that I am satisfied that the telephone call with Mr Mayling was a part of a course of conduct the purpose of which was to solicit MKG's business, Ms Donnelly's submission is to the effect that Mr Tilson's evidence would support the conclusion that he was doing something similar with other clients. That is more than a forensic point. If a witness is not frank, the court is entitled to draw inferences, particularly in circumstances where the other party is unlikely to have direct evidence of the wrongdoing. Mr Haynes' evidence suggests that a good many of the calls to other clients were also taken in Mr Bill's room.

89. On the evidence I have, I am satisfied that it is more likely than not that Mr Tilson did solicit or attempt to solicit other customers on his client list. That is consistent with the fact that he also retained confidential information about them to fix his future charges and to facilitate future contact. If it were necessary to determine which customers, in the absence of being able to rely upon Mr Tilson's account, I would have to find that he did so in relation to those customers on his client list.

90. I have already dealt with Mr Qureshi's position. I am positively satisfied that he did not solicit clients. Ms Roche's position is different again. I find that she secured the payroll files for MKG and Plastics Plus knowing that Mr Tilson was engaged in making arrangements for them to transfer their business with him. Ms Donnelly uses the word "colluded" in her closing submissions. That is a fair assessment. But I do not find that there was any wrongdoing beyond that. It is not suggested, for example, that any other payroll files were removed.

Hayward Wright

91. Jerroms' case is that Mr Hayward-Wright (and so his firm) had been a party to an unlawful means conspiracy. On the basis of my findings in relation to Mr Tilson, Ms Roche and Mr Qureshi, the unlawful means relate to Mr Tilson's soliciting of clients, his use of the client lists he took with him, and the removal of the payroll files for MKG and Plastics Plus. There is no direct evidence of an agreement or plan as between Mr Hayward-Wright and Mr Tilson to use unlawful means, but in a case such as this that is not surprising. The parties to such an agreement are unlikely to admit to it, and the lack of documents might be explained by a deliberate decision not to put anything in writing. The case turns on inference and the combination of circumstance.

92. In her closing submissions, Ms Donnelly referred to a number of matters. Firstly, that it was inherently unlikely that Mr Hayward-Wright would not have reached some arrangement with Mr Tilson about bringing his clients across to Hayward Wright. He was offering him a job at £48,000 per annum, and would need the fees to fund it. The point is to be taken in conjunction with my findings as to Mr Tilson's activities in the last few weeks of his employment with Jerroms. Secondly, that Mr Hayward-Wright had met Mr Mayling on 26 March 2018. Thirdly, that he must have known that Ms Roche had taken the payroll files home with her. Fourthly, that he had received an email from Mr Tilson on 11 June 2018 which included a list of clients. Ms Donnelly submits that the circumstances are such that Mr Hayward-Wright must have known by this point at least that this was a confidential list of Jerroms clients. Finally, there is the evidence about the "Battle of Trafalgar", as it was referred to.

93. Ms Donnelly makes the very best of the material available to her, but having heard Mr Hayward-Wright give evidence, I was not satisfied that he had been involved in a conspiracy to use unlawful means. I begin by briefly referring back to some of the history. The first point to make is that it was the employees of Jerroms who approached Mr Hayward-Wright. They were unhappy with the move to Shirley. This is not a case of Mr Hayward-Wright poaching the employees as part of a plan to take the business he had been interested in buying for nothing. Secondly, it is apparent that Mr Bill played a significant role in matters. Quite what that was is unclear, but it was he who provided these employees with Mr Hayward-Wright's contact details. Thirdly, just as the employees did not act as a group, so Mr Hayward-Wright did not deal with them or employ them as a group. He was looking to expand, and he offered them all a job, but it was done piecemeal. There is no evidence which suggests that he was asking one to encourage applications from the others, Fourthly, whilst there are distinctions to be drawn between the employees, and Mr Tilson was the most senior and best paid of them, there is no evidence that any of the other employees sought to solicit customers. In particular, Mr Qureshi denies that he was ever asked to bring clients with him, in circumstances where he had a good many clients to bring.

