Neutral Citation Number: [2017] EWHC 300 (Comm)

Case No: CL-2013-000689

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2017

Before:

THE HONOURABLE MR JUSTICE LEGGATT

- -

Between:

(1) Marathon Asset Management LLP	**Claimant**
(2) Marathon Asset Management (Services) Ltd	
- and -	
(1) James Seddon	**Defendants**
~~**(2) Louise Keeling**~~	
(3) Luke Bridgeman	
~~**(4) Julius Mort**~~	
~~**(5) Jennifer Buchanan**~~	
~~**(6) Global Investment Mandate**~~	

- -

Neil Kitchener QC, Jane McCafferty, Edwin Peel and **Gideon Cohen** (instructed by **Herbert Smith Freehills LLP**) for the **Claimants**
Pushpinder Saini QC and **Paul Luckhurst** (instructed by **Orrick, Herrington, Sutcliffe**) **(Europe) LLP** for the **First Defendant**
Stuart Ritchie QC, Victoria Windle and **Can Yeginsu** (instructed by **Withers LLP**) for the **Third Defendant**

Hearing dates: 21-24, 28 and 29 November; 1, 12 and 13 December 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE LEGGATT

Mr Justice Leggatt :

I. INTRODUCTION

1. The claimants ("Marathon") carry on an investment management business. A long-running dispute between the firm's three founders led to one of them leaving, followed by employees who worked with him. They have since set up a competing business. Protracted arbitration proceedings and this litigation have ensued. The arbitration claims have all now been resolved and some of the claims made in this action have been settled. But there remain claims against the first defendant ("Mr Seddon") and the third defendant ("Mr Bridgeman") for taking confidential documents. Those claims have been the subject of this trial.

2. Mr Bridgeman has admitted that, over a period of several months before he left Marathon's employment in December 2012, he copied onto USB drives a substantial number of files containing information confidential to Marathon and that he kept these files until the summer of 2013, when they were delivered up after these proceedings were threatened. Mr Bridgeman further admits that, in copying the files and retaining them when he left Marathon, he was in breach of his contract of employment.

3. There are two main issues in dispute. The first is whether Mr Seddon is liable for copying some of the files. This turns on the purpose for which Mr Seddon shared certain files containing information about Marathon's business with Mr Bridgeman on 29 August 2012 by saving copies on a shared drive on Marathon's computer system. Shortly afterwards Mr Bridgeman downloaded the files to one of his USB drives. Marathon's case – denied by Mr Seddon – is that Mr Seddon intended Mr Bridgeman to add these files to other files that he planned to keep for future use in setting up a new fund management business. If this factual dispute is decided in Marathon's favour, questions arise as to the legal basis on which Mr Seddon is liable to Marathon and the extent of his liability.

4. The second main issue is what, if any, damages are payable by Mr Bridgeman and, if he is also liable, Mr Seddon. It is common ground that the files which Mr Seddon shared with Mr Bridgeman were never actually used after they left Marathon's employment. Mr Bridgeman made some use of a few of the many other files which he copied and removed but it is not alleged that this caused Marathon any financial loss. Marathon's case is that it does not matter what use was actually made of any of the files or that no loss has been shown: the defendants unlawfully took its confidential information and must pay for the value of what they took – which Marathon estimates at £15m.

5. Marathon asks the court to assess damages by estimating the price which Marathon could reasonably have charged the defendants for releasing them from the obligations of which they are in breach. Such damages are often referred to as "*Wrotham Park* damages" after the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 in which such a measure was first articulated. But, as with "*Mareva* injunctions" and "*Anton Pillar* orders", a label based on the name of the case in which the remedy was originally granted is abstruse. Of the various alternative labels which have been suggested, I propose to use the term "licence fee damages", which captures the basic idea that the damages represent a fee that would reasonably have been agreed between the parties to license the defendant's wrongful activity.[1]

6. The justification for awarding licence fee damages and, in consequence, the question of when it is appropriate to do so is a controversial subject. In engaging with it I have had the assistance of strongly argued written and oral submissions from counsel representing each of the three remaining parties and citation of case law and legal scholarship filling no fewer than 11 volumes.

7. Before I come to the legal arguments, I will first summarise the background facts and decide the factual issues in dispute. The factual summary which follows is largely derived from awards made in earlier arbitration proceedings which I will describe in due course. The defendants were not parties to those proceedings but they disclosed documents and gave evidence in them. With some encouragement from the court, an agreement has sensibly been reached in relation to the use of the arbitrator's awards in these terms:

> "The parties agree that the judge may treat the contents of the arbitration awards as evidence of the truth of the propositions and conclusions contained therein and may adopt those propositions and conclusions as being true without giving independent consideration to the matter save where those propositions and conclusions conflict with the submissions of any of the parties (and are expressly identified as such by counsel)."

---

[1] Other labels sometimes used are "negotiating", "negotiation","hypothetical bargain" and "hypothetical release" damages – but these do not indicate the nature of the relevant hypothetical negotiation or bargain.

II. FACTUAL FINDINGS

Marathon's business

8. Marathon's investment management business was founded in the late 1980s by three individuals: Mr Neil Ostrer, Mr Jeremy Hosking and Mr William Arah. In 2004 the business was reorganised as a limited liability partnership (LLP). The funds which Marathon managed for its clients were of two main types. The "Global" funds, as the name implies, were invested in stocks worldwide. The "non-Global" funds (also referred to as "EAFE", denoting Europe, Australasia and the Far East) were aimed, in particular, at North American investors who wanted exposure to other international markets; they were "non-Global" only because their geographical scope excluded North America.

9. Marathon's business was extremely successful. By the end of 2011, Marathon had clients spread around the world and assets under management of some US$50bn. Marathon's profits in the year ending in March 2012 were approximately £146m.

10. Over time, however, tensions developed between the founders of Marathon. They disagreed over matters of business strategy, approach to investment and planning for the future. Increasingly, a divide emerged between Mr Ostrer and Mr Arah on the one side and Mr Hosking on the other.

11. The position was stabilised, in the short term, by an agreement reached between the founders in September 2006, which came to be known as the "separate beds agreement". This provided for a split between the Global business and the non-Global business. Control of the Global business was ceded to Mr Hosking and control of the non-Global business to Mr Ostrer and Mr Arah.

Recruitment of the Global team

12. The first four defendants in this action were subsequently employed by Marathon to assist Mr Hosking in developing the Global business and became known as the "Global team". The first to join was Mr James Seddon in November 2006, followed by Ms Louise Keeling in December 2006. Mr Luke Bridgeman was recruited in November 2009 and Mr Julius Mort in January 2011. Mr Seddon, Ms Keeling and Mr Mort were fund managers. Mr Bridgeman, whose background was in private equity investment, worked principally as an analyst focusing on companies in which Marathon held large stakes.

13. As a result of the separate beds agreement, the Global team functioned as a separate division of Marathon. The separation was accentuated when the Global division moved to a different floor of Marathon's offices. The members of the Global team developed a close working relationship with, and loyalty to, Mr Hosking. By contrast, they had very little contact, and little or no working relationship, with Mr Ostrer and Mr Arah.

The Marathon New Global Fund

14. In February 2008 a new Global product was launched, designed by Mr Hosking with the assistance of Mr Seddon and reflecting Mr Hosking's preferred investment

approach. It was called the Marathon New Global Fund. The fund was launched despite objections from Mr Ostrer and Mr Arah. It was successful. The fund's assets grew to around US$7bn and in the year to March 2012 it generated revenue of approximately £40m for Marathon.

15. Some investors in the New Global Fund were based in South Africa. The fifth defendant in this action, Ms Jennifer Buchanan, acted as a marketing agent for Marathon in South Africa under a consulting agreement dated 1 May 2002 between Marathon and the sixth defendant ("GIM"), a company of which Ms Buchanan was the sole shareholder.

Departure of Mr Hosking and the Global team

16. The separate beds agreement provided that it could not be altered for a minimum of five years. After that period had expired in September 2011, Mr Ostrer wanted to terminate the arrangement, while Mr Hosking wanted it to continue. Linked to this dispute was disagreement between the founders of Marathon over a range of issues. By early 2012, the relationship between them was permeated with acrimony. On 6 March 2012, Mr Ostrer commenced arbitration proceedings against Mr Hosking under the LLP deed seeking (among other things) a ruling on whether, and if so how, the separate beds agreement could be terminated. Lord Hoffmann was appointed as arbitrator and this arbitration – which never proceeded to an award – became known as "the Hoffmann arbitration". Clients and consultants had to be notified of the arbitration proceedings and some clients responded to the announcement by redeeming their investments with Marathon.

17. Matters came to a head when, on 5 April 2012, Mr Hosking gave six months' notice under the LLP deed of his intention to retire from Marathon. There followed a period of negotiations between the founders about the future of the firm. While these negotiations were taking place, Mr Hosking's retirement notice was put on hold under a series of standstill agreements. However, no resolution was reached. On 7 June 2012 Mr Hosking sought to withdraw his retirement notice but, at a members' meeting on 10 July 2012, Mr Ostrer and Mr Arah voted against allowing him to do so. No further standstill was agreed, with the result that Mr Hosking's notice of retirement became effective the next day.

18. Also on 10 July 2012, Mr Hosking commenced an arbitration under the LLP deed seeking a ruling on his ability to compete with Marathon after his retirement. In particular, under the terms of the LLP deed a founder member, following retirement, becomes a "non-executive" member of the firm and remains entitled to half of the profit share that he would have received as an "executive" member. There was uncertainty about whether Mr Hosking could set up a competing business without losing this entitlement. The arbitrator appointed to decide this question was Mr David Owen QC. This arbitration has been referred to as the "mini arbitration" (in contrast to the major arbitration proceedings which followed).

19. Once Mr Hosking's notice of retirement took effect, attention turned to what would happen to the Global team. On 13 July 2012, Mr Ostrer offered them a new remuneration package which was conditional on their remaining at Marathon for a period of 12 months. The offer was structured so that the remuneration would be doubled if all four team members accepted the offer immediately, and was otherwise

available for acceptance until 18 July 2012. None of the members of the Global team accepted this offer.

20. Between 16 and 18 July 2012, clients and consultants were notified of Mr Hosking's retirement from Marathon. As had been feared, there was a negative reaction to the news. In March 2012, before the announcement of the Hoffmann arbitration, Marathon's Global business had US$21.5bn of assets under management. By 21 August 2012, over 40% of these assets had been redeemed. By 27 November 2012, this proportion had risen to 55%, and by the end of the year to 65%. Thus, a client service update to Marathon's executive committee dated 5 February 2013 records that the total assets lost to the Global business between 12 March 2012 and 31 December 2012 amounted to US$13.8bn – of which US$13.3bn was related to the arbitration and Mr Hosking's retirement. A further US$1.3bn of assets were redeemed in the first quarter of 2013. After that, the position stabilised.

21. On 7 August 2012, Ms Buchanan gave three months' notice of termination of the consultancy agreement between GIM and Marathon. At a subsequent meeting with Mr Ostrer, she declined to reconsider the termination, which therefore took effect on 7 November 2012.

22. In the later part of July and in August 2012, Mr Ostrer had further negotiations with each of Mr Seddon, Ms Keeling and Mr Mort about whether they would stay at Marathon. He made no approach to Mr Bridgeman. On 31 August 2012, Mr Ostrer provided Mr Seddon with a written retention offer which was open for acceptance until 5 September 2012. Mr Seddon did not accept the offer and on 5 September 2012 he resigned from Marathon, giving the three months' notice required under his employment contract. Mr Mort and Ms Keeling resigned on 7 September, followed by Mr Bridgeman on 10 September 2012. The members of the Global team continued working during their notice periods and accordingly left Marathon just before Mr Hosking's retirement took effect on 11 December 2012.

23. The award in the mini arbitration was issued on 18 December 2012. Mr Owen QC held that Mr Hosking could compete with Marathon without losing his entitlement to a half share of profits. The LLP deed did nevertheless impose two relevant restrictions on Mr Hosking's freedom to compete with Marathon after his retirement. First, he was prohibited for a period of six months from practising within the UK a business of the kind carried on by Marathon. Second, he was prohibited for a period of 18 months from acting for or soliciting any client or person employed in the business of Marathon at the date of his retirement.

24. The contracts of employment of the members of the Global team also contained a restrictive covenant which prohibited them for a period of six months after leaving Marathon from soliciting or contacting anyone who was or had been a client or a prospective client of Marathon during the year preceding their departure.

Formation of a competing business

25. While they were still working at Marathon, the members of the Global team had discussions about the possibility of starting a new fund management business. Mr Bridgeman arranged several meetings with potential service providers and professional advisors. In the event, Ms Keeling chose not to join the new venture.

But the others went ahead. On 4 February 2013, Mr Seddon, Mr Mort and Mr Bridgeman incorporated Seculum Asset Management LLP. On 26 April 2013 a lease of premises was signed, and on 16 July 2013 a fund managed by Seculum was launched. However, the fund never attracted any investor.

26. In parallel, Mr Hosking incorporated Hosking & Co in Dublin on 13 February 2013. On 30 October 2013, the Hosking Global Fund was launched, with Mr Hosking putting his own money into the fund as the only investor. On 28 November 2013, Mr Hosking incorporated Hosking Research Limited, a wholly owned subsidiary of Hosking & Co, in England. On 1 January 2014, Mr Seddon, Mr Mort and Mr Bridgeman became employees of Hosking Research Limited.

27. The 18 month period during which Mr Hosking was prohibited from soliciting Marathon clients expired in June 2014. On 11 July 2014 the Hosking Global Fund received its first external investment. Seculum subsequently changed its name to Hosking Partners LLP and took over from Hosking & Co as the manager of the Hosking Global Fund. The members of Hosking Partners LLP now comprise Mr Hosking, Mr Seddon, Mr Mort, Mr Bridgeman and Ms Buchanan (along with three others). As at 31 March 2016, the Hosking Global Fund had 94 investors and assets under management of US$4bn.

The main arbitration proceedings

28. On 20 December 2012, immediately after the award in the mini arbitration had been issued, Marathon commenced further arbitration proceedings against Mr Hosking. Mr David Owen QC was again appointed as sole arbitrator. In these proceedings Marathon alleged that Mr Hosking had breached contractual and fiduciary duties owed to Marathon by having discussions with the members of the Global team and with Ms Buchanan while he was still working at Marathon about setting up a new fund management business. Marathon also alleged further breaches of duty by Mr Hosking in certain dealings with clients of Marathon. Marathon claimed that Mr Hosking thereby (i) caused the Global team to leave Marathon, (ii) caused Ms Buchanan to terminate GIM's consultancy, and (iii) undermined Marathon's relations with clients and caused Marathon to lose client business.

29. A hearing on issues of liability took place in May and June 2014. Mr Ostrer, Mr Arah, Mr Hosking, Ms Buchanan and the four members of the Global team (as well as other witnesses) gave oral evidence.

30. On 1 October 2014 the arbitrator issued a final award. The award, which runs to 190 pages, contains a very thorough examination of the evidence and issues. In the award, Mr Owen rejected some of Marathon's allegations but found other allegations proved. In particular, Mr Owen found that Mr Hosking had breached his duties to Marathon by:

    i) indicating at a meeting with Mr Seddon, Mr Mort and Mr Bridgeman, which took place in a café at some time between 10 and 13 July 2012, that there was a potential opportunity for the Global team to continue working with him in the future;

ii) producing over the weekend of 21 and 22 July 2012 a document entitled "Project Slipway", which he made available to Mr Bridgeman and Mr Mort, outlining a plan for a new investment management business;

iii) having discussions with Ms Keeling and Mr Seddon about his proposal for a new business involving the Global team;

iv) discussing with Ms Buchanan on 12 July 2012 the possibility that he would set up a new fund management business; and

v) failing to report these and certain other matters to Marathon.

31. The arbitrator found that Mr Hosking's breaches of duty had limited causative effect and that, absent any breach, Ms Keeling would still have resigned and Ms Buchanan would still have terminated the GIM consultancy. The arbitrator nevertheless concluded that Mr Hosking had caused Marathon to lose a real, albeit very slim, chance of retaining Mr Seddon, Mr Mort and Mr Bridgeman. He assessed this chance at 5%.

32. A substantial hearing on issues of quantum followed in July 2015. Mr Owen QC issued an award on 30 October 2015 in which he valued the lost chance in a sum of £1.38m. This valuation was based on a detailed examination of the likelihood that various investors would have been retained as clients if Mr Seddon, Mr Mort and Mr Bridgeman had not left Marathon. The arbitrator also held that Mr Hosking should forfeit 50% of his profit share as an executive member of Marathon for the period between July and December 2012 in which he was in breach of fiduciary duty. This amounted to some £10m. Mr Hosking appealed against the latter determination to the High Court. The appeal was dismissed on 5 October 2016: see *Hosking v Marathon Asset Management LLP* [2016] EWHC 2418 (Ch).

33. Marathon commenced another arbitration against Mr Hosking in April 2015. In this further arbitration Marathon alleged that Mr Hosking was in breach of the restrictions in the LLP deed which applied following his retirement and claimed that Marathon had thereby lost client business. This claim was settled at an early stage for a sum of £3.5m.

The present action

34. The present action was begun on 17 July 2013. In its particulars of claim Marathon alleged that the defendants were all parties to a common design to breach their own contractual obligations to Marathon and induce the other defendants and Mr Hosking to breach contractual or fiduciary obligations owed to Marathon, with the aim of establishing a competing business. The acts done pursuant to the common design allegedly included (amongst other actions) the removal by Mr Bridgeman of confidential information. (In the amended particulars of claim served on 15 May 2015 this allegation was extended to Mr Seddon.)

35. Pursuant to a consent order dated 20 December 2013, the action was stayed pending the outcome of the main arbitration proceedings. Under the terms of the order the defendants agreed to provide early standard disclosure on the basis that the documents disclosed could be used in the arbitration. In addition, the order provided that

Marathon will not invite the court to determine any issue in its favour if that issue has been decided adversely to Marathon in the arbitration so as to give rise to an issue estoppel in favour of Mr Hosking or to an issue estoppel in favour of any of the defendants if they had been parties to the arbitration.

36. The stay expired on 31 December 2014, but it was only after a case management conference on 18 December 2015 that the main steps were taken to progress this action towards a trial.

Settlements

37. Marathon's claims against Ms Keeling and Mr Mort were settled at the end of 2014 and beginning of 2015 respectively. Later, by a letter dated 3 February 2016, the remaining defendants made a joint offer of settlement under CPR Part 36. The offer was to settle the "common design claim" for a sum of £1.5m. The letter explained that the offer did not relate to the claim for misuse of confidential information nor to a counterclaim which GIM had made for sums allegedly due under its consulting agreement with Marathon, for the reason that each of those claims concerned only some and not all of the defendants.

38. Marathon did not accept the defendants' settlement offer immediately. But eventually, by a letter dated 19 September 2016, it did.

39. At a pre-trial review on 14 October 2016, GIM applied for summary judgment on its counterclaim, arguing that the settlement of the common design claim meant that Marathon had no real prospect of successfully defending the counterclaim. I rejected that application in a judgment given on 21 October 2016: see *Marathon Asset Management LLP v Seddon* [2016] EWHC 2615 (Comm).

40. Shortly before the start of the trial, the counterclaim was settled on Marathon agreeing to pay to GIM a sum of £250,000. This leaves the claim for misuse of confidential information.