94. The first to third Defendants make the point that not only do they deny that Mr Hayward-Wright asked them to solicit clients (or something to that effect) but that the evidence from Ms Atkin and Mr Haynes is to the same effect. In Ms Atkin's case Jerroms rely upon a note made by Ms Haywood that "*Sue said that they can only go if they go with clients*". Ms Haywood was not called, and Ms Atkin vehemently denied saying any such thing. I accept Ms Atkin's evidence as to that. She went to work at Hayward-Wright's Redditch office, and her clients would have been distinct from those of Mr Tilson's. Many of her clients followed her, but it is not claimed that they did so because she solicited them. Steven Haynes remained with Jerroms and did not take up the job he was offered by Mr Hayward-Wright. There is no suggestion in his evidence that Mr Hayward-Wright asked him to bring clients with him. The point is met by Ms Donnelly's submission that he was still a trainee and would not have clients to bring. That may well be right, but if it is then it is an example of Mr Hayward-Wright offering a job to someone without the promise or expectation that they will bring any work with them. Indeed the evidence is that he was going to assist Mr Haynes with his training costs. None of that demonstrates that Mr Hayward-Wright was engaged in anything unlawful. It is consistent with an accountant taking advantage of the fact that his competitors were closing its Kings Heath office, and offering jobs to those of its staff who approached him. He might expect that clients would follow those staff, or some of them. Mr Currie accepted that there was nothing unusual about clients following the people who did their work. But there is nothing objectionable about that.

95. The first point Ms Donnelly makes (about Mr Tilson) is her best one. I can accept the probability that an accountant looking for a job would tell his prospective employer about his existing clients, and that a prospective employer would be interested to know whether he would bring work into the practice. The fact that he and Mr Hayward-Wright say that there was no such discussion is a little hard to credit. But there is a significant difference between talking about the clients who you expect to follow you, because you have been doing their accounts for 28 years (in the case of MKG) or 20 years (in the case of Plastics Plus), and coming to some agreement with your prospective employer, even a tacit agreement, to solicit their business. It may be that Mr Tilson went on to speak to those clients, to solicit their business, and to make arrangements for them to move their work to Hayward Wright. But it does not necessarily follow that Mr Hayward-Wright agreed to or was aware of Mr Tilson crossing the line between what was permissible and what was not. It may be, for example, that Mr Hayward-Wright knew that Ms Roche had taken the payroll files home. But equally it

may be that he did not. It is supposition. Mr Hayward-Wright met with Mr Mayling. But whilst that might be consistent with knowledge of solicitation, it does not demonstrate that Mr Hayward-Wright had that knowledge. “Blind eye” knowledge is sufficient here, but having seen Mr Hayward- Wright well cross examined on the point, I was not satisfied of that.

The Battle of Trafalgar

96. This was another aspect of the evidence which was given some prominence in the way Jerroms put its case, both in Mr Currie’s witness statement and in the opening. “Trafalgars” was the name of the business which operated from the Kings Heath office, and which Jerroms had bought from Mr Bill and Mr Pate. It was still trading as “Jerroms Trafalgars” in March 2018. On 15 March 2018 Mr Hayward-Wright arranged for a company to be incorporated. The company’s name was Hayward Wright (1805) Limited. 1805 was the year of the Battle of Trafalgar. The draft contracts issued to the first to third Defendants gave this company as their employer, and Ms Donnelly submits that the choice of name indicates that this was a targeted attack.

97. Ms Donnelly took Mr Hayward-Wright through the chronology, suggesting that on 15 March 2018 battle was about to commence. Mr Tilson was offered a contract on 16 March 2018, Mr Qureshi was offered a contract on 19 March 2018 and Ms Roche on 27 March 2018. She suggested however, that the name ceased to be so amusing when solicitors for Jerroms started sending letters on 4 April 2018. Consequently Mr Hayward-Wright decided to change the company’s name “*because it gave the game away*”. She suggested that the change of name to Hayward Wright (Birmingham) Limited on 19 April 2018 betrayed the fact that he knew that he was involved in something unlawful. Mr Hayward-Wright denied those matters.

98. Mr Hayward-Wright’s explanation was that “1805” was chosen when he was about to make offers to 5 members of Trafalgars staff and there were negotiations (with Mr Bill) for the use of the Kings Heath office. Those came to nothing because Jerroms still had a lease and (for obvious reasons) were unwilling to let his firm operate from the premises. In the event he took an office next door. The change of name to “Birmingham” was because he was involved in the purchase of another practice, and “1805” was less appropriate. Like the letter from the Shepherds, this was an “eye catching” point on paper. But having heard the evidence as a whole, it lost its significance, and did not really assist me in reaching a conclusion on the question of Mr Hayward-Wright’s involvement in a conspiracy.

99. Ms Donnelly also cross examined Mr Hayward-Wright about Mr Tilson’s possession and use of the client lists he took from Jerroms. Ms Donnelly submits that at the least this evidence demonstrates that Mr Hayward-Wright had blind eye knowledge of the use of unlawful means. On 11 June 2018 Mr Tilson sent an email to Mr Hayward-Wright [601] attached to which was a list of Jerroms clients with contact details and year end dates. The list was compiled by Mr Tilson using the confidential information he had taken from Jerroms. The case against Mr Hayward-Wright is that he must have appreciated that was what it was, for by this time Jerroms had brought proceedings for an injunction and Mr Currie had filed evidence alleging that Mr Tilson had taken confidential client lists with him. Mr Hayward-Wright accepted that he had read Mr Currie’s evidence. His firm was paying for the representation of the (then three) Defendants, and at a hearing on 6 June 2018 they were required to file Affidavits saying whether they held any confidential lists of clients. Ms Donnelly submits that when Mr Hayward-Wright realised the significance of the issue during

his cross-examination, he tried to change his evidence about having read Mr Currie's witness statement about the matter.

100. There were times when Mr Hayward-Wright looked uncomfortable during Ms Donnelly's cross examination. It is tempting to see his choice of company name and his receipt of these client details apparently without comment as evidence of a conspiracy and the knowledge of some of the unlawful means employed by Mr Tilson. Moreover I follow the reasons why Jerroms suspect that Mr Hayward-Wright was involved. After all it was his firm which was benefitting from this influx of work. Ms Donnelly submits that this is a case where I can be satisfied that there is at least some "blind eye" knowledge. But I have concluded that the evidence, taken as a whole and in the context of the history I have summarised, is not sufficient to satisfy me of those matters.

Causation

101. I begin by recognising that this is often a problem for claimants in a case like this. They are dependent upon piecing together scraps of evidence obtained from disclosure or information gleaned from people who are either engaged in the wrongdoing, or the clients who are being fought over. Those clients are often unwilling to become involved, and it can be counter productive for a professional firm to seek to involve the clients who remain with it in a dispute such as this. The issue is one of fact, to be determined on the balance of probabilities and on the evidence before the court. The court may draw inferences from the primary facts, but suspicion and surmise are not enough.

102. Put simply, the Defendants' case is that the clients who were solicited would have followed Mr Tilson to Hayward Wright regardless. In other words Mr Tilson's unlawful actions in approaching those clients, securing the payroll files and/or his use of confidential information to prepare competitive prices for the work he was to do were not the dominant nor a substantial cause of the loss Jerroms suffered when these clients terminated their retainers.