Copying of files by Mr Bridgeman

41. Between 16 July and 26 October 2012 Mr Bridgeman copied from Marathon's server onto portable USB drives a substantial volume of documents. Marathon's headline figure is that over 40,000 documents were copied. This gives a somewhat exaggerated impression in so far as the material copied included Mr Bridgeman's email account, which contained 37,296 individual items. Even so, the amount of documentation collected by Mr Bridgeman on his USB drives was prodigious. The forensic evidence shows that files were copied on 19 dates: namely: 16, 24, 25, 27 and 31 July; 3, 8, 10, 29, 30 and 31 August (Mr Bridgeman was on holiday from 11-27 August); 5, 14 and 17 September; and 3, 17, 19, 24 and 26 October 2012.

42. The context in which this conduct took place was that, once Mr Hosking's retirement notice took effect on 10 July 2012 and it appeared inevitable that Mr Hosking would be leaving Marathon, Mr Bridgeman saw his own future as bleak. Unlike the other members of the Global team, Mr Bridgeman was not a fund manager and his prospects of getting a job at another investment management firm were limited. Moreover, his role at Marathon was closely linked to Mr Hosking and Mr Hosking's

approach to investment. Mr Hosking was a proponent of holding larger stakes in companies and investing in a wider range of assets than is usual in the industry, including unlisted shares. Mr Bridgeman had been recruited because Mr Hosking had wanted to have someone with a background in private equity to analyse such investments and engage with the companies in which Marathon held large stakes. This aspect of Mr Hosking's investment strategy was a bone of contention with Mr Ostrer and Mr Arah, who thought that it made the portfolio too illiquid.

43. It therefore seemed unlikely that the sort of investments in which Mr Bridgeman specialised would be continued after Mr Hosking left. If the other members of the Global team left as well, it seemed certain that Mr Bridgeman's role would be redundant. The fact that in the weeks after Mr Hosking's departure was announced Mr Ostrer had discussions with the other members of the Global team about staying at Marathon but made no approach to Mr Bridgeman simply served to confirm Mr Bridgeman's belief that his days at Marathon were numbered. As he graphically described in his evidence in the arbitration proceedings, he saw a "career graveyard" opening up in front of him.

44. Nevertheless, Mr Bridgeman thought that there might be a possibility of starting up a new fund management business with other members of the Global team, and with Mr Hosking if he was free to compete with Marathon. From late July 2012 onwards, Mr Bridgeman began to investigate and learn as much as he could about how to establish and operate a fund management business.

45. The first group of eight documents which Mr Bridgeman copied to a USB drive on 16 July 2012 included the LLP deed and a legal opinion from leading counsel containing advice on the extent to which the LLP deed restricted an outgoing member of the firm from subsequently carrying on an investment management business. The forensic evidence shows that Mr Bridgeman accessed these documents on his laptops on many occasions, which plainly reflects his pressing interest in the ability of Mr Hosking to join a new venture.

46. On the evening of 24 July 2012, Mr Bridgeman copied his entire Marathon email account from his Marathon laptop to a USB drive as a .pst file. However, when he connected the USB drive to his personal laptop he found that he could not access the emails. (Although Mr Bridgeman did not know the reason for this, the IT experts are agreed that it was because of the size of the file and the way in which the USB drive was formatted.) On the morning of 25 July 2012 Mr Bridgeman copied the file from the USB drive to the hard drive of his Marathon laptop, from which he was able to access its full contents. Later, on 5 September 2012, Mr Bridgeman copied the file back to the USB drive. There is a dispute, which I will come to later, about whether Mr Bridgeman ever successfully accessed his email account after he left Marathon.

47. Also on 25 July 2012, Mr Bridgeman copied onto the same USB drive the entire contents of his personal directory on the Marathon server, which comprised 2,665 documents. These documents included all the reports analysing companies and stocks which Mr Bridgeman had produced during his employment with Marathon, along with notes of meetings with company managers.

48. On 30 July 2012, Mr Bridgeman requested a copy of the latest prospectus for the Marathon New Global Fund from Marathon's General Counsel. He received the prospectus by email the next day and saved it to a USB drive.

49. On 2 August 2012, Mr Bridgeman contacted by telephone two investment management businesses based in Dublin called Prescient and Key Capital. Mr Bridgeman followed up these telephone conversations with emails sent the same day. His aim was to investigate the possibility of starting up a new investment management business under the umbrella of an existing firm which was already regulated and could provide the necessary systems and administrative services. As explained in the emails, Mr Bridgeman's thinking was that such an arrangement with an Irish firm might enable a new business to "hit the ground running" by taking on clients straight away and doing so outside the UK "in order for restrictive covenants not to be an issue".

50. On 9 August 2012 Mr Bridgeman went to Dublin and met (separately) representatives of Prescient and Key Capital. The day before this trip he created on one of his USB drives a folder which he named "Useful Docs". He saved to this folder six documents which contained information about Marathon's operating procedures and internal controls. On his return from Dublin on 10 August 2012, Mr Bridgeman copied further documents, which included the whole of Marathon's compliance manual, Marathon's most recent financial statements, a schedule of the fees agreed with the administrator and custodian of the New Global Fund and a report containing information about Marathon's pooled funds.

51. From 11 until 27 August 2012 Mr Bridgeman was on holiday. During this period (on 19 August 2012) he had a telephone conversation with Mr Seddon, who was also on holiday at the time, in which (according to Mr Seddon) Mr Bridgeman told Mr Seddon that he had contacted potential service providers. On his return from holiday, Mr Bridgeman met a representative of Key Capital on 28 August 2012 to discuss a presentation they had sent him about the services they could provide. On the same day Mr Bridgeman sent an email to Prescient to suggest a meeting. No meeting took place at this stage but on 6 September 2012 Prescient sent a proposal indicating the services they could offer.

52. On 29 August 2012, Mr Bridgeman saved to a USB drive 33 documents shortly after Mr Seddon had copied the documents to a common drive on the Marathon server. These documents included some which Marathon regards as especially sensitive and confidential. As mentioned earlier, the main factual dispute in this case concerns Mr Seddon's role in copying these documents and, in particular, his knowledge and purpose in doing so.

53. On the next day, 30 August 2012, Mr Bridgeman copied onto a USB drive every edition from 1994 to 2012 of Marathon's Global Investment Review. This publication was produced around eight times a year and sent to consultants, clients, prospective clients and some others in the investment community. It contained articles written by Marathon employees on topics of interest. On 31 August 2012, Mr Bridgeman copied around 400 of Marathon's most recent marketing presentations made to clients and prospective clients.

54. The vast bulk of the documents copied by Mr Bridgeman onto USB drives were copied before he gave notice of his resignation from Marathon on 10 September 2012. A few further individual documents were copied during his notice period.

55. Overall, the evidence shows that, between 16 July 2012 and the time when he left Marathon, Mr Bridgeman copied indiscriminately onto USB drives any documents to which he wanted to have access or thought that he might in future want to have access for his own purposes, either while he was still employed by Marathon or after he left. Such documents included documents which he wanted to consult or thought that he might want to consult to assist him in setting up a new investment management business. They also included documents which he thought might come in useful in conducting such a business, if his aspiration of starting up a new business with Mr Hosking and/or other members of the Global team was realised.

56. The documents copied by Mr Bridgeman which Marathon maintains would have been valuable in establishing a new, competing business can be divided into three broad categories:

   i) documents containing information about Marathon's clients;

   ii) documents containing information about Marathon's funds, including details of the portfolios and performance of each individual manager; and

   iii) documents containing information about Marathon's business operations, including documents relating to compliance with regulatory requirements and arrangements with service providers.

The lead up to Mr Seddon's resignation

57. In resolving the dispute about Mr Seddon's knowledge and intentions on 29 August 2012, it is relevant to have regard to his situation at that time. I accept his evidence that on 29 August 2012 he had not yet decided to resign from Marathon. But it is clear – and must have been clear to him – that he was close to leaving.

58. On 21 August 2012 Mr Ostrer had sent Mr Seddon a document entitled "Traditional Global and New Global". This outlined a plan to introduce a new "Traditional" Global fund from 1 January 2013 which would operate in parallel with the New Global Fund and would be invested in accordance with Mr Ostrer's preferred investment approach. Mr Seddon said in evidence that he regarded this proposal as "fundamentally unacceptable" because he thought it calculated to undermine the New Global Fund and inconsistent with the business philosophy to which he had been committed throughout his time at Marathon.

59. Either on 21 August 2012 or very shortly afterwards, Mr Seddon met Mr Ostrer to discuss the plan to launch a Traditional Global Fund. Mr Seddon tried to persuade Mr Ostrer that his plan was a mistake, but Mr Ostrer made it clear that it was not negotiable. Despite Mr Seddon's fundamental objection to Mr Ostrer's plan, Mr Ostrer had not given up hope that Mr Seddon might be persuaded to stay at Marathon. On 28 August 2012 he sent an email to Mr Seddon suggesting that they should continue discussions. They agreed that Mr Seddon would accompany Mr Ostrer to a company meeting scheduled for 1.30pm the next day (29 August) and that afterwards

they would sit down together to see if they could agree a basis on which Mr Seddon would stay at Marathon.

60. I have no doubt that Mr Seddon was prepared to consider any improved offer which Mr Ostrer might make to him but also that he was deeply pessimistic that they would reach a satisfactory agreement. Handwritten notes prepared by Mr Seddon before his meeting with Mr Ostrer on 29 August 2012 show his thinking at the time. In these notes he wrote "seen movie b4 … scary + bad ending". In his evidence Mr Seddon explained that this referred to his experience before leaving his previous employment, when he had learned the lesson not to stay at an organisation where the environment was not to his liking and where it was not possible for him to produce good investment performance. A further handwritten note stated "no good future @ MAM" [Marathon Asset Management]. This evidently reflected Mr Seddon's state of mind at the time and also (according to him) the tenor that he adopted at his meeting with Mr Ostrer.

61. I am sure that Mr Seddon also had in mind that, if he was going to resign from Marathon and wanted to maximise the prospect of being able to work with Mr Hosking, it was desirable to give the three months' notice required by his contract of employment by, at the latest, 10 September 2012. I do not think it a coincidence that all the members of the Global team in fact resigned on or very shortly before that date. Mr Bridgeman gave evidence that by August it was common knowledge within Marathon that, if any member of the Global team wanted to work with Mr Hosking, they would need to resign by 10 September 2012. This was because Mr Hosking was going to be retiring on 10 December 2012 and under the terms of the LLP deed Mr Hosking was restricted for the following 18 months in his ability to work with anyone who was employed by Marathon at the date of his retirement. Mr Bridgeman also said that he discussed this in general terms with the other members of the Global team. Mr Mort said the same in a witness statement made in these proceedings (although he was not called to give oral evidence). Ms Keeling gave evidence in the arbitration proceedings that she was aware of the significance of the 10 September date. Although Mr Seddon said in evidence that he did not know about this potential restriction on working with Mr Hosking, I am sure that he was well aware of it at the time.

62. Given the approach that Mr Ostrer had adopted when making his initial offer to retain the Global team on 13 July 2012 and the imminence of the 10 September date, Mr Seddon must have anticipated on the morning of 29 August 2012 that any offer made by Mr Ostrer when they met that afternoon might have a very short deadline for acceptance. He must also have anticipated that, if he rejected the offer and resigned in the next few days, he might be put on garden leave rather than being allowed to continue working during his notice period.

63. At 10.13 on 29 August 2012 Mr Bridgeman made a phone call to Withers LLP. Then, at 10.58 Mr Bridgeman sent a text message to Ms Keeling and Mr Mort to tell them that he and Mr Seddon would be "seeing the employment lawyer at Withers at 11am in order to make sure we are all well prepared for next steps", and to ask Ms Keeling and Mr Mort if they would like to attend or dial in to the meeting. Although this is not clear from the text message, the meeting at Withers had been arranged for 31 August 2012 (presumably at 11am on that day). Mr Seddon went with Mr Bridgeman to see the employment lawyer at Withers on 31 August 2012 (although Ms Keeling

and Mr Mort did not take up the invitation to join them). It is evident from the fact that this meeting was arranged by Mr Bridgeman on the morning of 29 August 2012 and that Mr Seddon agreed to come to it that they were both planning for the eventuality that they would very soon be leaving Marathon.

64. The forensic IT evidence indicates that Mr Seddon began to copy documents to a common drive on Marathon's server at 12.36 on 29 August 2012. At intervals over the course of the next hour, a further 32 documents were copied, with the last one timed at 13.32. At 14.53 Mr Bridgeman created a folder which he named "James" on one of his USB drives and saved to that folder the 33 documents which Mr Seddon had copied to the common drive.

65. It was Mr Ostrer's recollection that Mr Seddon did not show up for the company meeting at 1.30pm on 29 August 2012 and that he did not meet Mr Seddon to discuss his retention until 31 August. Mr Seddon, on the other hand, recalled that he did meet Mr Ostrer on 29 August 2012 and gave an account of the meeting. Since Mr Seddon was still sharing documents with Mr Bridgeman at 1.30pm when the company meeting was scheduled to begin (at another location), I think it likely that Mr Ostrer is correct that Mr Seddon did not come to the company meeting. But I also think it likely that Mr Ostrer and Mr Seddon did meet later that afternoon as planned and that at this meeting Mr Ostrer indicated the level of pay that he was prepared to offer – which Mr Seddon jotted down on the bottom corner of his handwritten notes. On the evening of 29 August 2012, Mr Seddon sent a text message to Mr Hosking asking to speak to him and they then had a telephone conversation lasting nearly 24 minutes. It is likely that the subject matter of this conversation was Mr Seddon's meeting with Mr Ostrer.

66. Mr Ostrer put his offer to Mr Seddon in writing in a letter dated 31 August 2012. The offer was open for acceptance until 5 September 2012. Mr Seddon did not regard the level of remuneration offered to him as acceptable and was in any case not prepared to stay at Marathon in view of what he saw as the fundamental differences in investment approach between himself and Mr Ostrer and Mr Ostrer's determination to launch a Traditional Global Fund alongside the New Global Fund. As mentioned earlier, Mr Seddon resigned on 5 September 2012.

The dispute about Mr Seddon's role in copying documents

67. It is Marathon's case that, when on 29 August 2012 Mr Seddon copied documents to a shared drive on Marathon's server, he did so in order to enable Mr Bridgeman to save the documents onto a USB drive so that the documents could be taken away when they left Marathon and used in a competing business. Marathon also alleges that on the same occasion Mr Seddon learnt that Mr Bridgeman had already copied other documents which he intended to take with him for use in a new business.

68. Marathon's case is supported by Mr Bridgeman's evidence. Mr Bridgeman gave evidence that on 29 August 2012 he told Mr Seddon that he had found a way of copying files from Marathon's systems onto a USB drive via his work laptop and suggested that, if there were any documents to which Mr Seddon might like to have access after leaving Marathon or which he thought Mr Bridgeman might be interested in, he should place them in a common folder from which Mr Bridgeman could save them to his USB drive. Mr Bridgeman accepted that it must have been apparent to Mr

Seddon from what he said that he had already copied other documents which he intended to take away with him. In his witness statement Mr Bridgeman said that he remembers standing next to Mr Seddon as he was selecting documents to put in the common folder but did not look very closely at what he was doing.

69. Mr Seddon agrees that he copied the documents in question to a shared drive where they were available to Mr Bridgeman but denies that he did so with the knowledge or intention that Mr Bridgeman would remove any of the documents from Marathon. According to Mr Seddon, on 29 August 2012 he and Mr Bridgeman had a long conversation about what was going on at Marathon. Mr Bridgeman was keen to discuss a whole range of matters including the dispute between Marathon's founders, Mr Seddon's reasons for objecting to Mr Ostrer's plan to introduce another Global fund, and the system of remuneration for members of the Global team. Mr Seddon said that during the course of the conversation he referred to a number of documents (some of which he may have opened while they were talking) and mentioned others. Mr Bridgeman asked if he could review these documents later and asked Mr Seddon to save them to a common drive. It was Mr Seddon's evidence that Mr Bridgeman specifically asked him for some of the documents – for example, he said he remembers Mr Bridgeman saying that he had never understood how the performance fee for the New Global Fund was calculated and asking if Mr Seddon had any documents which explained this. Mr Seddon also said that his thinking was that some of the documents might help to justify the continuance of Mr Bridgeman's role at Marathon.

70. Mr Seddon stated that he does not recall Mr Bridgeman telling him that he intended to copy documents from the common drive to a USB drive but, if Mr Bridgeman did tell him this, he did not understand that Mr Bridgeman was planning to retain the documents after leaving Marathon.

Findings about the sharing of documents

71. Making every allowance for the fallibility of human memory, it is hard to think that the explanation which Mr Bridgeman first gave in a witness statement made in March 2014 of how he came to save documents which Mr Seddon had shared with him to a portable USB drive could have been the product of faulty recollection. Nor is it obvious what reason Mr Bridgeman would have to lie about this, given that he does not exonerate himself by implicating Mr Seddon and that Mr Seddon is a business partner whom he works with on a daily basis. I do not need to place any reliance on Mr Bridgeman's evidence, however, in order to be satisfied – as I am – that Mr Seddon's account of what happened is false. The objective facts – including the forensic evidence, the nature of the documents copied and the context in which the copying occurred – all point inexorably to that conclusion.

72. Even considered on its own, Mr Seddon's explanation of why he shared documents with Mr Bridgeman makes little sense. There would have been no point in Mr Bridgeman reviewing documents on 29 August 2012 to seek to justify his role at Marathon, since his fate was – as both he and Mr Seddon recognised – out of his hands and entirely dependent on what happened to the rest of the Global team. Since the initial retention offer made to the whole Global team on 13 July 2012, Mr Ostrer had not made any further offer or approach to Mr Bridgeman. All the evidence indicates that at the end of August 2012 Mr Bridgeman's mind was focussed on what

he was going to do after leaving Marathon and on his plan to try to start up a new business. As part of this plan, Mr Bridgeman had for several weeks been systematically copying onto USB drives documents that he intended to take with him on leaving Marathon.

73. Mr Seddon knew, as he accepted in his evidence, that Mr Bridgeman wanted to continue working with the other members of the Global team. He knew that Mr Bridgeman had recently been to Dublin to meet potential service providers. And on the same morning that he shared documents with Mr Bridgeman, Mr Seddon had arranged to go with Mr Bridgeman in two dayss time to see an employment lawyer to make sure they were "well prepared for next steps". In these circumstances the idea that Mr Bridgeman was interested – or that Mr Seddon might have believed that he was interested – in copying or reviewing documents for any purpose other than starting up a new venture is hard to credit.

74. A telling piece of forensic evidence is that at 12:32:01 on 29 August 2012 a USB drive was connected to Mr Seddon's laptop. The record of the serial number shows that this was the same USB drive as the one on which – some 2½ hours later – Mr Bridgeman saved the files that Mr Seddon had made available to him. Although the USB drive was connected to Mr Seddon's laptop, no evidence was found on the laptop to indicate that the USB drive was accessed. That is consistent with the fact that Mr Seddon's laptop was configured so as not to allow documents to be saved to a USB drive. It was some four minutes later at 12:36:28 that Mr Seddon began copying documents to a common drive.

75. The obvious implication is that Mr Seddon's initial intention was to save documents directly onto Mr Bridgeman's USB drive. (Mr Seddon was not able to suggest any other possible explanation for the fact that the USB drive was first connected to his laptop.) When Mr Seddon found that he could not do this, he and Mr Bridgeman conceived another, more circuitous way of achieving the same result. This in turn shows that, contrary to his evidence, Mr Seddon was aware that Mr Bridgeman intended to save the documents to a USB drive, and that Mr Seddon intended this to happen. The obvious purpose of saving the documents on a USB drive rather than on Mr Bridgeman's Marathon laptop was to have them on a portable device which could be taken away from Marathon.

76. The first five documents copied by Mr Seddon to the common drive were copied in quick succession in less than four minutes between 12:36:28 and 12:40:14. This timing does not fit easily with Mr Seddon's account of the documents coming up and being discussed in the course of a conversation. It is, however, consistent with Mr Seddon selecting the documents as ones that he wanted Mr Bridgeman to copy.

77. Dealing with these five documents individually:

i) The first document copied by Mr Seddon was a spreadsheet named "sub portfolio history", which showed details of the individual performance of each fund manager who managed assets held in the Marathon New Global Fund for the whole period from the fund's inception in April 2008 to date. This was a key document so far as Mr Seddon was concerned, as it showed his individual performance record and enabled him to compare it with the performance of the seven other individual fund managers. It was a document which Mr Seddon emailed to his personal email address on several occasions, before and after 29 August 2012. His explanation for providing the sub portfolio history to Mr Bridgeman is that it related to a discussion they were having about how the remuneration that Mr Ostrer had offered Mr Seddon compared with what Mr Seddon could expect to receive under the existing system of remuneration, which was affected by performance. I doubt that any such discussion took place, since at the time when the document was copied Mr Seddon did not yet know what offer Mr Ostrer was going to make to him that afternoon and other evidence (including his own) suggests that he kept his negotiations with Mr Ostrer private (as also did Ms Keeling and Mr Mort) and did not discuss their content with other members of the Global team. Even if there was such a discussion, it is hard to see what point there would have been in Mr Bridgeman reviewing this document, let alone in saving it to a USB drive.

ii) Less than two minutes after copying the sub portfolio history, Mr Seddon saved to the common drive a spreadsheet showing the composition of each individual fund manager's portfolio. In his evidence he said that his reason for doing so was that this spreadsheet helped to explain to what extent the individual managers in the Global team had identical portfolios and whether that was the case for the non-Global team. Why Mr Bridgeman should have been interested in making such a comparison is not apparent. This was, however, another document of considerable interest to Mr Seddon, which he emailed to himself on other occasions. Within a minute of copying the spreadsheet Mr Seddon had also copied the next document to the common drive – a report referred to as the "Whiteboard".

iii) The "Whiteboard" contained a list of clients who had redeemed investments in Marathon's funds since 13 March 2012 (the day after clients and consultants were notified of the Hoffmann arbitration) and included comments on their reasons for doing so; it also listed a number of "pipeline" (prospective) clients. Such investors would have been obvious targets for marketing a new fund, particularly if it was managed by Mr Hosking. Mr Seddon said that he shared the Whiteboard with Mr Bridgeman because they were discussing what was happening to Marathon's Global business as a result of the announcement of Mr Hosking's retirement. That does not explain, however, why Mr Seddon or Mr Bridgeman would want to save the document to a USB drive. There was in any case no time for such a discussion before 70 seconds later Mr Seddon saved the next document to the common drive.

iv) The next document was a spreadsheet named "Performx" which showed the performance since inception of each of Marathon's pooled funds (including the New Global Fund) and segregated client accounts. Again, it is easy to see why this document was of interest to Mr Seddon as a fund manager but obscure why on 29 August 2012 Mr Bridgeman might have been interested in studying it. Mr Seddon's explanation was that part of their discussion was "about the Marathon history and the different products in Global and non-Global". There was, however, no time for such a discussion in the 45 seconds which elapsed between Mr Seddon saving this document to the common drive and his saving a copy of the "JS Holdings Report".

v) The “JS Holdings Report” showed all the holdings in Mr Seddon’s individual sub-portfolio of stocks. It was another key document from Mr Seddon’s point of view which he emailed to himself on other occasions. His explanation for sharing it with Mr Bridgeman was that “it formed part of the discussion as to how my portfolio was structured with a long tail of small holdings and including some of the companies that Luke [Bridgeman] was focused on.” The notion that on 29 August 2012 Mr Seddon and Mr Bridgeman spent time discussing the structure of Mr Seddon’s portfolio is fanciful. I think it clear in any case that they did not, since less than four minutes elapsed before the next two documents (which were unrelated to this subject) were copied to the common drive.

78. Copying of a further 28 documents to the common drive proceeded steadily over the following 50 minutes. In each case it is possible to see why Mr Seddon might have wanted to save the document so as to have it available after leaving Marathon, but difficult or impossible to conceive why Mr Bridgeman might have wanted to review the document in the situation existing on 29 August 2012. In each case Mr Seddon in his evidence either offered an implausible explanation of how the document allegedly related to a discussion he was having with Mr Bridgeman or could offer no explanation at all for why he might have shared it with Mr Bridgeman. Moreover, explanations put forward by Mr Seddon which seem far-fetched enough when the documents are looked at individually are completely incredible when the documents are viewed as a whole and the pattern and timing of the copying are taken into account. The longest gap between copying one document and the next was seven minutes 40 seconds, and there were a few gaps of four or five minutes. But in most cases the interval was less than two minutes. It is not possible to square these timings with what on Mr Seddon’s account would have been a discussion ranging over many facets of Marathon’s history and business. In most cases there would barely have been time to open the document and note the nature of its contents before moving on to the next, let alone time to discuss its significance for some theme to which it is said by Mr Seddon to have been relevant. It is also impossible to see how the discussion could have developed through any form of natural progression. Rather, it would have had to jump rapidly and disjointedly from one topic to another.

79. The only explanation which makes sense of the pattern is that, over the best part of an hour, Mr Seddon was systematically selecting documents which he intended Mr Bridgeman to save for potential future use. My impression from their content is that Mr Seddon began by copying documents which immediately occurred to him as important, before moving on to documents of lesser importance which might be useful in starting a new business and ending with a number of documents of little relevance. These last documents are in fact some of the most revealing because the only intelligible reason for copying them is that Mr Seddon chose to keep them just in case he might want to refer to them in the future. The suggestion that Mr Bridgeman might have been interested in reviewing them lacks any sense.

80. It is unnecessary to go through each one of the documents, but to illustrate these points I will give some examples:

i) A number of the documents copied by Mr Seddon (albeit interspersed with others) showed the “active share” of each fund manager’s individual portfolio (including his own). The “active share” is a measure of how far the portfolio diverges from the holdings in a relevant benchmark portfolio. The fact that the Global team's portfolios had a high active share was a distinctive feature of their investment style and one which they emphasised in their marketing to clients. It was later used as a selling point in a marketing brochure prepared by Seculum. Mr Seddon's explanation for sharing these documents with Mr Bridgeman was that they were discussing a debate within Marathon about "the capabilities of the Global team and whether we could think independently or not". There is no evidence of any such debate within Marathon in August 2012 and no credible reason why, even if there had been such a debate, Mr Bridgeman would have wanted to study active share data for different portfolio managers at that time.

ii) Mr Seddon copied two documents showing the performance of the unusually long "tail" of smaller holdings in Marathon's Global portfolios in 2008 and 2009. This long tail was another distinctive feature of the investment strategy of Mr Hosking and the Global team which often came up in discussion with clients and consultants. The suggestion that Mr Bridgeman might have been concerned to review these historic documents on the basis that they were, according to Mr Seddon, "relevant to debates we had at Marathon" and to Mr Bridgeman's role is again not credible.

iii) Mr Seddon copied two old attendance notes of company meetings that he had made in 2007. He also copied two drafts of letters he had written to companies in which Marathon owned shares (both undated but probably written in 2008), which he described in his evidence as examples of shareholder activism. The notion that Mr Seddon might have wanted to keep these documents as evidence of such activism on his part is readily intelligible. The notion that they might have been referred to in a discussion of topical events in August 2012 or that Mr Bridgeman would have been interested in reviewing them is not. The same applies to another document copied by Mr Seddon, which was part of a debate with a broker in 2008 about the relative merits of companies buying back shares as opposed to paying special dividends as a means of creating shareholder value.

iv) The last but one document saved by Mr Seddon contained an explanation (written by him in around 2007) of why and how performance fees charged to investors should be applied to all the investor's assets, including any assets held in a "side pocket". According to Mr Seddon, the ability to have side pockets was a distinctive feature of the New Global Fund but not one which had in fact ever been employed since the fund was launched. Once again, the idea that this was a subject of topical interest to Mr Bridgeman in August 2012 parts company with reality. The only conceivable relevance of the document is that it might potentially have been useful in setting up a new investment fund which offered the facility to have side pockets.

81. Counsel for Mr Seddon emphasised that some of the documents copied to the common drive by Mr Seddon (nine on my count) were documents which he emailed to himself on other occasions. They argued that this contradicts the thesis that Mr Seddon intended Mr Bridgeman to save copies for him. I disagree. The fact that Mr Seddon emailed documents to himself on other occasions shows that the documents were of interest to him. In the case of four of the nine documents, however, the email

attaching the document had been sent four or five years earlier in 2007 or 2008, and there is no reason to think that Mr Seddon recalled this in August 2012 or had kept the document to hand. Other documents which Mr Seddon emailed to himself on other occasions (including after 29 August 2012) were documents such as the sub portfolio history which were very important to Mr Seddon and were regularly updated. The fact that Mr Seddon included these documents in those copied on 29 August 2012 indicates to me that he wanted to have the most recent version available to him if he resigned from Marathon in the next few days and was put on garden leave.

82. A further point on which counsel for Mr Seddon relied heavily is that, after they left Marathon, Mr Bridgeman never provided Mr Seddon with the documents which he had saved in the "James" folder on his USB drive. Indeed, as mentioned earlier, the forensic evidence shows that none of the files in this folder was ever subsequently accessed. However, the fact that none of the files was subsequently accessed in my view undermines rather than supports Mr Seddon's case. It contradicts Mr Seddon's claim that the documents were copied so that Mr Bridgeman could review them after their conversation. Had that truly been the purpose, it would have to be supposed that Mr Bridgeman immediately and completely lost interest in the documents which Mr Seddon had spent an hour laboriously copying for him.

83. If, on the other hand, the documents were saved for Mr Seddon, the fact that nothing was done with them for the next few months is readily explained by the fact that, although he resigned a few days later, Mr Seddon was not put on garden leave and continued to have access to his files at Marathon during his notice period. Then, after the Global team left Marathon in December 2012, it took some time to develop plans for a new business. It was not until around April 2013 that Mr Seddon began to work on a prospectus for a proposed new fund. By that time the files which Mr Bridgeman had saved to USB drives had become, in Mr Bridgeman's words, a "hot potato".

84. On 27 February 2013, Marathon's then solicitors wrote to each member of the Global team accusing them of acting in breach of their contractual duties to Marathon, in particular by collaborating in the establishment of a new investment business whilst still employed by Marathon. Amongst other things, the letter sent to Mr Seddon referred to the restriction in his contract on the use of confidential information and asked him to confirm that "you have not taken or removed or retained following the termination of your employment any sensitive or confidential business documentation belonging to Marathon (whether in hard copy or soft copy format or otherwise howsoever)." That confirmation was given by Withers LLP on behalf of Mr Seddon and the other members of the Global team in a letter dated 12 March 2013. It is not surprising that, having given an assurance that he had not retained any confidential documents, Mr Seddon never subsequently asked Mr Bridgeman to give him access to any of the files which were copied on 29 August 2012. Moreover, having denied by this letter that he had taken or removed any confidential documentation, any later admission that he had been involved in doing so would have required Mr Seddon to acknowledge that he had not been truthful in his response to Marathon's solicitors – or at the very least had been "economical with the truth". Instead, when later confronted with evidence of his involvement, Mr Seddon tried to brazen it out.

Conclusion on Mr Seddon's involvement

85. I conclude that, when Mr Seddon copied 33 files to a common drive on 29 August 2012, he did so with the intention that Mr Bridgeman would save them to a USB drive so that they would be available after Mr Seddon left Marathon. I find that by the time this happened Mr Seddon was seriously interested in the idea of starting up a new business with Mr Bridgeman and other members of the Global team, together, if possible, with Mr Hosking. I infer that the documents were all selected by Mr Seddon on the basis that they might be useful to have in the future if this plan was pursued. I think it inevitable that, when arranging to save these documents, Mr Bridgeman must have told Mr Seddon that he had already saved other documents which he was planning to retain. However, there is no evidence to support a finding that Mr Seddon was told any details of the other documents which Mr Bridgeman had already saved.

Subsequent correspondence and delivery up

86. Mr Bridgeman received a letter from Marathon's solicitors in the same terms as that sent to Mr Seddon on 27 February 2013 containing the same request for confirmation that he had not removed any confidential documents, and the same reply was sent on his behalf on 12 March 2013. When he gave the confirmation requested, Mr Bridgeman of course knew it to be untrue. For the next three months he continued to access documents that he had taken with him on leaving Marathon.

87. On 10 June 2013 (the day before the last of the contractual restrictions on Mr Hosking's freedom to compete with Marathon expired) Marathon's solicitors sent to the defendants' solicitors draft particulars of claim in these proceedings. By this time Marathon had discovered from forensic examination of Mr Bridgeman's Marathon laptop that he had copied numerous files to USB drives. The draft particulars of claim contained details of this activity which Marathon had discovered and included a proposed claim against Mr Bridgeman for an injunction for "the delivery up of Marathon's confidential and proprietary information as contained on the … USB drives and/or transferred to any other medium".

88. In response to this, Mr Bridgeman handed the USB drives to his solicitors who delivered up the files on the drives to Marathon on 8 July 2013. Since then, the solicitors have kept the USB drives in a secure place. On 11 September 2013 Mr Bridgeman's solicitors delivered up a further file containing his personal email account. They explained that this had not been delivered up previously because Mr Bridgeman had believed that the file had not been successfully copied to his USB drive; however, a forensic computer expert instructed by Mr Bridgeman's solicitors had been able to access its contents.

The IT expert evidence

89. IT experts instructed by Marathon and Mr Bridgeman, respectively, gave evidence at the trial. There was very little dispute between them and their evidence established the following:

    i) Each of the three USB drives on which Mr Bridgeman saved Marathon files contains a record of the date when each file on the drive was last accessed. It can therefore be determined with certainty which files copied to the USB drives were never subsequently accessed on those USB drives. Access for this purpose includes copying the file to another computer drive.

ii) The experts agreed that, of all the files that he copied to USB drives, only 52 files were ever subsequently accessed by Mr Bridgeman. There is also a substantial amount of evidence about the pattern of access to those files. The only information which is not necessarily complete is the number of occasions on which any given file was accessed and the precise nature of such access.

iii) In addition to his Marathon laptop, Mr Bridgeman used a personal laptop in 2012 which has been referred to as "Laptop A". In January 2013 he acquired a new personal laptop ("Laptop B"). Mr Bridgeman has retained Laptop A, but did not use it after 27 January 2013. As a result, there has been very little overwriting of relevant data on Laptop A and the experts have been able to reconstruct a more or less complete picture of access to Marathon files on that laptop.

iv) In the case of Laptop B, a significant amount of data have been overwritten by subsequent use of the computer – in particular, by the installation of the Windows 10 operating system in August 2015 followed by a further upgrade in December 2015. No forensic image of the data on Laptop B was preserved until 5 February 2016. In consequence, the evidence recovered from Laptop B provides an incomplete picture of the access to Marathon files that occurred on that computer. Nevertheless, the experts have been able to reconstruct from data which have been recovered a good deal of information about access to Marathon files on Laptop B.

90. The only real points in dispute are whether Mr Bridgeman after leaving Marathon (a) accessed any Marathon files on a computer other than Laptops A and B or (b) copied any Marathon files to another drive – either on another computer or on another storage device.

91. The experts have attempted to match access to Marathon files recorded on the USB drives after Laptop B was in use with evidence of such access recovered from Laptop B. There are three dates (4 and 6 February and 13 March 2013) for which the experts have established that all the access to Marathon files recorded on the USB drives occurred on Laptop B and four dates for which evidence of some of the relevant access has been found on Laptop B. For seven further dates on which Marathon files are known to have been accessed from the USB drives, no evidence of such access has been recovered from Laptop B.

92. In his first witness statement Mr Bridgeman sought to explain the occasions for which no evidence of access to Marathon files had been found on Laptop B on the basis that he had used a computer in a public library. However, a subject access request made under section 7 of the Data Protection Act 1998 has elicited that Mr Bridgeman used a library computer on only one of the relevant dates (21 March 2013). I do not think that when he made his witness statement Mr Bridgeman was being deceitful. Rather, he assumed (erroneously) from the fact that no relevant data had been found on Laptop B for dates on which he was known to have accessed Marathon files from the USB drives that he could not have used his laptop on these occasions and was doing his best to come up with another explanation. For some of the dates for which he

initially gave the public library explanation, evidence indicating that Laptop B was used has in fact since been recovered.

93. I do not attach weight to the opinion expressed by Marathon's expert, Mr Madden, that it is unlikely that all of the data recording all of the access to Marathon files on all of the dates for which no data have been recovered from Laptop B have been lost. I do not consider that Mr Madden had a reasonable basis for that opinion. He explained that the overwriting of data follows an unpredictable pattern (for example, recent data are as likely to be overwritten as older data) and that it is not possible to determine why some forensic artefacts have survived and others have not. He agreed that the continued use of Laptop B and the installation of Windows 10 had a significant impact in terms of overwriting data but also said that it is not possible to quantify how much information has been lost and what proportion has survived. In these circumstances he had no way of judging how likely or otherwise it is from a technical point of view that all the data relating to access to Marathon files on a given date (or on a particular proportion of the relevant dates) have been overwritten. What can, however, be said is that there is independent evidence for concluding that Laptop B was indeed used to access Marathon files on most of the dates for which either little trace or no trace of such access has been found on the laptop.

94. I have mentioned that there are four dates on which Marathon files are known (from information on the USB drives) to have been accessed and for which evidence of some but not all of the known access has been found on Laptop B. More specifically:

i) On 27 January 2013 Mr Bridgeman accessed two Marathon presentations from a USB drive and evidence of access to one of these presentations has been found on Laptop B.

ii) On 18 February 2013 Mr Bridgeman accessed four files from a USB drive and evidence of access to one of the files has been found on Laptop B.

iii) On 29 May 2013 Mr Bridgeman accessed five issues of Marathon's Global Investment Review from a USB drive and evidence of access to one of the files has been found on Laptop B.

iv) On 30 May 2013 Mr Bridgeman accessed eleven sections of Marathon's compliance manual (contained in separate files) from a USB drive and evidence of access to five of these files has been found on Laptop B.

95. It is unlikely that on these dates Mr Bridgeman accessed any of the relevant files using another computer. In particular, it is unlikely that Mr Bridgeman accessed one Marathon presentation on Laptop B but on the same day accessed another similar presentation on a different computer; or that he accessed one issue of the Global Investment Review on Laptop B but on the same day accessed four other issues on a different computer; or that he accessed five sections of Marathon's compliance manual on Laptop B but on the same day accessed six other sections of the manual on a different computer. I think it much more likely that all the access to Marathon files on these four dates took place on Laptop B but that some of the evidence of such access has not survived.