103. The two accounts Mr Tilson would have been most interested in, and the two where the evidence of solicitation is the strongest, are the MKG and Plastics Plus accounts. They had been clients of the practice for 28 and 20 years respectively. Mr Tilson had been with the practice for 24 years, and had been doing these accounts for a long time. Whatever challenges there were to the evidence of Mr Mayling and Mr White, there is no question but that they had a close working relationship with Mr Tilson. It is not unusual for businessmen to want to keep the professional advisers they know and trust. They did not know Mr Currie or anyone else at Jerroms. There is no evidence that any steps had been taken over the previous 3 years to introduce these important clients, or indeed any of the "Trafalgars" clients, to other members of Jerroms staff, or to gradually involve the Shirley office. The lack of a significant notice period for the relevant employees meant that there was no chance of effecting a gradual and orderly transfer of this work when notice was given. There was no real opportunity for another member of staff to become acquainted with these clients, let alone an opportunity to build up a relationship of trust. Turning the question of causation on its head, it would have been surprising if these clients had not followed Mr Tilson to Hayward Wright when they found out that the Kings Heath office was closing and he and Ms Roche were moving on.

104. As to the other Tilson clients identified on the schedule, the probability is that others were also solicited. But it is of note that no other payroll files were secured, and the only direct evidence we have of any other direct action is the approach by Mr Tilson to Mr Hayes about the Keystone Wood accounts. Consequently, whilst there was conduct on the part of

Mr Tilson which amounted to solicitation (for example some encouragement or inducement which crossed the line) none of it is likely to have been as potentially effective in terms of causation as his conduct in relation to MKG and Plastics Plus. There is also Mr Tilson's use of the confidential information he removed. He used this to price his work competitively, and failed to disclose the updated Excel spreadsheet. These are not attractive features of his case. However, there is no evidence to the effect that the use of this information caused loss to Jerroms. Again that is not uncommon. The difficulty of proving loss in those circumstances is well known, and is often the justification for the grant of an injunction. But whilst that difficulty might justify an injunction, it would not be right to find for the Claimant on the damages claim without some evidence that the wrongdoing caused a loss.

105. Mr Najib submits that the transfer of clients from Jerroms to Hayward Wright is to be seen in a broader context. These were the clients of the firm run by Mr Pate and Mr Bill. As is often the case when a business is purchased, Mr Pate and Mr Bill were retained as consultants by the new owners. But Mr Pate died in 2016, Mr Bills was due to end his consultancy in 2018, and another long standing employee Mr Gilbert had retired in 2017. On 5 March 2018 Jerroms announced the closure of the Kings Heath office. Then on 13 April 2018, about 3 weeks before the closure of the office, Jerroms clients received a letter saying that the person undertaking their work was leaving. Of the staff who decided to leave, Ms Atkin had been with the practice for 26 years, Mr Tilson for 24 years, Ms Roche for 18 years, Mr Bill for 18 years and Mr Qureshi for 15 years. With all this change, it is hardly surprising that so many clients decided that this was the moment to leave. Mr Najib's analysis of these clients drew out one further and important point, which was that a number of these clients were connected to Mr Bill, either because he was a Director of the client company or these were in reality his clients. I am satisfied that these clients would have been influenced by Mr Bill's decision to part company with Jerroms, and for that reason alone would have been lost to Jerroms.

106. I understand the suspicions that come from the fact that so many clients defected to one competitor, and that Mr Tilson and to an extent Ms Roche engaged in unlawful conduct. But there is real merit in the Defendants' case that this conduct was the occasion for Jerroms' loss rather than the cause of it. The probability is that these clients would have followed Mr Tilson regardless of his unlawful approaches to them, just as Mr Qureshi's clients followed him, and Ms Atkin's clients followed her. When I asked Ms Donnelly if she had anything to add in relation to the issue of causation, she submitted that the fact that Mr Tilson considered it necessary to engage in acts of solicitation in order to effect the transfer of this business was indicative of its causative effect. It was a point well made, but it does not persuade me that what he did was in fact the effective or dominant cause of the loss Jerroms sustained.

Quantum

107. Given my findings on causation, I deal with this aspect relatively briefly. The parties agree that the loss of client income is to be assessed by identifying the fees charged for each client lost in the previous year, and applying a multiplier. There were disagreements as to both elements of that calculation.