96. For two dates (29 January and 1 March 2013) evidence has been found on Laptop B of access to other files which Mr Bridgeman had stored on the USB drives but not of access to any of the Marathon files which Mr Bridgeman is known to have accessed from the USB drives on those dates. All but one of the Marathon files which Mr Bridgeman is known to have accessed on those dates were files which he repeatedly viewed on other occasions on his Marathon laptop and on Laptops A and B. (The one other file was a client presentation, and there are other occasions when Mr Bridgeman is known to have accessed client presentations on Laptop B.) In the circumstances it is unlikely that some other unknown computer was used to access any of the Marathon files on these two dates. I find it much more likely that Laptop B was used but that the data recording such access have been overwritten.

97. This leaves five dates on which Mr Bridgeman is known to have accessed Marathon files from his USB drives but for which no record of any access to files stored on the USB drives has been found on Laptop B. One of these dates (21 March 2013) is the occasion when Mr Bridgeman used a computer in a public library. As to the other four dates:

   i) On 27 February 2013 Mr Bridgeman accessed his employment contract, and on 12 March 2013 he accessed Marathon's prospectus, from a USB drive. These are both documents which Mr Bridgeman accessed on many other occasions from the USB drive using his known laptops. Furthermore, the dates in question precede the period (which began in April 2013) when Mr Bridgeman had the use of another computer at Seculum. I see no reason to suppose that Mr Bridgeman used some other unknown computer to access these files. Rather, in circumstances where it is clear that a significant amount of data on Laptop B have been lost, I find that the most likely explanation for the absence of evidence on Laptop B is that the data recording such access have been overwritten.

   ii) On 4 June 2013 Mr Bridgeman accessed two Marathon documents from a USB drive. One of these was a document showing the historic active share of Marathon's funds and the other was Marathon's audited accounts. Mr Bridgeman has explained that he looked at the first of these documents because he had been discussing with Mr Seddon and Mr Mort how high the active share of the Seculum fund would be and wanted to compare the active share of the New Global Fund with that of other Marathon funds.

   iii) On 6 June 2013 Mr Bridgeman again accessed two Marathon documents from a USB drive, one of which showed the fees paid to Marathon's custodian: Mr Bridgeman says that he wanted to compare the level of these fees with the fees that Seculum was being asked to pay to its custodian. This was the last occasion when Mr Bridgeman accessed any of the files which he retained on leaving Marathon before they were delivered up.

   iv) By June 2013 Mr Bridgeman had the use of another computer at Seculum which has not been made available for inspection. The times when the access took place on 4 and 6 June 2013 cannot be identified. It is entirely possible that Mr Bridgeman again used Laptop B on these dates but that the data recording such access have been overwritten and therefore lost. It is also possible that the reason why no record of the access to files made on these dates has been found on Laptop B is that the files were accessed using a computer at Seculum. There is insufficient evidence to enable me to say which of these possibilities is the more likely.

98. I conclude that on the last two dates on which Mr Bridgeman is known to have accessed Marathon files from his USB drives he may have used a computer at Seculum for that purpose; but that on all the other occasions (apart from one when he used a computer in a public library) he used his known laptops.

99. Even if there were more occasions on which Mr Bridgeman accessed any Marathon files from any of the USB drives using a computer other than his Marathon laptop and Laptops A and B, I see no reason to suppose that he copied any Marathon files to another device. He denies doing so and the forensic evidence shows that Mr Bridgeman's persistent practice was to access Marathon files directly from the USB drives. In particular:

i) For the period for which there is a very full forensic record before Mr Bridgeman started using Laptop B on 22 January 2013, the evidence shows that Mr Bridgeman invariably accessed Marathon files directly from the USB drives. In the case of some documents, such as counsel's opinion on whether Mr Hosking could compete with Marathon, he accessed the same document on many occasions.

ii) For the period after 27 January 2013 (when only Laptop B was in use) the pattern does not change. Mr Bridgeman continued to access Marathon files from the USB drives, sometimes repeatedly accessing the same document from the USB drive (without saving it to his laptop).

iii) If Mr Bridgeman had chosen to copy any of the files to another drive, I consider that the most likely location would have been the hard drive of his laptop. However, apart from Mr Bridgeman's employment contract and Marathon's prospectus, only one Marathon file (an issue of the Global Investment Review) was saved on Laptop B.

iv) I think it improbable in these circumstances that Mr Bridgeman copied any Marathon files to another device and accessed them elsewhere.

100. Marathon has raised a particular issue about whether Mr Bridgeman copied the file containing his email account to another device. As mentioned earlier (see paragraph 46 above), for technical reasons it was impossible to access the body of the file directly from the USB drive on which Mr Bridgeman had saved it, but Mr Bridgeman had been able to do so after copying the file to the hard drive of his Marathon laptop. The experts are agreed that he would also have been able to access all the emails if he had copied the file from the USB drive to the hard drive of Laptop A or Laptop B or another computer, or to an appropriately formatted external drive.

101. On 7 January 2013 Mr Bridgeman tried to access the file directly from the USB drive using Laptop A, and encountered the same problem as before. He tried again on 6 February 2013 using Laptop B. His evidence was that, having met with the same result, he then assumed that the file was inaccessible and gave up. Counsel for Marathon submitted that Mr Bridgeman has shown that he is not a man to give up

easily and that he is likely to have copied the file to another undisclosed computer or device from which he was able to access his entire email account. (If such a copy was made, it could only have been on 6 February 2013, as this is the date on which the file was last accessed from the USB drive.)

102. I see no reasonable basis for drawing such an inference. To the contrary, having tried unsuccessfully to access the file using two different laptops, I think that Mr Bridgeman would naturally have concluded that the file could only be accessed on his Marathon laptop. Had it occurred to him that it might be possible to access the file if it was copied to another drive, I would have expected Mr Bridgeman to have copied the file to the hard drive of Laptop B, which he did not. There is no evidence that Mr Bridgeman had any other computer available to him in February 2013 and I think it unlikely that he would have seen any point in copying the file from one external drive to another. Furthermore, the fact that Mr Bridgeman did not disclose the file in July 2013 but only did so in September 2013 (see paragraph 88 above) is consistent with his evidence that he had thought that the file was inaccessible until an IT expert advised him otherwise.

103. I conclude that Mr Bridgeman did not copy the file containing his email account – or any other file – from any of his USB drives to any undisclosed computer or other device.

Mr Bridgeman's use of confidential information

104. Marathon's witnesses devoted many pages of their witness statements to describing the commercial value of the documents copied by Mr Bridgeman and to explaining the advantages which certain of the documents or types of document would have afforded the defendants in starting up a new venture. Marathon's witnesses focussed particularly on the "Whiteboard" and other documents which they said would have assisted Mr Bridgeman and Mr Seddon in targeting Marathon's current and former clients. Their core allegation was that the use of the files copied by Mr Bridgeman would have enabled the defendants to "hit the ground running" – a phrase taken from an email sent by Mr Bridgeman on 2 August 2012 to a potential service provider (see paragraph 49 above).

105. The fact is, however, that this did not happen. When Mr Bridgeman and Mr Seddon left Marathon, they did not "hit the ground running". They took several months to form Seculum and it was not until July 2013 that Seculum launched a fund – which never attracted any investor. By the time that fund was launched, all the files which Mr Bridgeman had copied had been delivered up to Marathon, apart from the file containing his email account which was delivered up in September 2013. It was not until July 2014, after Seculum had merged with Mr Hosking's business, that a competing fund began to receive external investment. Accordingly, there was never an opportunity to use any information in the files removed by Mr Bridgeman to target any of Marathon's clients or former clients.

106. There is no evidence that Mr Bridgeman ever shared any of the documents saved on his USB drives with either of his colleagues at Seculum (Mr Seddon and Mr Mort). Furthermore, it is known with certainty that most of the files copied by Mr Bridgeman were never subsequently accessed. That includes the "Whiteboard" and all the other documents provided to Mr Bridgeman on 29 August 2012 by Mr Seddon.

107. Of Marathon's headline total of over 40,000 files which Mr Bridgeman copied, I have mentioned that only 52 files were ever accessed by Mr Bridgeman. Of these files, only 11 contained some client information. Seven of these 11 files were presentations made to clients. Another was the pooled funds report referred to at paragraph 50 above. There is no evidence to suggest that Mr Bridgeman (or Seculum) derived any material benefit from looking at these documents.

108. Of the other files which Mr Bridgeman accessed, 16 related to compliance and regulatory matters. These included several sections of Marathon's compliance manual. Seculum did not, however, reproduce Marathon's compliance manual but paid a consultant to create one for it. Mr Bridgeman looked at sections of Marathon's compliance manual only as a cross-check. Two other documents in this category related to Marathon's arrangements with third party service providers.

109. 12 of the 52 documents contained information about Marathon's funds. In addition to Marathon's prospectus, to which Mr Seddon had access in any event in his capacity as an investor, these documents included eight articles published in Marathon's Global Investment Review and a spreadsheet containing details of Mr Mort's portfolio.

110. Overall, there is a vast gulf between the extent of the use which Marathon says could potentially have been made of the files removed by Mr Bridgeman – on which its claim for damages is based, and the very limited use which the evidence shows was in fact made of them.

III. LEGAL LIABILITY

Mr Bridgeman

111. The law implies into a contract of employment an undertaking by the employee to carry out the employment with fidelity and good faith. It is long established that this duty of fidelity includes an obligation on the employee to use information which is confidential to the employer solely for the purposes of the employment relationship and not for any other purpose: see *Merryweather v Moore* [1882] 2 Ch 518, 524; *Robb v Green* [1895] 2 QB 315, 317, 318-9, 320. Mr Bridgeman has admitted that his actions in copying documents with the intention of using or keeping them to use for his own purposes amounted to a breach of the duty of fidelity that he owed to Marathon.

112. In addition to the implied duty of fidelity, Mr Bridgeman's contract of employment contained an express term concerning confidentiality. Clause 12 of the contract provides as follows:

> "Confidentiality
>
> You shall neither during your employment (except in the proper performance of your duties) nor at any time (without limit) after the termination of your employment:
>
> (a) divulge or communicate to any person, company, business entity or other organisation;

> (b) use for your own purposes or for any purposes other than those of the Company; or
>
> (c) through any failure to exercise due care and diligence, cause any unauthorised disclosure of
>
> any trade secrets or Confidential Information relating to the Company. These restrictions shall cease to apply to any information which shall become available to the public generally otherwise than through the default of an employee.
>
> "Confidential Information" shall include (without limitation) details of suppliers (including, but not limited to, brokers) and their terms of business, details of clients and their requirements, marketing plans, financial information, results and forecasts (save to the extent that these are included in published audited accounts), any proposals relating to the acquisition or disposal of a company or business or any part thereof or to any proposed expansion or contraction of activities, details of employees and of their remuneration and other benefits paid to them, information relating to research activities and investments on behalf of clients, any information which you are told is confidential and any information which has been given to the Company in confidence by clients, suppliers or other persons.
>
> All notes, memoranda, records, lists of clients and suppliers and employees, correspondence, documents, computer and other disc and tapes, data listings and other documents and material whatsoever (whether made or created by you or otherwise) relating to the business of the Company (and any copies of the same):
>
> (a) shall be and remain the property of the Company; and
>
> (b) shall be handed over by you to the Company on demand and in any event on the termination of your employment."

113. This clause contains three distinct obligations:

i) An obligation during the employment not to disclose and not to use for any purposes other than those of Marathon any confidential information (as defined);

ii) A similar obligation expressed to continue indefinitely after the termination of the employment; and

iii) An obligation (repeated in clause 6.5 of the contract) to hand over documents to Marathon on the termination of the employment.

114. Mr Bridgeman accepts that the first and third of these obligations are legally enforceable and that he was in breach of them. Marathon does not seek to rely on the

second obligation in so far as it goes beyond the restriction on the use of confidential information after the termination of the employment relationship which would anyway exist without any express term. That concession was realistic. The post-termination limb of clause 12 is drawn so widely that it plainly amounts, in my view, to an unreasonable restriction on the right to work. It would therefore be contrary to public policy to enforce it.

115. In the leading case of *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 the plaintiff company carried on a business of selling fresh chickens from refrigerated vans. The company's sales manager left and set up a competing business, in which several of the company's former van salesmen were also employed. In an action brought against its former employees, the company argued that they were in breach of an implied term of their contracts of employment not to use sales information acquired in the course of their employment. The relevant sales information consisted of the names and addresses of customers, the routes taken to reach the customers' premises, the times when deliveries were made, the customers' regular requirements and the prices charged (which varied between customers). The Court of Appeal affirmed the judge's decision that this sales information came within a category of confidential information which the defendants were bound to use only for their employer's purposes during their employment but were free to use in another job after the employment had ended.

116. It is fair to say that the judgment of the Court of Appeal does not clearly distinguish between two questions: (1) the question whether particular information acquired in the course of employment is confidential (and therefore may not, for example, be disclosed to a competitor of the employer) even though there is no term of the employment contract which says so expressly; and (2) the question whether, even though information is confidential, a former employee cannot be prevented from using it for the purposes of subsequent employment. But, as I read it, the *ratio* of the case is that an individual will not be prevented from using for the purposes of subsequent employment confidential information which has become part of their general skill, experience and knowledge, as such a restriction would unreasonably interfere with their right to work.

117. The sales information at issue in the *Faccenda Chicken* case fell into this category principally because it was information which (a) the employees had learnt in the ordinary course of their work and carried away in their heads and (b) could not easily be isolated from other information which the employees were undeniably free to use. Different considerations apply where information is embodied in a particular document such as a list of customers: see e.g. *Robb v Green* [1895] 2 QB 315; *Roger Bullivant Ltd v Ellis* [1986] ICR 464; *Universal Thermosystems Ltd v Hibben* [1992] 1 WLR 840. It is difficult to see how it could be contrary to public policy to prevent a former employee from using a particular confidential document for the purposes of subsequent employment, even when the employee cannot be prevented from using information contained in the document in so far as it has become part of his or her general knowledge.

118. In the present case, clause 12 of Mr Bridgeman's employment contract purports to prevent him from ever using any information about Marathon's business acquired during his employment even when it was simply carried away in his head and not embodied in any document. The definition of "Confidential Information" includes, for example, "information relating to … investments on behalf of clients". I have

expressed my view that, because it is so widely drawn, this restriction is unenforceable. Marathon only complains, however, about the use of information in documentary form. In so far as information embodied in documents which Mr Bridgeman removed from Marathon was confidential, it cannot be said – and has not been argued – that preventing him from keeping and using such documents for his own purposes was an unreasonable restraint on his freedom to earn a living.

119. A person may be under an obligation to keep a particular document confidential even though the obligation would not apply to the same information in another form. In *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203, for example, the plaintiffs instructed the defendants to manufacture tools for making leather punches using confidential drawings provided by the plaintiffs for this purpose. The defendants used the drawings to make further tools for their own purposes from which they manufactured leather punches which they sold on their own account. The defendants could have bought one of the leather punches in a shop and worked out how to make the necessary tools without using the plaintiffs' drawings. That, however, did not prevent the drawings from being protected as confidential in circumstances where, by using the drawings, the defendants had saved themselves a great deal of labour: (1948) 65 RPC 203 at 215; and see also *Force India Formula One Team Ltd v Aerolab SRL* [2013] RPC 36 at paras 72-74.

120. This point is important in the present case. Some of the documents copied by Mr Bridgeman were indisputably confidential in that they contained commercially sensitive information which was secret to Marathon and could not be obtained elsewhere. The prime example is the Whiteboard, which listed clients of Marathon who had redeemed investments since March 2012 and the reasons for the redemptions (where known). There were other documents which cannot, in my view, properly be regarded as confidential because the information which they contained was so freely available. An example is Marathon's prospectus which was generally available to anyone who was interested in investing in Marathon's funds (and which, as an investor, Mr Seddon was entitled to receive without any limitation on its use). Many of the documents which Mr Bridgeman copied and retained when he left Marathon, however, fell into an intermediate category. They contained information which could have been obtained from other sources but not without a significant cost – if not directly in money, then in terms of time and effort. Such documents (as well as the documents in the first category) were, in my view, protected by a duty of confidence which continued after Mr Bridgeman's employment had ended.

Breach of confidence

121. In the *Faccenda Chicken* case the Court of Appeal regarded the duty not to disclose or use confidential information after the employment has ended as an implied term of the employment contract. There is no need so to characterise it, however, as such a duty arises under a general principle of law which does not depend on the existence of a contractual relationship between the parties. In *Attorney-General v Guardian Newspapers Ltd (No 2) ("Spycatcher")* [1990] 1 AC 109 at 281, Lord Goff stated the general principle as being that:

> "a duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is

> confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at para 13, Lord Nicholls endorsed this statement of principle and said:

> "This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. ... Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential."

See also paras 47-8 (Lord Hoffmann), 87 (Lord Hope) and 134 (Baroness Hale); and see *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556 at para 23 (Lord Neuberger).

122. Accordingly, a situation in which the defendant has agreed to keep information confidential is merely one application of the general principle under which a duty of confidence is imposed by law. To make, retain, or supply to a third party a copy of a document whose contents are, and were or ought to have been appreciated by the defendant to be, confidential to the claimant is a breach of this duty: see *Tchenguiz v Imerman* [2011] Fam 116, para 69. It follows that, to the extent that he is liable to Marathon for breach of contract in copying and retaining for his own purposes documents containing confidential information, Mr Bridgeman is also liable to Marathon for breach of a duty of confidence. Nothing turns on the existence of this additional basis of liability so far as Mr Bridgeman is concerned but, as I will indicate in a moment, it is potentially significant for Marathon's claim against Mr Seddon.

123. An objection was made by the defendants that a claim for breach of confidence has not been pleaded. I see no merit in this complaint. It is true that the amended particulars of claim do not state that the defendants owed a duty of confidence under the general law as well as under their contracts of employment, but the facts on which Marathon relies are pleaded in the amended particulars of claim and sufficient notice of Marathon's intention to assert such a duty was given in its particulars of loss.

Liability of Mr Seddon

124. Mr Seddon's contract of employment was in similar terms to Mr Bridgeman's and contained the same clause 12 (quoted at paragraph 112 above). It follows from the conclusions I have already reached that, in sharing 33 files with Mr Bridgeman on 29 August 2012 with the intention that Mr Bridgeman would keep them on a portable drive for use after they left Marathon, Mr Seddon was in breach of clause 12 of his employment contract and of the implied contractual duty of fidelity which he owed to Marathon. It likewise follows that Mr Seddon was also in breach of a duty of confidence owed to Marathon under the general law.

125. Marathon seeks to go further, however, and to hold Mr Seddon liable for (a) Mr Bridgeman's conduct in copying and retaining other files and (b) Mr Bridgeman's breach of contract in failing to return files which he had copied (including the 33 files

provided to him by Mr Seddon) on the termination of his employment. Marathon has sought to establish such liability on three alternative grounds:

i) Participation in a common design with Mr Bridgeman to misuse confidential information;

ii) Conspiracy to injure Marathon by unlawful means; and

iii) Breach of a contractual duty to report Mr Bridgeman's conduct to Marathon.

Can Marathon rely on additional grounds?

126. Both defendants have taken a preliminary point that it is not open to Marathon to rely on these grounds because they form part of the "common design claim" which was compromised by Marathon's acceptance of the defendants' Part 36 offer (see paragraphs 37-38 above). I do not accept this. As I interpret the amended particulars of claim and the letter containing the defendants' offer, the "common design claim" which the defendants offered – and Marathon agreed – to settle was, broadly stated, a claim that the defendants acted together in breach of duties which they and Mr Hosking owed to Marathon with the aim of establishing a competing business. In its particulars of loss Marathon claimed that these breaches of duty caused Marathon loss and damage consisting of: (i) loss of profits resulting from the resignations of Mr Seddon, Mr Bridgeman and Mr Mort; (ii) loss of profits resulting from the diversion of Marathon's South African and Australian client base; and (iii) loss of profits resulting from the solicitation of clients in breach of restrictive covenants.

127. The allegations that Mr Bridgeman and Mr Seddon copied and removed files containing confidential information are relied on in the amended particulars of claim in two ways. They are among the actions said to have been done in pursuance of the alleged common design and which allegedly resulted in loss of profits under the three heads mentioned above. But the same actions are also relied on to found a separate claim for damages in the amount that would have been agreed in a hypothetical negotiation to release Mr Bridgeman and Mr Seddon from their obligations owed to Marathon in respect of the relevant files. No doubt because of this overlap, the "common design claim" and the "misuse claim" were distinguished in the defendants' offer letter by reference to the two different paragraphs of the amended particulars of claim in which the claims for (i) loss of profits and (ii) what I am calling "licence fee damages" are respectively pleaded. As mentioned earlier, the offer letter specifically excluded the "misuse claim" from the scope of the defendants' Part 36 offer. The result, in my view, is that the acceptance of the offer prevented Marathon from pursuing its claim for loss of profits; but it still left Marathon free to pursue its claim for licence fee damages in respect of the misuse of confidential information and to rely on any of the factual allegations made in the amended particulars of claim in so far as they are relevant for that purpose.

128. I therefore consider that, in so far as allegations of common design, conspiracy and failure to report misconduct made in the amended particulars of claim relate to the alleged actions of Mr Bridgeman and Mr Seddon in copying and removing files containing confidential information, Marathon is entitled to rely on those allegations at this trial.

129. Counsel for Mr Seddon made a further argument that the misuse claim is inconsistent with the common design claim and that it would in these circumstances be unjust to award damages on the misuse claim in addition to the money which Marathon has received in settlement of the common design claim. The inconsistency was said to arise because the common design claim included an allegation that, but for the defendants' breaches of duty, Marathon would probably have retained Mr Seddon and Mr Bridgeman, whereas the misuse claim is premised on the fact that they left Marathon. This is not a good argument. There were in fact scenarios on which Marathon could have made a substantial recovery on the common design claim even if it had been found that, but for the defendants' breaches of duty, Mr Seddon and Mr Bridgeman would probably have stayed at Marathon. Even if the common design claim had gone to trial, however, and Marathon had recovered damages on the basis that the defendants' breaches of duty had caused the departure of Mr Seddon and Mr Bridgeman with a consequent loss of client business, there would have been no inconsistency (or overlap) in pursuing the misuse claim. In deciding what damages, if any, should be awarded on the misuse claim, the relevant counterfactual question is not what would have happened if Mr Seddon and Mr Bridgeman had stayed at Marathon, but what would have happened if they had left Marathon without copying or taking with them any confidential information.

130. The argument based on alleged inconsistency between the misuse claim and the common design claim was not mentioned by counsel for Mr Seddon in closing submissions. Instead, another inconsistency argument was advanced which seems to me equally bad. This argument again relied on the fact that the misuse claim is founded on the factual premise that Mr Seddon and Mr Bridgeman left Marathon. It was submitted that this premise directly contradicts the basis on which Marathon recovered damages from Mr Hosking in the arbitration proceedings because those damages were awarded on the basis that, but for Mr Hosking's breaches of fiduciary duty, there was a real chance of Mr Seddon and Mr Bridgeman remaining at Marathon. Again, however, there is no inconsistency because in the misuse claim Marathon is not seeking a remedy for business lost as a result of the departure of Mr Seddon and Mr Bridgeman: it is seeking a remedy for their misuse of Marathon's confidential information. It is common ground that the only loss of client business that is potentially relevant at this trial is any *additional* business lost through the use of Marathon's confidential information over and above business that would have been lost in any case as a result of the departure of the Global team and/or Mr Hosking (see further paragraph 151 below).

Common design

131. I have already held that Mr Bridgeman's actions in copying and retaining for his own purposes documents containing confidential information about Marathon's business amounted to a breach of a duty of confidence as well as a breach of contract. One way in which Marathon seeks to hold Mr Seddon liable for actions of Mr Bridgeman is on the basis of a joint liability for this breach of duty founded on a common design.

132. To establish liability for assisting another person in the commission of a tort, it is necessary to show that the defendant (i) acted in a way which furthered the commission of the tort by the other person and (ii) did so in pursuance of a common design to do, or secure the doing of, the acts which constituted the tort: see *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229, para 21. Although the origins of

breach of confidence as a legal wrong lie in equity rather than the common law, that historical accident should not prevent a defendant from being held liable for assisting in a breach of duty on the same principle of accessory liability that applies generally to tort claims. In *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556 at paras 32-33, the Supreme Court has accepted that the same general principle does indeed apply and that a defendant can be held liable for the wrongful use of confidential information by another person on the basis of a common design.

133. On the evidence, however, the only common design to misuse confidential information to which Mr Seddon was a party and which he did anything to further was a common design formed with Mr Bridgeman on 29 August 2012 to copy and keep for potential future use the 33 files which were copied on that date. It has not been shown that Mr Bridgeman copied any other files (before or after 29 August 2012) or made any other wrongful use of any files in pursuance of a common design with Mr Seddon. Nor has it been shown that Mr Seddon did anything in pursuance of a common design with Mr Bridgeman to misuse confidential information apart from his action on 29 August 2012 of saving the 33 files to a shared drive so that Mr Bridgeman could download them.

134. Apart from the copying and retention of those files, therefore, Marathon has failed to show any breach of a duty of confidence for which Mr Seddon is jointly liable with Mr Bridgeman.

Conspiracy

135. For similar reasons, Marathon cannot establish a wider liability on the part of Mr Seddon by invoking the tort of conspiracy to injure by unlawful means. The elements of this tort are a combination or agreement between the defendant and another person pursuant to which unlawful action is taken which causes loss or damage to the claimant and is intended or expected by the defendant to do so (whether or not this was the defendant's predominant purpose): see *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271, para 108. In the present case, the only relevant unlawful actions taken pursuant to a combination or agreement between Mr Seddon and Mr Bridgeman were the copying of files which took place on 29 August 2012 and Mr Bridgeman's retention of those files. It has not been shown that any of the other files which Mr Bridgeman copied unlawfully were copied (or removed) pursuant to a combination or agreement between himself and Mr Seddon.

136. Even in relation to the 33 files which Mr Seddon participated in copying, a conspiracy claim cannot succeed. That is because, as I will discuss later when I consider the issue of damages, the copying and retention of those files caused Marathon no loss – which is an essential element of the tort of conspiracy.

Failure to report misconduct

137. I have found that Mr Seddon learnt on 29 August 2012 that Mr Bridgeman had already copied files to a USB drive which he intended to take with him when he left Marathon, albeit that Mr Seddon did not learn which files (or how many files) Mr

Bridgeman had copied. Marathon contends that, on acquiring this knowledge, Mr Seddon had a contractual duty to report Mr Bridgeman's conduct to his employer.

138. There was no express term of Mr Seddon's employment contract which required him to report misconduct of a fellow employee. Whether a duty to report misconduct is to be implied as an aspect of the duty of fidelity and good faith depends on the circumstances, including the nature and terms of the employment, the nature of the misconduct, and how the employee has become aware of it. The leading authority on this point is *Sybron Corp v Rochem Ltd* [1984] 1 Ch 112, where an employee in a senior executive position had conspired with other employees to perpetrate a large-scale commercial fraud on their employer. The Court of Appeal held that the defendant employee was under a contractual duty to disclose the misconduct of his fellow employees notwithstanding that this would inevitably have involved disclosing his own role in the conspiracy. Fox LJ said (at 129):

> "I am not at all saying that an employee has in every case a duty to disclose to his employers any information that he has about breaches of duty by his fellow employees. I can see that ordinary usage is in many respects against such a rule. The matter must depend, I think, upon all the circumstances of the case. The important circumstances in the present case are that [the defendant] was in a senior executive position in the group and there was existing a continuing fraud by the employees against the company, of which he was well aware."

139. In the present case, Mr Seddon did not occupy an executive or managerial position at Marathon and did not have any responsibility for supervising Mr Bridgeman (or anyone else at Marathon). The relationship of the two men within the firm was one of professional colleagues, of equal standing. Nor was there any express term of Mr Seddon's employment contract from which any duty to report misconduct could be inferred. For example, Mr Seddon's contract did not include an obligation to protect or promote the firm's interests (cf *Swain v West (Butchers) Ltd* [1936] 3 All ER 261).

140. It is possible to conceive of circumstances – for example, discovering that another employee was embezzling large sums of money from Marathon – where it could nevertheless be said that any reasonable employee in Mr Seddon's position would have been bound to report the discovery and could not in good faith have stayed quiet. But I do not think that the facts of the present case come into this category. It is not suggested that the conduct of which Mr Seddon became aware involved any criminal offence. Nor did Mr Seddon have any evidence that Mr Bridgeman had done anything or was about to do anything which had caused or was about to cause financial loss to Marathon. He knew only that Mr Bridgeman had, in breach of his employment contract, copied files (with unknown content) to a USB drive with the intention of retaining them after he left Marathon. That by itself was not enough, in my view, to trigger an implied contractual duty to report.

141. I therefore reject Marathon's contention that Mr Seddon's failure to report Mr Bridgeman's breach of contract to Marathon was itself a breach of contract.

Conclusions on liability

142. In summary, I find that Mr Bridgeman was in breach of duties of confidence owed to Marathon in contract and under the general law in the following respects: (i) between 16 July and 26 October 2012 copying for his own purposes files containing information confidential to Marathon; (ii) retaining those files until 8 July 2013 (or, in the case of his email account, 11 September 2013); and (iii) accessing those files to the extent outlined in paragraphs 107-109 above. I further find that Mr Seddon: (i) was in breach of such duties in copying 33 files to a shared drive on 29 August 2012; and (ii) is jointly liable with Mr Bridgeman pursuant to a common design for Mr Bridgeman's breach of a duty of confidence in (a) copying those 33 files to a USB drive and (b) retaining them until 8 July 2013.

IV. DAMAGES

Quantification of Marathon's claim

143. Marathon contends that the appropriate measure of damages in this case is the amount of money which would reasonably have been agreed in a hypothetical negotiation between a willing seller in Marathon's position and a willing buyer in the position of the defendants to release the defendants from the duties to Marathon of which they were in breach.

144. The amount of damages claimed on this basis has been quantified by Mr Ostrer and Mr Arah in the sum of £15m. This is said to be the minimum price which Marathon would have required Mr Bridgeman and Mr Seddon to pay to release them from their obligations of confidentiality in respect of all the files removed by Mr Bridgeman. Mr Ostrer's starting point was that he would not have been willing to agree a fee to release the defendants from their obligations at all; but if he was required to do so, he would have considered that a fee of around £15m was necessary to reflect the commercial risks to Marathon and the benefits to a new competing business of having unrestricted access to the files. He noted that such a figure would have represented just over half of the revenue of the Marathon New Global Fund for the year to March 2012. Mr Arah said that he too would not have agreed to permit Mr Bridgeman and Mr Seddon to use the files copied by Mr Bridgeman at any price but, if required to make a contrary assumption, he agreed with Mr Ostrer's figure of around £15m, which sounded about right to him. In his oral evidence Mr Arah described this as "a very, very low figure".

145. Mr Ostrer also put a price on the 33 files shared by Mr Seddon with Mr Bridgeman on 29 August 2012. He did this by considering the nature of these documents, which he viewed as some of the most valuable, and comparing them with the totality of the files copied by Mr Bridgeman. On this basis he attributed a value to the 33 files of at least £2m.

Expert valuation evidence

146. Recognising that the court could not be expected to rely simply on the subjective views of Mr Ostrer and Mr Arah as to the value of Marathon's files, Marathon served a report from a forensic accountant, Mr Mark Bezant. In response, Mr Bridgeman served an expert report from Mr Nicholas Good. An issue as to whether this evidence

should be admitted was resolved by an agreement between the parties that the experts would not be called to give oral evidence, but that the court may place such reliance as it sees fit on their written reports.

147. The experts proceeded on the premise that the relevant question is to consider what price would have been arrived at in a hypothetical negotiation between a willing buyer and a willing seller assuming that each party was making reasonable use of its bargaining position and bearing in mind the information available and commercial context at the time of the hypothetical negotiation. Mr Bezant identified the subject matter of the hypothetical negotiation as "the release of Messrs Seddon and Bridgeman from their obligations to Marathon in respect of the removal of the Marathon files". He explained in his report that he was treating the parties to the negotiation as bargaining for the sale and purchase of the right to make commercial use of the information contained in the files which Mr Bridgeman copied and removed from Marathon, without any limitation on such use. Mr Good performed his calculations on a similar footing.

148. The experts agreed that the exercise which they undertook is inherently difficult not least because (i) there was no market for the right to use the relevant information, (ii) its value was highly specific to the parties concerned, and (iii) the hypothetical negotiation related to the grant of a right to a direct competitor to whom such a right would never have been granted in reality. Furthermore, they agreed that the situation could well be one in which the expected cost to Marathon of granting the right exceeded the expected benefit to the defendants of acquiring it, with the result that no consensus could in fact have been reached. In the light of the factual witness evidence, I am sure that this was indeed the case.

149. Mr Bezant's calculations were made as at 29 August 2012, ignoring hindsight. In order to estimate the result of the hypothetical negotiation, Mr Bezant made assumptions about: (i) the timetable for the launch of a competing business involving the defendants; (ii) the likelihood that Marathon would lose clients to the competing business as a result of the defendants' use of the relevant information; (iii) how quickly Marathon would lose clients; (iv) the assets under management that the competing business would acquire (from Marathon or elsewhere); (v) the likelihood that the competing business would survive; and (vi) the time period over which losses to Marathon and gains to the competing business would arise from use of the information.

150. His assumptions included the following:

i) Mr Seddon, Mr Bridgeman and Mr Mort would leave Marathon to establish a competing business;

ii) It was probable that Ms Keeling would also join;

iii) The competing business would be launched as soon as the Global team left Marathon in December 2012;

iv) The competing business would offer investment products similar to Marathon's Global products and would market itself as a continuation of Marathon's Global business;

v) It was probable that Ms Buchanan would assist the competing business in South Africa; and

vi) It was likely that Mr Hosking would join the competing business at some future date, which was at that stage uncertain.

151. A critical factor in Mr Bezant's calculations is the amount of client business which Marathon could be expected to lose to the competing business as a result of permitting it to use the information. The figures mentioned earlier (at paragraph 20 above) show that a substantial volume of assets had already been withdrawn from Marathon's funds by 29 August 2012 and that the redemptions continued until the second quarter of 2013. But these redemptions could not have been caused by the defendants' use of confidential information to attract Marathon's clients to invest in a fund launched by a competing business because no such fund or competing business yet existed at that time. It is common ground that Marathon's loss of client business was largely caused by Mr Hosking's resignation and the uncertainty about the firm's future which this created, exacerbated by the resignation of the Global team. The question on Mr Bezant's approach was therefore what *additional* loss of client business would have been expected to result from the use of Marathon's confidential documents, over and above business lost for other reasons. Mr Bezant performed calculations on three bases which assumed, respectively, that this additional loss would amount to (i) 5% (ii) 10% or (iii) 20% of the assets under management of the Marathon New Global Fund as at 29 August 2012. Mr Bezant also made alternative assumptions that the loss would endure for (a) a minimum of three years or (b) a maximum of six years. On these six permutations, Mr Bezant calculated a range of values between £2.5m and £39.4m.

152. Mr Good produced different calculations making somewhat different assumptions which arrived at a range of values between US$200,000 (assuming a 1% loss of assets under management) and US$13.8m (assuming a loss of 20% of assets under management).

153. The estimates made by the valuation experts of the price that would have been agreed in a hypothetical negotiation therefore range between US$200,000 and £39.4m (a figure almost 200 times higher). The very width of this range seems to me to reflect the inherent indeterminacy of the task they have attempted.

The position in principle

154. Before I discuss the authorities on which Marathon relies to support its claim for damages, I will start by considering the claim from first principles. It is axiomatic that the general object of an award of damages for a civil wrong is to compensate the claimant for injury caused by the defendant's wrongful act. Such injury may consist of financial loss; or it may consist of non-financial injury of a kind for which the law provides monetary compensation.

155. Sometimes when confidential information is misused, injury of a non-financial kind may be caused through, for example, invasion of the claimant's privacy. The present case, however, is a commercial case brought by a commercial entity whose only interest in maintaining confidentiality in information about its business is financial. Marathon has not alleged or attempted to show that the unlawful copying of

confidential information or any subsequent misuse of that information by the defendants caused Marathon to suffer any financial loss. It follows on the face of it that no injury has been sustained for which Marathon is entitled to be compensated in damages.

156. There are circumstances (which I will consider soon) in which, instead of claiming compensation for financial loss or other compensable injury, a claimant may seek a remedy which requires the defendant to pay to the claimant a sum of money which represents all or part of a gain made by the defendant from its wrongful act. Again, in a commercial case of the present kind, if this approach is available, the relevant gain could only be financial. Again, however, Marathon has not alleged nor attempted to show that Mr Bridgeman or Mr Seddon (or for that matter any business in which they have been involved since leaving Marathon) has made any financial gain by misusing Marathon's confidential information.

157. In circumstances where the misuse of confidential information by the defendants has neither caused Marathon to suffer any financial loss nor resulted in the defendants making any financial gain, it is hard to see how Marathon could be entitled to any remedy other than an award of nominal damages.

158. At the level of principle, counsel for Marathon have sought to justify a claim for substantial damages in three ways. First and foremost they have argued that "the principle of law is straightforward: if you take something, the law requires you to pay for it." They contended that the conduct of the defendants in copying and retaining Marathon's confidential files is analogous to the conversion or detention of goods and gives rise to a claim for damages representing the value of the information taken.

159. Far from being straightforward, I do not think that this argument bears scrutiny. The analogy with the conversion of goods breaks down because, by copying electronic data, Mr Bridgeman did not deprive Marathon of anything. Marathon's employees still had access to all of the information which was copied and their ability to use that information was unimpaired.[2] Nor can I accept that taking away a USB drive on which confidential information is stored is analogous to conversion of a cheque – another analogy which counsel for Marathon sought to draw. If a cheque is stolen and paid into the thief's bank account, there is a transfer of money from the owner of the cheque to the thief. By contrast, when a record of information which A owes a duty to B to keep confidential is wrongfully copied by A, the act of copying does not make B any poorer or A any richer. It is only if and when A makes use of the information that there may be an impact on the wealth of either or both parties.