108. As to the multiplicand, the schedule I have helpfully identifies the fees lost. The claim in respect of the tax only clients is not pursued. Mr Tilson's clients account for some £173,250 of the £279,809 on the schedule. That would be the starting point for a multiplicand. The Defendants submit that there should be a deduction for so called "special work". The Defendants' case was that this was not recurring, and so should be ignored. I prefer the Claimant's approach, which is to the effect that whilst special work may not recur

for that client, there would be special work for other clients which would replace it. Over time that would seem to be right. There was also a dispute as to whether the fees of clients who were struck off or dissolved in 2019 should be excluded. This rather turns on how the question of valuation is approached. Ms Donnelly's submission is made on the premise that quantum is assessed by reference to the sum a hypothetical purchaser would have paid for this block of clients as at April 2018, whereas the Defendants look at the actual loss. The sum involved is just over £4,000, and was not argued in any great detail. Given that the parties agree the hypothetical purchaser approach to valuation, the Claimant's approach is the correct one in principle. Some natural wastage is built into a calculation such as this.

109. The experts reach very different conclusions on the level of the appropriate multiplier. Mr Taub for Jerroms starts with a fee multiplier of 1, discounts it by 20% to reflect the fact that (in particular) there were no restrictive covenants binding the relevant employees, and concludes that an appropriate multiplier is 0.8. He notes that Jerroms paid Trafalgars on the basis of a multiplier of 0.7. Mr Southall for the Defendants does not disagree with the range of multipliers Mr Taub takes as the starting point, but contends that a normal gross fee multiplicand of up to 1 would be the appropriate basis for a valuation where the employees (and hence the clients and contacts) were locked in. In his experience a purchaser of a block of fees is looking for some certainty as to the future revenue stream.

110. At paragraph 6.10 of the joint statement Mr Southall says that the price that any hypothetical purchaser would be willing to pay in this case was likely to be negligible because the future income stream was not secured. He notes three matters:

- a. *the lack of restrictive covenants ...*
- b. *the short notice period of the employee Defendants, which gave JTL limited time to take any protective action; and*
- c. *the "personal history" with the clients of the employee Defendants, which existed prior to their employment with JTL.*

At 6.11 he concludes that:

... no hypothetical purchaser would be willing to pay anything other than a nominal value for a future revenue stream over which there was no short to medium term certainty. This is in contrast to many actual transactions, where client retention is effectively secured.

At 6.15 he considers that the multiplier would be significantly less than the 0.7 which Jerroms paid Trafalgars. That was in circumstances where Mr Pate and Mr Bill were tied in by means of consultancy agreements, and where the office was to remain in Kings Heath (as was generally understood) for the next 5 years, which in turn had the effect of keeping the existing staff.

111. The absence of oral evidence from the experts means that their evidence was not tested in cross examination. That said, I clearly prefer the evidence of Mr Southall. The problem with Mr Taub's assessment of the multiplier is that these clients were sold a few years before on the basis of a multiplier which was less than the one he now proposes, but with some real client retention security built in. Mr Southall's approach seems to me to be the more realistic. The three factors he identifies at paragraph 6.10 of the Joint Statement provide a compelling basis for this opinion. This block of fees may well have had some value, for the hypothetical purchaser may have taken the view that notwithstanding the lack of certainty, some of these

clients would have remained. However, on the material before me I am unable to do other than assess the loss as nominal.

Conclusion

112. The claims against Mr Tilson and Ms Roche for breach of contract and or breach of confidence succeed to the extent set out above, but the Claimant fails to prove any substantial loss. In those circumstances the Claimant is entitled to judgment for nominal damages against Mr Tilson and Ms Roche. The claims against Mr Qureshi and Hayward Wright are dismissed. The parties wish to argue the issue of costs, and there is to be a hearing for that purpose on a date to be fixed. Any application for permission to appeal may be made at that further hearing, and the date for the filing any appellant's notice pursuant to CPR 52(2)(b) is extended to 21 days after the date of that hearing.