160. Marathon's case can be tested by asking what the position would be if, after copying Marathon's files, Mr Bridgeman had thought better of his behaviour and had destroyed the USB drive on which they were stored or if he had put the USB drive in a drawer and never afterwards accessed the files. This is not a purely hypothetical example because it is in effect what happened in the case of the 33 files which Mr Seddon was jointly responsible for copying. In circumstances where these files were

---

[2] The present case can be contrasted in this respect with, for example, *Gorne v Scales* [2006] EWCA Civ 311, which did involve conversion as the claimant's confidential information was (solely) contained in a card index which the defendants did not merely copy but removed without permission.

never subsequently accessed I do not see how it can be said that Mr Seddon's wrongdoing made him any better off or Marathon any worse off.

161. The second justification which Marathon gave for seeking an award of substantial damages was that, even though no actual financial loss or gain has been shown, by copying Marathon's files onto USB drives which were retained on leaving Marathon's employment, Mr Bridgeman (and, to the extent of his involvement, Mr Seddon) exposed Marathon to a *risk* of loss and acquired an *opportunity* for financial gain.

162. This argument, in my view, is even more threadbare than the first. The law does not compensate people for being exposed to a risk of injury. If a man drives at high speed the wrong way round a roundabout putting the lives and safety of other people at risk, but by good fortune avoids an accident, he may be prosecuted and punished for dangerous driving; but the people whose safety he endangered cannot claim damages for having been exposed to a risk of injury. If the law were to recognise any such principle of compensation for exposure to risk, it is difficult to see where it would ever end. Equally, acquiring an opportunity to make a financial gain does not justify a remedy, if the opportunity is not in fact taken. Just as the law does not provide compensation for injuries which might have been but were not in fact suffered, courts do not order the surrender of hypothetical benefits which might have been but were not in fact gained.

163. The third argument advanced by Marathon was an argument based on uncertainty. The point was made that, when files containing confidential information are unlawfully copied, it may be extremely difficult or practically impossible to identify what subsequent use has been made of the information and what, if any, detriment to the claimant or benefit to the defendant has resulted. In these circumstances, it was argued, it is a just solution to require the defendant to pay a sum which represents the value of the information, assessed at the time when the breach of duty occurred on the assumption that the information would thereafter be exploited to whatever extent the defendant chose to do so – without requiring the claimant to prove what use was actually made of the information and what financial consequences actually ensued.

164. There are legal principles which may assist a claimant who has difficulty in proving loss. One such principle is that difficulty of estimation should not be allowed to deprive the claimant of a remedy, particularly where that difficulty is itself a result of the defendant's wrongdoing. Accordingly, the court will attempt as best it can to quantify the claimant's loss even where precise calculation is impossible. The court may do so by making reasonable assumptions about what the claimant's financial position would have been if the defendant had complied with its obligation to the claimant. A second principle is that, where the defendant has destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court will make presumptions in favour of the claimant. The classic illustration of this principle is the old case of *Armory v Delamirie* (1722) 1 Strange 505, 93 ER 664, where a chimney sweeper's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant did not return the jewel but only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated. According to the case report:

> "The Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."

165. These principles can help a claimant to overcome evidential difficulties in proving damages. There is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained,[3] or has in fact been adduced.[4] They may give the claimant a fair wind, but not a free ride.[5]

166. In this case there has been an extensive forensic investigation of the use made of the files which Mr Bridgeman copied. This investigation has established to a high degree of certainty that most of the files were never accessed and, in relation to those which were accessed, what use was made of them. In these circumstances, I cannot see a justification for awarding damages to Marathon for loss which it is known that Marathon did not suffer and use of information which the defendants did not make. The only purpose which such an award of damages or other financial remedy could serve in this case, as it seems to me, would be to punish the defendants for their wrongdoing or aim to deter others from engaging in such conduct. But save in very limited circumstances, which do not apply here, punishment and deterrence are not purposes for which damages for civil wrongs can be awarded in English law.

167. Unaided, or unhindered, by the case law on which Marathon relies, the conclusion that I would therefore reach is that there is no principled reason why the defendants should be ordered to pay any substantial damages to Marathon in this case. I must, however, examine whether this provisional conclusion is consistent with authority. I will begin by identifying two situations in which it is well established that a claimant who has not suffered financial loss as a result of the defendant's wrong may nevertheless be granted a financial remedy.

Breach of fiduciary duty

168. The first is where the defendant is in breach of a fiduciary duty owed to the claimant. Such a duty of its nature requires the fiduciary to subordinate her own interests to those of the principal to whom the duty is owed. If instead of doing so the fiduciary makes a profit for herself, the law will put the principal in the same position as if the duty had been performed. One way of doing so is by ordering the fiduciary to account for the profit. As Lord Templeman explained in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, 337:

> "[E]quity insists on treating [the fiduciary] as having acted in accordance with his duty; he will not be allowed to say that he

[3] See eg *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas* [2012] EWCA Civ 1407, paras 80, 122-3.
[4] See eg *Force India Formula One Team Ltd v Aerolab Srl* [2013] EWCA Civ 780, [2013] RPC 36, paras 92-93.
[5] See Adam Kramer, *The Law of Contract Damages* (2014) at 470-1.

> preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself … equity insists on treating it as a legitimate payment intended for the benefit of his principal."

169. In *Boardman v Phipps* [1967] 2 AC 46 this principle was applied in a case where the defendants had used confidential information acquired in their capacity as fiduciaries acting for a trust to make a profitable investment for themselves. The defendants were held liable to account for the profit they had made from the investment even though their actions had caused no loss to the trust (which was not in a position to make the investment itself).[6]

170. This principle is not applicable in the present case. It is not alleged that Mr Bridgeman or Mr Seddon owed any fiduciary duty to Marathon. Neither of them was a partner or director of Marathon. As employees, they owed (as discussed earlier) an implied contractual duty of fidelity and good faith, which included a duty not to use confidential information acquired in the course of their employment for any purpose other than the purposes of their employment. The duty of fidelity, however, is not a fiduciary duty. It does not require the employee to subordinate his own interests to those of the employer. The fidelity expected of the employee is not personal loyalty to the employer; it is fidelity to the employment relationship, which is defined by the contract of employment. As Elias J made clear in *University of Nottingham v Fishel* [2000] ICR 1462, 1491:

> "the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and ... [t]he employee's freedom of action is regulated by the contract ..."

See also *Ranson v Customer Systems plc* [2012] EWCA Civ 841, [2012] IRLR 769, paras 41-43.

The user principle

171. A second situation in which a claimant who has not suffered loss may be awarded a financial remedy is where the defendant's wrong consists in using the claimant's property for the defendant's own purposes. In such a case damages may be awarded representing the value of such use to the defendant. This principle has been called "the user principle" see *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406, 1416; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1083, para 87.

---

6 In fact, the defendants' actions, which involved taking over a company in which the trust owned shares, positively benefited the trust by increasing the value of its own shareholding.

172. The user principle was first developed in cases of trespass to land. In *Whitwham v Westminster Brymbo Coal Co* [1896] 1 Ch 894, affirmed [1896] 2 Ch 538, the defendants dumped spoil from their colliery on the plaintiffs' land. The plaintiffs were awarded damages measured as the reasonable value to the defendants of using that part of the land for tipping purposes. Another example is *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359, where the purchaser of a pontoon who wrongfully failed to collect it within a reasonable time from the berth where it was moored was held liable to pay damages representing the benefit of having had the use of the berth until the pontoon was eventually removed. The benefit was measured by what the purchaser of the pontoon would have had to pay for a berth elsewhere. These cases were followed in *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285, where trespassers who had occupied a residential property were ordered to pay damages based on the ordinary letting value of the property for the period of their occupation although the plaintiff had not proved that it would have let the property, had the property been vacant.

173. The user principle has also been applied to goods. In *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, the defendant hired theatre equipment from the plaintiff. After the hire period had ended, the defendant wrongly kept the equipment for a further period. The judge awarded damages based on the financial loss suffered by the plaintiff. He accordingly made an allowance to reflect his finding that, if the defendant had not wrongly detained the equipment, the plaintiff would only have been able to hire it out for part of the relevant period. On appeal the Court of Appeal held that the judge was wrong to make this deduction and that the plaintiff was entitled to damages representing a reasonable hire charge for the full period of the detention, even though the amount of such damages was more than the plaintiff's loss. Denning LJ said (at 254-5):

> "The claim for a hiring charge is ... not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods."

Misuse of intellectual property

174. The user principle applies to intellectual as well as physical property. Where intellectual property rights are infringed, the court may order an account of profits or award damages. If damages are awarded, the claimant is entitled to recover damages in respect of all sales of infringing articles made by the defendant, even if such sales have not caused loss by displacing sales that the claimant would otherwise have made itself. In *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* (1914) 31 RPC 104, 119, Lord Shaw stated the principle as being that:

> " wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, of price or hire. If A being a livery man, keeps his horse standing idle in the stable, and B against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'against what loss do you want to be

> restored? I restored the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'"

Lord Shaw also indicated that the appropriate "price or hire" could take the form of a royalty for each infringing article sold by the defendant; and he endorsed the view expressed by Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157 at 165 that, even if it has not been the claimant's practice to grant licences:

> " it would be right for the court to consider what would have been the price which – although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way. "

175. This approach was approved by the House of Lords in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819, 826. See also *Blayney (t/a Aardvark Jewelry) v Clogau St David's Gold Mines Ltd* [2002] EWCA Civ 1007, paras 19-20 (a copyright case).

176. The owner of a patent, trademark or copyright has an exclusive right to exploit the patented invention or the trademark or the copyrighted work. If another person derives a benefit from doing so without the owner's permission, the law requires that benefit to be surrendered to the owner of the right. Information which it would be a breach of confidence to disclose or use without permission is a similar kind of asset. It is true that the right to exploit the use of confidential information is not a property right in the sense of being a right against the whole world: it is a right which operates only against persons who owe a duty of confidence to the claimant. Nevertheless, as between the claimant and such a person, the claimant has the exclusive right to exploit the information. To protect that right, if the defendant derives a benefit from misusing confidential information, the defendant may be ordered to surrender the benefit to the claimant. As in other cases of misuse of protected intellectual property, such a remedy may take the form of an account of profits: see e.g. *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96; *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109. Alternatively, damages may be awarded on the user principle, calculated as a reasonable payment for the use made of the information: see e.g. *MVP 3 APS (formerly Vestergaard Frandsen A/S) v Bestnet Europe Ltd* [2016] EWCA Civ 541, paras 83-84.

The limits of the user principle

177. A line has, however, been drawn between claims based on the wrongful use of the claimant's physical or intellectual property and other claims in tort. In *Stoke-on-Trent Council v W & J Wass Ltd* [1988] 1 WLR 1406 the Court of Appeal refused to extend the user principle to a claim in nuisance. The defendant in that case had held a same day market in an area where the plaintiff had a right to operate such a market without disturbance. The plaintiff could not show that the defendant's market had caused it any loss but claimed damages calculated as a fee which the plaintiff could reasonably have charged to allow the defendant to hold a market lawfully. The Court of Appeal held that damages could not be recovered on this basis.

178. Nourse LJ suggested that the cases involving trespass to land and detention of goods in which the user principle has been applied could be distinguished on the ground that the defendant's use of the plaintiff's land or goods deprives the plaintiff of any opportunity of using the property itself – whereas an unlawful use of the plaintiff's right to hold its own market does not deprive the plaintiff of the opportunity to exercise the right (see 1414G-H). However, not every wrongful use of land for which damages may be awarded on the user principle does deprive the owner of the opportunity of using the land.[7] Nor does this explain the intellectual property cases. As I have indicated, damages are recoverable on the user principle for wrongful use of the claimant's patent or trademark or copyright or confidential information, even though such use has not deprived the claimant of the opportunity to use the asset itself. The distinction between intellectual property rights and market rights was explained by Nicholls LJ in a passage (at 1418G) which, as I see it, expresses the *ratio* of the *Wass* case:

> "A market right confers a monopoly, as does a patent, but the protection which the law affords to the owner of a market right is limited to protecting him against being disturbed in the enjoyment of his right. If an unauthorised market is held without disturbing the lawful market, the owner of the lawful market has no remedy, either for damages or otherwise. In such an event there is no place for an award of damages to be assessed on the user principle."

179. The difference, in other words, between a market right and the kind of property right possessed by the owner of a patent (or other intellectual or physical property) is that a market right is not an exclusive right to enjoy the benefits of holding markets in the relevant location but only a right to hold a market in that location without disturbance. There will be no such disturbance if, for example, the owner of the right is currently not exercising or seeking to exercise the right, and is not holding a market at all. It follows that the owner of a market right is entitled to recover damages only if and to the extent that the owner suffers loss as a result of the defendant's conduct.

180. This distinction also explains the decision of the Court of Appeal in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390. The claimants in that case had purchased vitamins from one or more of the defendants, who were found to have participated in cartels relating to the supply of vitamins in breach of statutory duties. A preliminary issue was tried to decide whether the claimants were entitled to pursue claims for user damages or an account of profits. The Court of Appeal answered that question in the negative. A majority (Arden and Tuckey LJJ) considered that the Court was bound by its earlier decision in the *Wass* case to hold that a remedy based on the defendant's gain cannot be awarded on a claim for a non-proprietary tort. Although Longmore LJ disagreed about that, he agreed with the other members of the Court of Appeal that the relevant breaches of competition law only gave the claimants a right to claim compensation for loss caused to them by the defendants' unlawful conduct and not a right to receive gains made by the defendants from their wrongful acts which the claimants would never have made themselves.

---

7 Nourse LJ implicitly recognised this by "putting to one side" the way-leave cases from which the user principle originated, though without giving a justification for doing so.

The *Wrotham Park* case

181. The case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 is significant for two main reasons. First, it extended the range of cases in which damages may be assessed by reference to the defendant's gain rather than any loss suffered by the claimant. Second, in quantifying the damages awarded, the court employed the concept of a hypothetical bargain between the parties to license the invasion of the claimant's right.

182. The facts were that land within the Wrotham Park estate was sold subject to a restrictive covenant "not to develop the said land for building purposes except in strict accordance with a lay-out plan to be first submitted to and approved in writing by the vendor …" Many years later a small area of the land to which the covenant applied, mostly consisting of wasteland, was acquired by a developer (Parkside), which began to build on it. The company which owned the estate brought an action against Parkside to enforce the restrictive covenant but did not apply for an interim injunction to halt the development. By the time of the trial, 14 houses had been built and sold by Parkside, and the purchasers of these houses were added as defendants to the action.

183. The trial judge (Brightman J) held that the restrictive covenant was enforceable but refused to grant a mandatory injunction on the ground that it would be "an unpardonable waste of much needed houses to direct that they now be pulled down": see [1974] 1 WLR 798, 811B. He went on to consider whether to award damages in substitution for an injunction under what is now section 50 of the Senior Courts Act 1981 (originally Lord Cairns's Act). The company which owned the estate had not suffered any financial damage (see 811B) and conceded that the development of the land had not diminished the value of the estate "by one farthing" (812G). But the judge thought it unjust "that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing" (812H).

184. In justifying an award of substantial damages, Brightman J drew an analogy with cases where the user principle has been applied. He considered that a similar principle should operate where the defendant Parkside had "invaded the plaintiffs' rights in order to reap a financial profit for itself" (814H). In his view, a just substitute for a mandatory injunction would be "such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a *quid pro quo* for relaxing the covenant" (815D). To assess this sum, the judge first identified the profit which Parkside made from the development, which was about £50,000. He then asked what percentage of that amount the landowner would reasonably have required for the relaxation of the covenant, "assuming, as I must, that he feels obliged to relax it" (815H). The judge considered that a fair proportion would have been 5% and awarded that sum as damages.

Licence fee damages

185. In cases where damages are awarded on the user principle the defendant has obtained a benefit from wrongfully making use of the claimant's property in a way that only the claimant (or someone licensed by the claimant) had the right to do. In *Whitwham v Westminster Brymbo Coal Co*, for example, only the plaintiffs (or someone licensed by them) had the right to use their land for tipping purposes. Similarly, in the *Strand*

Electric case only the company which owned the theatre equipment (or someone licensed by them) had the right to use their equipment during the period when the defendant wrongfully detained it. And in *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* only the owner of the patent (or someone licensed by the patent owner) had the right to manufacture and sell the patented products. In contrast, the plaintiffs in the *Wrotham Park* case did not own the land in question and did not have the right to build on the land themselves: their right was only a negative right to prevent the person(s) who owned the land from using it for this purpose. The benefit obtained by the defendants from their wrongdoing was therefore not one which the plaintiffs could have obtained themselves.

186. Nevertheless, the right violated by the defendants was not merely a right of the plaintiffs to enjoy the use of their own property without disturbance, like the right to hold a market at issue in the *Wass* case or the right of an occupier not to be exposed to a nuisance by the occupier of neighbouring land. The holder of a restrictive covenant over neighbouring land is in principle entitled to enforce the covenant without having to demonstrate that breach of the covenant has caused or threatens to cause compensable harm. Furthermore, requiring the defendant to surrender to the claimant a benefit made from its wrongdoing reflects the sense that this is just where the benefit has been made from doing unlawfully something which the defendant could only ever reasonably have expected to acquire the right to do lawfully by paying a fee. Denning LJ put this point with characteristic pungency in the *Strand Electric* case when he said (at 253):

> "The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire."

187. I am using the term "licence fee damages" to denote damages measured in this way as a reasonable fee for releasing the defendant from the obligation of which it is in breach or (put the other way round) for licensing the action which constituted the breach.

The hypothetical bargain

188. In fixing the amount of the licence fee damages awarded in the *Wrotham Park* case, Brightman J imagined a process of negotiation resulting in a bargain between a landowner in the position of the plaintiffs who was willing to relax the restrictive covenant for a reasonable price and a developer in the position of Parkside who was willing to pay a reasonable price for the relaxation of the covenant so as to obtain permission to build on the land. There seem to me, however, to be two different possible explanations of the purpose served by postulating such a hypothetical bargain.

189. One is to see it as a method of estimating the fair market value of the benefit obtained by the defendant in infringing the claimant's right. The fair market value or fair value of an asset is generally defined as the price that would be agreed for the sale of the asset between a willing seller and a willing buyer (acting with full information and under no undue pressure to sell or buy). This concept is difficult to apply, however, where there is no active market for assets of the relevant kind. In the *Wrotham Park*

case the owners of the estate sought to rely on expert evidence that half or a third of the development value of land was commonly demanded by a landowner whose property stood in the way of development. Brightman J did not agree with this approach to valuation, however, as he found that (1) the restrictive covenant was not an asset which could be turned to account by the estate owner and had "no commercial or even nuisance value", and (2) the breach of covenant which had taken place was over a very small area and the impact of the breach on the estate was insignificant (see 815E-G).

190. In the absence of any relevant market, the judge took as a starting-point the profit which Parkside actually made from the development, attributing to the parties "the benefit of foresight" in this respect (see 815H). He then assessed what would be a fair percentage of this profit to award as damages. In making this assessment, the judge attached importance to the fact that the plaintiffs had been aware before Parkside bought the land that it was being offered for sale as building land and yet did not inform either the vendor or Parkside before completion of the sale that they were not going to consent to any such development. He thought it highly unlikely that Parkside would have paid the sum that it did pay to buy the land if the plaintiffs had made their attitude clear (see 815H-816A). Although the significance of this factor is not fully spelt out in the judgment, it seems to me to be twofold. First, it meant that the plaintiffs were at least partly responsible for the breach of covenant. Second, it implicitly recognised that Parkside would not have purchased and developed the land at all unless it could expect to make a sufficient profit.

191. In substance, it seems to me that the exercise which Brightman J undertook was to apportion the profit made by the developer between a sum which could fairly be attributed to its breach of the restrictive covenant and the balance which was attributable to other causes (including Parkside's investment of capital in the project and the contributory fault of the plaintiffs). Imagining a bargain being negotiated and struck to license the defendant's activity may have provided a useful framework for making the apportionment, but it is open to question what this thought experiment really added to the analysis.

The nature of "*Wrotham Park* damages"

192. Much ink has been spilt in discussing whether the kind of damages awarded in the *Wrotham Park* case should be described as "compensatory" or "restitutionary" (or neither or both). In their written closing submissions counsel for Marathon developed an argument that such damages are properly characterised as "compensatory".

193. Counsel for Marathon were able to point to a number of cases in which the damages have been described as "compensatory", including most recently a statement of Christopher Clarke LJ in *One Step (Support) Ltd v Morris-Garner* [2017] QB 1, para 81, that "*Wrotham Park* damages are a form of compensatory damages, although not of the ordinary type." As is often the case, however, the choice of a label does not by itself illuminate the legal concept and may indeed be misleading without further definition.

194. When an award of damages is described as "compensatory", this typically means that the object of the award is to repair a loss (or other injury) caused by the defendant's wrongdoing by ordering the defendant to pay a sum of money equivalent (or as nearly

equivalent as the court can determine) to the amount of the claimant's loss. In the *Wrotham Park* case, however, the owners of the estate did not suffer any loss. Brightman J expressly found that they had suffered no financial damage and it was not suggested that they had suffered any non-financial loss for which damages could be awarded. Accordingly, the damages were not "compensatory" in this sense.

195. The argument advanced in Marathon's closing submissions was that in the *Wrotham Park* case and other cases in which damages have been awarded on a similar basis the claimant has nevertheless lost something of "objective" value. Counsel noted that this "loss" has been conceptualised as the loss of an opportunity to bargain with the defendant.[8] Thus, Lord Hobhouse in his dissenting judgment in *Attorney General v Blake* [2001] 1 AC 268, 298F-G, suggested that in cases such as the *Wrotham Park* case "[w]hat the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent to the development." (It was on this basis that Christopher Clarke LJ in the *One Step* case described the damages as "a form of compensatory damages, although not of the ordinary type.") There seem to me, however, to be two flaws in this explanation. First, it treats the defendant's breach of duty as if it consisted in a failure to obtain the claimant's consent to the defendant's action. Strictly, in the *Wrotham Park* case the defendant's breach of duty lay in building on the land. If Parkside had obtained the plaintiffs' consent to build, they would not have been in breach of the restrictive covenant, but they were not actually under an obligation to seek consent. Indeed, such a positive obligation would not have been enforceable because only a negative covenant can run with the land.[9] Second, even if Parkside had been obliged to seek consent, their breach of the obligation would only have caused the owners of the estate to suffer a loss if, had their consent been sought, the owners would have demanded and received a fee for giving their consent to the development. However, Brightman J found as a fact that the owners would not have granted any relaxation of the covenant (see 815D). He nevertheless awarded a financial remedy on the assumption that, contrary to the actual facts, they would have done so.

196. Such a counterfactual assumption could not be justified if the object of the award of damages was to compensate the claimant for loss caused by the defendant's wrongdoing. If that was the object, the relevant counterfactual inquiry would be to ask what difference it would have made to the financial position of the claimant if the defendant had not acted wrongfully and in breach of duty. The answer in the *Wrotham Park* case is "none".

197. Counsel for Marathon also made a related argument that, in cases of the *Wrotham Park* type, the claimant has lost a right which objectively had a market value. Again, however, this explanation in my view does not work. It is not strictly correct to say that in a case such as the *Wrotham Park* case the claimant's right has been lost. The right on which the claim was founded in that case was the right of the owners of the estate that no development to which they had not consented should take place on the land in question. That right was violated by the defendant but it was not lost. If it had

---

8 See Sharpe & Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 OJLS 290.

9 Thus, a covenant to submit plans for approval before building is enforceable against a subsequent purchaser only as a covenant not to build without first submitting plans: see *Powell v Hemsley* [1909] 1 Ch 680, 687-8; affirmed [1909] 2 Ch 252.

been lost, no remedy for the violation could have been awarded. Nor is it correct that the right had a market value. As mentioned earlier, Brightman J expressly found that the right under the restrictive covenant had “no commercial or even nuisance value”.

198. For the same reasons as make it potentially misleading to describe the damages as “compensatory”, it also seems to me inapt to describe the damages as “restitutionary”, if by this is meant that the remedy is intended to restore to the claimant the value of something that it has lost. As already discussed, the plaintiffs in the *Wrotham Park* case did not lose something of value. Nor is it realistic to characterise the gain made by Parkside from its breach of the restrictive covenant in building on the land as involving a transfer of value when the gain was not one which (either in whole or in part) the owners of the estate could have made themselves.

199. The damages can, however, be described as “restitutionary”, if this label is used loosely to refer to an award of money which is assessed by valuing a gain made by the defendant – rather than by valuing a loss suffered by the claimant – from the defendant’s wrongful act.

200. The award may also be described as “compensatory”, if this term is understood in a broad sense to denote any remedy which is awarded as a response to a wrong done to the claimant. That is the sense in which the damages awarded in the *Wrotham Park* case seem have been described as “compensatory” or as “compensation” in some of the authorities, including the *Wrotham Park* case itself.[10] The use of the term in this sense also explains some statements in the judgment of the Court of Appeal in *WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment* [2008] 1 WLR 445 which have caused some confusion and at first sight seem puzzling.

201. What the Court of Appeal actually decided in the *WWF* case was that advancing a claim for damages on the *Wrotham Park* basis was an abuse of process when the claimants had previously been refused permission to add a claim for an account of profits (a decision from which there had been no appeal). Part of the reasoning for this conclusion was that damages of the kind awarded in the *Wrotham Park* case and the remedy of an account of profits are “juridically highly similar” remedies. An account of profits is on any view a “gain-based” remedy, which is for that reason inconsistent with an award of damages as compensation for loss: see e.g. *Tan Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, 520. Nevertheless, Chadwick LJ (with whom the other members of the Court of Appeal agreed) rejected the proposition that “an award of damages on the *Wrotham Park* basis is not an award of compensatory damages, but is properly to be characterised as a gains-based award”, saying that this proposition was “not made out” (para 57). He also suggested – somewhat surprisingly – that an account of profits, when based on a breach of contract, might be characterised as “an award of compensatory damages” (see para 58). Chadwick LJ went on to say (at para 59):

> “The circumstances in which an award of damages on the *Wrotham Park* basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is

[10] See the quotation from the judgment at paragraph 183 above.

> that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable loss. To label an award of damages on the *Wrotham Park* basis as a 'compensatory' remedy and an order for an account of profits as a 'gains-based' remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him." [emphasis added]

202. It is important to note that in this passage Chadwick LJ was not suggesting that an award of damages on the *Wrotham Park* basis is intended to provide compensation for loss. Indeed, he suggested – albeit that this suggestion has been disapproved[11] – that such an award cannot be made unless the claimant is unable to demonstrate loss. The only sense in which he characterised such an award – and also the remedy of an account of profits – as "compensatory" was in describing both remedies as a response to the need to compensate the claimant "for the wrong which has been done to him". In other words, the remedies are "compensatory" only in the broad sense that they provide redress for wrongdoing. I think it plain that they do this, however, not by providing compensation in the narrow sense of compensation for loss, but by ordering the defendant to pay to the claimant a sum of money which represents a gain made by the defendant from its wrongful act. The correctness of this understanding is confirmed by the other leading authority in this area, to which I now turn.

Attorney General v Blake

203. The *Wrotham Park* case could have been narrowly interpreted as limited to restrictive covenants in respect of land and, for over 25 years after it was decided, the only cases in which it was followed were other cases involving such restrictive covenants. The *Wrotham Park* case was given traction as a precedent, however, by the decision of the House of Lords in *Attorney General v Blake* [2001] 1 AC 268. *Blake's* case remains the only occasion to date on which the measure of damages awarded in the *Wrotham Park* case has been considered by the UK's highest court.

204. As described by Lord Nicholls at the start of his speech, the defendant, George Blake, was "a notorious, self-confessed traitor": see [2001] 1 AC 268, 275. He was employed by British intelligence but became a double agent and in 1961 was convicted of spying for the Soviet Union. In 1966 Blake escaped from prison and went to live in Moscow. In 1989 he wrote an autobiography which included information he had acquired from working for British intelligence. After Blake had already received some £60,000 from a publisher, the Crown brought an action against him to seek to prevent him from receiving any further money from the book.

205. At the trial, the Crown argued that, as a former member of the intelligence services, Blake owed a lifelong fiduciary duty not to disclose confidential information acquired in the course of his duties. The judge dismissed the claim on the basis that, although substantial parts of the book were based on information acquired by Blake as a member of the intelligence services, the Crown had not alleged or shown that this

---

11 See *One Step (Support) Ltd v Morris-Garner* [2017] QB 1, paras 117-8.

information remained confidential: see [1997] Ch 84. When the case reached the House of Lords, the Crown did not maintain that Blake was in breach of a fiduciary duty but relied on the fact that, when he joined the intelligence services, Blake had given an undertaking not to divulge any official information gained as a result of his employment. This undertaking had contractual force, and Blake was in breach of it when he submitted his manuscript for publication. The House held (by a 4:1 majority) that an account of profits could and should be ordered to prevent Blake from profiting from his breach of contract.

206. Lord Nicholls (with whose speech the rest of the majority agreed) discussed the circumstances in which damages in tort or for an equitable wrong or for a breach of contract may be assessed by reference to a financial gain obtained by the defendant rather than any financial loss suffered by the claimant. In this context Lord Nicholls referred to the *Wrotham Park* case and said (at 283H-284A):

> "The *Wrotham Park* case … still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained."

Lord Nicholls went on to conclude that there may, exceptionally, be circumstances when the just response to a breach of contract is to go further and to order an account of profits so as to prevent the wrongdoer from retaining any profit from the breach.

207. Lord Nicholls emphasised it will only be in exceptional cases, where the remedies of damages, specific performance and injunction are inadequate, that any question of accounting for profits will arise. He said that no fixed rules can be prescribed, but indicated (at 285H):

> "A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, depriving him of his profit."

Coherence of remedies

208. *Blake's* case established that a money award measured by the benefit gained by a wrongdoer can, exceptionally, be made in an action for breach of contract. In *Blake's* case itself the defendant's wrong consisted in the misuse of information. The right violated by the defendant was purely contractual since, as already mentioned, no equitable duty of confidence was established. But the justice of requiring a person who obtains a benefit from the wrongful use of information to surrender the benefit to the claimant does not depend on the source of the right infringed. A key part of Lord Nicholls' reasoning was that the remedies available in cases involving misuse of information should be consistent and should not depend on whether the claim is founded on a duty of confidence which arises under the general law or (as in *Blake's* case itself) pursuant to a contractual undertaking. He said (at 285D):

> "If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties."

In *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390, para 4, Arden LJ identified this reasoning as expressing the *ratio* of the decision, stating:

> "The overall holding in *Blake's* case is that the law on remedies ... should be coherent and that the same remedies should be available in the same circumstances, even if the cause of action is different."

Marathon's contractual claims

209. It follows from the holding in *Blake's* case that the ability of Marathon to obtain a remedy measured by the benefit gained by the defendants from misusing Marathon's confidential information does not depend on whether Marathon's claim is formulated as a claim for breach of confidence or as a claim for breach of contract. In addition to its contractual claim against each defendant for misuse of confidential information, however, Marathon has also claimed that Mr Seddon was in breach of an implied term of his contract of employment which required him to report Mr Bridgeman's wrongdoing to his employer. I have rejected the contention that Mr Seddon owed such a duty. But in case I am wrong, I will also consider Marathon's argument that such a breach of contract, if established, would justify an award of licence fee damages.

210. Apart from cases involving misuse of information, there have been very few cases since *Blake's* case in which licence fee damages, let alone an account of profits, have been awarded for a breach of contract. The principal such authority is the decision of the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.

211. The background to that case was that the administrators of the estate of Jimi Hendrix had settled earlier litigation against the defendant (PPX) on terms which allowed PPX to exploit Jimi Hendrix recordings in return for paying royalties. As part of the settlement PPX had agreed not to exploit certain recordings of another musician on which Jimi Hendrix had played as a "sideman". In breach of the settlement agreement, PPX exploited these "sideman" recordings for profit for a number of years. The claimant (which had succeeded to the rights of the estate) accepted that it would never be able to show or quantify any financial loss caused by the breaches of contract. But it adduced evidence at the trial that the way in which the "sideman" recordings had been marketed had confused and alienated potential buyers of Jimi Hendrix records. An injunction was granted to prevent further marketing of the recordings. In relation to past breaches, the Court of Appeal did not regard the case as "exceptional to the point where the court should order a full account of all profits which have been or may be made by PPX" (see Mance LJ at para 44). The Court of Appeal nevertheless decided that, to avoid injustice, PPX should be ordered to make a reasonable payment (calculated as a royalty on retail sales) in respect of the benefit it had gained from exploiting the "sideman" recordings (see paras 45 + 58).

212. It was made clear in *Blake's* case by the House of Lords and reiterated by the Court of Appeal in *Experience Hendrix* that only exceptionally will it be appropriate to award a remedy for a breach of contract measured by the defendant's gain from the breach. Such cases are bound to be exceptional because it is seldom just to award a remedy which makes the claimant better off financially by reason of the defendant's breach of contract than it would have been if the contract had been performed.

213. Necessarily, if damages (assessed in the ordinary way as compensation for loss) are an adequate remedy for the wrong done to the claimant, it cannot be appropriate to award a sum of money measured by reference to an additional gain which the defendant has made. The converse proposition, however, does not hold. There are a variety of reasons why damages assessed as compensation for loss may not be an adequate remedy for a breach of contract, some of which cannot in principle justify awarding a remedy based on the defendant's gain. For example, the fact that the defendant is impecunious and is unlikely to be able to satisfy a judgment for damages may be a good reason to grant an injunction to prevent a wrong from being committed which would go uncompensated. Damages would not be an adequate remedy in such a case because the defendant could not pay them. But the defendant's lack of resources does not affect whether it is just to award a remedy based on the defendant's gain rather than a remedy based on the claimant's loss.

214. Again, the fact that the claimant's loss would be difficult to prove or quantify may be a good reason for granting an injunction rather than leaving the claimant to seek damages, but it is not a principled reason for awarding a sum of money which does not depend on whether the claimant has suffered any loss at all. There is no clear distinction between cases in which a claimant cannot prove loss because of its intangible nature and cases where the claimant cannot prove loss because none has been suffered. The fact that the claimant has not suffered any loss as a result of the defendant's breach of contract is plainly not itself a reason to award damages representing a gain made by the defendant: it is a reason to award only nominal damages. A finding that the claimant has failed to prove loss is tantamount to a finding that the claimant has not suffered loss, and the same legal consequence should follow. I have mentioned earlier that, where loss is difficult to prove, there are legal principles and presumptions which may assist the claimant (see paragraph 164 above). But where, even with the aid of such principles, the claimant is unable to prove any loss, just as where the claimant is unable to prove any other element of its claim, the logical consequence is that the claim should fail – not that the claimant should be awarded a sum of money which does not correspond to any damage done to it.

215. Awarding a gain-based remedy can only, as I see it, be a just response where compensatory damages are an *inherently* inadequate remedy because they would not represent adequate redress for the wrong done to the claimant even where any loss caused by the defendant's wrong can be fully identified and reversed. This explains why, as mentioned earlier, Lord Nicholls in *Blake's* case indicated that a "useful general guide" to the circumstances in which an account of profits may be appropriate is whether the claimant had "a legitimate interest in preventing the defendant's profit-making activity": see [2001] 1 AC 268 at 285. In *Experience Hendrix* the Court of Appeal confirmed that this test is also applicable in deciding whether to award licence fee damages for a breach of contract: [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, paras 35 + 54.

216. Under an ordinary commercial contract the claimant's legitimate interest in performance of the contract is limited to its "expectation" interest – that is to say its interest in receiving the profit it expects to make from performance. Hence the normal measure of damages for breach seeks to place the claimant in the same financial position as if the contract had been performed. In general, the claimant has no legitimate interest in preventing the contract-breaker from making a profit which is not reflected in any loss which the claimant has suffered. Such a legitimate interest does exist, however, where the purpose of the contract is to protect a proprietary interest. I have discussed the user principle and its limits in relation to claims in tort, as well as the holding in *Blake's* case that the availability of a gain-based remedy for misuse of property does not depend on whether the claimant's cause of action lies in tort or in contract. I have also discussed the extension of the user principle in the *Wrotham Park* case to the protection of a property right which is akin to a negative easement (as Lord Walker put it in *Pell Frischmann Ltd v Bow Valley Ltd* [2011] 1 WLR 2370, para 48). The interest of the claimant in *Experience Hendrix* can also be characterised as proprietary or quasi-proprietary. Although the claimant did not own the copyright in the "sideman" recordings and had no right to exploit the recordings commercially itself, it had a legitimate interest in preventing PPX from doing so in order to protect the name and image of Jimi Hendrix. Such image or personality rights are increasingly recognised as a form of intellectual property, albeit that in English law – unlike under the laws of Canada and the United States – they are not protected by statute or common law and can only be protected by contract.

217. Recently, in *One Step (Support) Ltd v Morris-Garner* [2017] QB 1 the Court of Appeal declined to interfere with a decision to award licence fee damages as a remedy for breaches of covenants not to carry on a business competing with the claimant and not to solicit customers of the clamant, as well as for wrongful use of confidential market research. The availability of the remedy for misuse of confidential information was unproblematic. In so far as the remedy was granted for breaches of obligations not to compete with the claimant, however, I have not found it easy to discern from the judgments the principle on which the Court of Appeal considered that the judge was entitled to award licence fee damages. On the face of it, the purpose of such a covenant is solely to protect the covenantee against damage to its commercial interests. A restrictive covenant which goes beyond the reasonable protection of such interests will indeed be unenforceable. It is therefore difficult to see how a claimant could be said to have a legitimate interest in preventing a defendant who is in breach of such a covenant from profiting from its activity except to the extent that the breach has harmed the claimant. Nor is it obvious how the rights invaded in the *One Step* case differed in nature from the rights of the claimants in the *Devenish Nutrition* case where, as discussed earlier, the Court of Appeal held that a remedy based on the defendant's gain was not available.

218. At all events, I do not think that the decision in the *One Step* case supports, let alone entails, the conclusion that licence fee damages could properly be awarded in the present case if it were held that Mr Seddon was in breach of contract in not reporting Mr Bridgeman's wrongful copying of files to Marathon. I see no reason why damages (assessed as compensation for loss) would be inadequate as a remedy for breach of such a contractual duty, nor that the employer has a legitimate interest in performance of such a duty which goes beyond the avoidance of loss. The ostensible purpose of a duty to report misconduct is to enable the employer to take steps to

protect itself from harm caused by the employee whose conduct should be reported – not to prevent the employee who owes the duty from making a financial gain. It is hard to think of circumstances in any case where an employee who owes such a duty would stand to make a financial gain from failing to report another employee's misconduct. (He might stand to gain from failure to report his *own* misconduct, but there is generally no duty on an employee to disclose his own misconduct and, if such a duty were imposed by the contract of employment, it would be a different duty.)

219. I conclude that, even if Mr Seddon was in breach of contract in not reporting to Marathon his knowledge that Mr Bridgeman had copied files, that breach of contract by Mr Seddon did not give rise to a claim for licence fee damages.

The conspiracy claim

220. As discussed earlier, Marathon has also sought to establish liability in tort for conspiracy to injure by unlawful means. However, conspiracy is actionable only on proof of loss and to the extent of that loss: see e.g. *Clerk & Lindsell on Torts* (20th Edn, 2010), para 24-111. It therefore follows from my earlier conclusion that licence fee damages do not represent compensation for loss that such damages are not an available remedy for a claim in conspiracy. There is direct support for this conclusion in *Pell Frischmann Ltd v Bow Valley Ltd* [2011] 1 WLR 2370, para 60, where one of several obstacles identified by the Privy Council to a claim based on an unlawful means conspiracy was that actual loss (and not merely a basis for awarding licence fee damages) would have had to be proved.

221. Accordingly, as Marathon does not claim to have suffered any actual loss and the only remedy sought for the defendants' misuse of confidential information is an award of licence fee damages, the conspiracy claim must fail.

Licence fee damages or an account of profits?

222. I have indicated that in cases where confidential information has been misused the remedies of an account of profits and licence fee damages are both potentially available, that both remedies involve measuring the benefit gained by the defendant from its wrong rather than a loss suffered by the claimant, and that they are for this reason "juridically highly similar" remedies. In order to decide whether Marathon is entitled to an award of licence fee damages for the defendants' breaches of confidence, it is also necessary to understand the differences between the two measures and what determines which remedy, if either of them, is the appropriate measure to apply in a case of the present kind.

223. This is necessary because, as Sales J held in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at paras 333-339, in a claim for misuse of confidential information the claimant does not have a discretion to choose between the remedies of an account of profits and licence fee damages. It is for the court to decide which remedy is appropriate. I respectfully endorse this holding, both for the compelling reasons given by Sales J and because I think it must follow once it is recognised that the two remedies represent different techniques for measuring a gain made by a wrongdoer. Just as it is a matter for the court, and not for the claimant, to decide what is the most appropriate measure of a claimant's loss, so it must be for the court, and not for the claimant, to determine the most appropriate measure of a defendant's gain.

Furthermore, the choice of measure should not be a matter of judicial hunch but should be made by applying legal principles.

224. In the present case Marathon originally claimed an account of profits as an alternative to an award of licence fee damages. That claim was later abandoned, however, when amendments were made to the particulars of claim. The deletion of the claim for such relief no doubt reflected the fact that there is no evidence that the defendants made any profit from any wrongful use of Marathon's confidential information. Should this be a case, therefore, in which an account of profits represents the appropriate measure of the benefit gained by the defendants, the result would be a nil recovery for Marathon.

225. The basic difference between the two measures is that on an account of profits the court inquires into what profits the defendant has actually made as a result of its wrongful act; by contrast, when licence fee damages are awarded, the benefit to the defendant is, where possible, measured by estimating the sum of money which the defendant would reasonably have had to pay to do lawfully what was done unlawfully or to obtain an equivalent benefit. On this latter measure the court is not concerned with what profit (if any) the defendant has made as a result of its wrongdoing. In *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, where (as discussed earlier) the value to the defendant of wrongfully detaining theatre equipment was measured by what it would have cost to hire such equipment, Somervell LJ explained:

> "There are no doubt some cases in which a wrongdoer may be called on to account for profits, but in considering the measure of damages as raised here I think the actual benefit which the defendants have obtained is irrelevant. The damages could not, in my view, be increased by showing that a defendant had made by his use of the chattels much more than the market rate of hire. Equally they cannot be diminished by showing that he had made less."

Similarly, in *Whitwham v Westminster Brymbo Coal Co* [1896] 2 Ch 538 at 543, Rigby LJ observed that "it is a matter of indifference whether the defendants made a profit or loss out of the transaction."

226. A consequence of such indifference is that the amount of damages awarded on this measure may exceed the amount of any profit made by the defendant from its wrongful act. This is illustrated by the decision of the Privy Council in *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713. The defendants in that case, who owned a hotel, unlawfully ejected the plaintiff and retained possession of 30 apartments in the hotel for a period of 15½ years. During that time the defendants let out the apartments as part of their hotel business, though the average occupancy was only 35-40%. The defendants argued that the damages should reflect such profit as they had made from letting out the apartments. The Privy Council rejected that argument and held that the defendants were liable to pay the going rate for possession of the apartments for every day of the 15½ year period even though they had not earned rent from the use of all of the apartments for all of that time.

227. Another case where the amount of licence fee damages awarded exceeded the amount of the defendant's profit is *Pell Frischmann Ltd v Bow Valley Ltd* [2009] UKPC 45, [2011] 1 WLR 2370. In that case the defendant became involved in a transaction as a potential joint venture partner of the claimant, which was negotiating with a third party for the right to develop an oilfield. The defendant then used confidential information without the claimant's consent to negotiate directly and conclude a contract with the third party on its own account. The Privy Council held that the claimant was entitled to an award of licence fee damages in a sum of US$2.5m representing the sum which the defendant might reasonably have been required to pay for a licence to use the information. This was significantly more than the profit which the defendant ultimately made from the contract, which was estimated only to be between US$1m and US$1.8m.

228. The position is complicated by the fact that, as Mance LJ pointed out in the *Experience Hendrix* case, licence fee damages can be assessed in two different ways. He said (at para 26):

> "In a case such as the *Wrotham Park* case the law gives effect to the instinctive reaction that, whether or not the [claimant] would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense. ... The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) an equivalent benefit from another source."

As discussed earlier, in the *Wrotham Park* case itself the court acted in the first of these ways by awarding damages which were calculated as a percentage of the profit made by the defendant from building in breach of the restrictive covenant.

229. The judgment of Sales J in the *Vercoe* case (at paras 340-345) contains a valuable discussion of considerations which are relevant to the court's decision whether to order an account of profits or to award licence fee damages. In particular, he identifies two factors which seem to me to go to the heart of the matter. One is the strength of the interest which the law recognises as deserving protection. Sales J suggested a scale "moving from lesser protection in relation to an ordinary commercial context to greater protection appropriate where there is a fiduciary relationship" (see para 343). The extent of protection afforded to intellectual property rights may be seen as falling somewhere in between.

230. Focusing on the strength of the interest which the law is seeking to protect may serve to explain why, when the remedy awarded is an account of profits, the test of causation varies according to the nature of the defendant's wrong. Thus, where the wrong consists in a breach of fiduciary duty, a stringent test of causation is applied and the burden is on the fiduciary to show that part of the profits made from a transaction entered into in breach of duty is not attributable to the breach: see e.g. *Murad v Al-Saraj* [2005] EWCA Civ 959. A similarly stringent test was applied in *Blake's* case which involved a promise to keep state secrets. On the other hand, where the wrong consists in misuse of intellectual property, the court's task is likewise to decide what profits made by the defendant may fairly be attributed to the

defendant's wrongful act, but the court will more readily engage in an apportionment between profits attributable to the infringement of the claimant's intellectual property and profits which should be attributed to other, non-infringing elements of the defendant's activities: see e.g. *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203. Having regard to the strength of the interest which the law protects may also explain, at least in part, why an account of profits is seldom likely to be an appropriate remedy in an ordinary commercial context.

231. It is important to note, however, that, in terms of recovery, an account of profits does not always provide greater protection for the claimant's interest than an award of licence fee damages. I have given the examples of the *Inverugie* and *Pell Frischmann* cases, where an account of profits would in each case have resulted in a substantially lower monetary award than the sum which the claimant was in fact awarded. To explain this, a second important factor needs to be considered, which may often correlate with the strength of the interest requiring protection but is distinct from it. This is the question whether the defendant could reasonably have expected to obtain the benefit enjoyed by its infringement of the claimant's right (or an equivalent benefit) by paying for it. Sales J identified this criterion when he suggested that, in relation to ordinary rights in property of a kind which is regularly bought and sold in a market, licence fee damages may often represent an appropriate and fair remedy, whereas "it may be more appropriate to award an account of profits where the right in question is of a kind where it would never be reasonable to expect that it could be bought out for some reasonable fee" (see *Vercoe* at para 340).

232. Applying this criterion, I think there is a coherent framework which is capable of explaining the cases. The first question to ask is whether there was an alternative means by which the defendant, acting lawfully, could have obtained the benefit gained by its unlawful act or an equivalent benefit. That test will be met where the benefit consists of using property which can be bought or hired in a market. The benefit can then be valued on the basis of the market price. Even when there is no available market, the benefit may be one which the defendant could have obtained in another way. For example, in *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203, discussed earlier (at paragraph 119 above), the value of using the plaintiffs' confidential drawings could fairly have been assessed by reference to what it would have cost to pay a consultant to prepare an equivalent set of drawings or by valuing the amount of labour saved by using the drawings. The approach of measuring the benefit of misusing confidential information by what it would have cost to employ a consultant in order to obtain an equivalent benefit was adopted in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] RPC 29. On appeal in that case, the Court of Appeal said that, in selecting this measure, the judge was "following a well-trodden path": see *Force India Formula One Team Ltd v Aerolab SRL* [2013] EWCA Civ 780, [2013] RPC 36, para 107.

233. Difficult questions can arise where the defendant could not have obtained an equivalent benefit from another source. In this situation it is necessary to ask whether the defendant's activity is one which it was reasonable to expect that the claimant would license in return for payment of a reasonable fee. If so, then it is likely to be appropriate to value the benefit obtained by the defendant by estimating the licence fee that would reasonably have been charged.

234. There are other cases, however, in which it is unrealistic to value the benefit obtained by the defendant in this way because the defendant could not reasonably have expected to purchase a licence from the claimant for its activity (and could not have obtained an equivalent benefit from another source). This was clearly the position in *Blake's* case and the *Spycatcher* case where state interests were involved. It may also be the position in some cases where intellectual property is protected in a commercial context. A patent, trademark, copyright or confidential information may be a means of generating revenue for the owner of the right through the granting of licences (as appears to have been the aim of the inventor in *Seager v Copydex* [1967] 1 WLR 923, for example). But in other cases it may be relied on to protect intellectual property which the owner of the right would not be willing to allow anyone else to exploit at all – or not at a price which would rationally be paid for a licence.

235. In cases where the defendant could not reasonably have expected to purchase a licence from the claimant for its use of the claimant's property (nor to obtain an equivalent benefit in another way) it in my view makes no sense to value the benefit by postulating a hypothetical negotiation between a willing seller and a willing buyer. Such a method makes no sense because in such a context the negotiation is not merely fictional in the sense that it did not actually happen but fictional in the stronger sense that it lacks any verisimilitude. The law ought not to employ fictions of the latter sort.

236. In such cases the appropriate method of valuation, as it seems to me, is to assess the amount of profit made by the wrongdoer which is fairly attributable to its wrongful use of the claimant's property (or other wrongful act). As the law currently stands, there are two routes by which this can in principle be achieved. One is to order an account of profits and to apportion the profits made by the defendant between profits which should be attributed to its wrongful act and profits which should be attributed to other factors. The other route is to order payment of a percentage of the defendant's profits as licence fee damages, in accordance with the first of the responses described by Mance LJ in the passage quoted above from the *Experience Hendrix* case. It may be that, as the law of remedies in this area develops further, these two different methods of awarding a percentage of profits made by a wrongdoer will be harmonised into a single measure. For the time being, however, they remain doctrinally distinct.

237. Some of the difficulty which the *Wrotham Park* case has occasioned may, I think, be due to the fact that the judgment introduces the concept of a fee that would reasonably have been demanded to license a relaxation of the restrictive covenant but at the same time the judge found that the owners of the estate would never (for good reason[12]) have been willing to grant such a licence. It seems to me that the proper approach in those circumstances was to order the defendants to pay over a proportion of the profits actually made from the development. As discussed earlier, that is exactly what Brightman J indeed did (see paragraphs 190-1 above).

238. Unlike in the *Wrotham Park* case where there was never any actual negotiation between the parties, in *Pell Frischmann Ltd v Bow Valley Ltd* negotiations took place in which the parties very nearly reached agreement on a buy-out of the claimant's

[12] See [1974] 1 WLR 798 at 815D ("the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation.")

rights. The final price offered by the defendant before the negotiations broke down amounted to US$7.5m payable in instalments (with a further US$2.5m if the project was extended to include a submarine pipeline); whereas the claimant was willing to accept US$8m over a shorter time frame (and also with a further US$2.5m if the project was extended). There was therefore tangible evidence that the parties expected that the contract would be much more profitable than it turned out to be. The reasons why the negotiations failed were found on the facts to be largely the fault of the claimant, which was also guilty of "extraordinary delay" in bringing proceedings. In these circumstances the Privy Council adopted something of a hybrid approach and fixed the amount of licence fee damages in a sum which was greater than the profit actually made by the defendant but substantially less than the price which it (no doubt reasonably) had at the time been willing to pay.

239. The *Vercoe* case was also a case in which the defendants exploited for themselves a business opportunity identified to them by the claimants. In the *Vercoe* case the opportunity consisted in a company acquisition, which proved highly profitable. The opportunity had been marketed by the claimants to a number of venture capital companies, including the first defendant, and the right to use the information which the defendants received in confidence and to exploit the opportunity was plainly one which the defendants could reasonably have expected to purchase. Sales J found on the facts that, if the claimants' rights had been bought out, it would probably have been in return for an allocation of shares in the target company and he assessed the allocations which would reasonably have been agreed, taking account in doing so of evidence of usual industry expectations. He also considered that the assessments fairly reflected the claimants' contributions to the transaction. He therefore in effect used both the valuation measures which I have described in order to reach the same result.

Valuing Marathon's information

240. If the principles I have sought to identify are applied to the information about Marathon's business contained in the files copied by Mr Bridgeman, then a distinction mentioned earlier between two different categories of information is again relevant. I mentioned that many of the files which Mr Bridgeman copied and retained when he left Marathon contained information which could have been obtained from other sources, though not without some cost. If and in so far as such documents were wrongfully used, the benefit of such use could in my view fairly be valued by estimating the costs which would have been incurred to obtain the information from other sources.

241. In some cases that assessment would be relatively straightforward. An example is use of Marathon's compliance manual. In setting up Seculum, a fee of £2,400 was paid to a consultant for the preparation of a compliance manual and a programme for monitoring regulatory compliance. This shows that, if Mr Bridgeman had reproduced Marathon's compliance manual (which on the evidence he did not), the benefit obtained could readily be measured by what it would have cost to employ a consultant to prepare a compliance manual for the new firm. In other cases, the task of valuing the wrongful use of Marathon's confidential information on the basis of the cost saved would be more difficult, but nevertheless feasible. Suppose, for example, that Mr Bridgeman had used an analysis of the value of shares in a particular company which he had prepared while employed by Marathon and wrongly kept, and that this had

saved him the time and trouble of having to carry out the relevant analysis again. The cost thereby saved could in principle be quantified by making reasonable assumptions about how long the work would have taken Mr Bridgeman to repeat and the value of his time.

242. I also identified earlier, however, another category of documents copied by Mr Bridgeman which contained commercially sensitive information about Marathon's business which could not have been obtained from any other source. The prime example is the Whiteboard, which listed clients of Marathon who had redeemed investments since March 2012 and the reasons for the redemptions (where known). This is a document to which Marathon understandably has attached particular importance on the ground that it could potentially have been used to target likely investors when launching a competing fund. In fact, the Whiteboard was never used for that purpose. But if it had been, I find it difficult to see how the benefit of using it could fairly be valued on the basis of what the defendants would reasonably have had to pay to obtain the information. The only source from which the information could have been obtained was Marathon, and Marathon's witnesses made it abundantly clear that they would not have been willing to sell it to a competitor at any price (or certainly not at any price at which it would have made economic sense for the defendants to purchase the right to use the information). In these circumstances it does not seem to me that estimating a price that would have been agreed in a hypothetical negotiation between a willing seller and a willing buyer to license the use of the information is a reasonable measure to adopt. That is because it is unreasonable to expect that the information could ever have been acquired at such a cost. In such a situation the just approach, as it seems to me, would be to value the benefit by estimating the profits actually derived from the wrongful use of the Whiteboard.

Marathon's approach to the assessment of damages

243. It is unnecessary to explore these questions further, however, because Marathon has repeatedly made it clear that it does not advance any case based on any use actually made of any of the files copied by Mr Bridgeman. It has consistently maintained that the extent of such use is not relevant to its claim for damages. That was plainly a considered approach. It is clear that, had the exercise been undertaken of seeking to value any costs saved or profits made by the defendants from using information confidential to Marathon, then, whatever the measure adopted, the conclusion would have been that the benefit obtained by Mr Bridgeman was extremely modest and that Mr Seddon obtained no benefit at all. To have sought, even in the alternative, an award of damages on such a basis would simply have highlighted the enormous mismatch between any gain made by the defendants and the amount of money for which Marathon is seeking a judgment in this action.

244. The basis on which Marathon's case was argued was that the licence fee damages which it claims should be assessed by valuing all the confidential information contained in all the documents copied and removed by the defendants on the assumption that the defendants were free to make as much use as they saw fit of the information. Counsel for Marathon submitted that the defendants' breaches of duty were complete as soon as the documents were copied onto Mr Bridgeman's USB drives. The copying took place over the period 16 July to 26 October 2012. Counsel for Marathon proposed that it is convenient to take a single date during this period for

the assessment of damages and that a suitable date to take is 29 August 2012, as this was the date when Mr Seddon also participated in unlawful copying. They submitted that the task for the court is to determine what sum would have been agreed in a hypothetical negotiation conducted on that date as the price for releasing Mr Bridgeman and Mr Seddon from their obligations to Marathon. They further argued that, in principle, the damages should be assessed at the date of the breach and that later events are irrelevant. On this basis they contended that it is not relevant to have regard to what actual use the defendants subsequently made of the information which they took, as this would involve an impermissible use of hindsight.

The valuation date

245. In support of their contention that the appropriate valuation date is the date of breach, counsel for Marathon relied on *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, a decision of the Court of Appeal. In that case a landlord was found to have acted unlawfully in blocking up and relocating a fire door without the tenant's consent. The judge declined to order the landlord to reinstate the fire door and instead awarded licence fee damages representing the sum which would have been negotiated between willing parties as the price payable to the tenant for permitting the landlord to block up the fire door. At the time when the landlord's breach took place the landlord was attempting to forfeit the lease. In assessing damages, the judge treated it as clear for the purpose of the hypothetical negotiation that the lease could not be forfeited, even though this had only been established by his own subsequent decision on the point. On appeal, counsel for the landlord argued that the judge should have taken account of the fact that, at the date of the breach, the tenant was at risk of having the lease forfeited, which would have influenced the hypothetical negotiation.

246. In addressing that argument, Neuberger LJ (with whom the other members of the Court of Appeal agreed) started from the position that damages for breach of contract – whether awarded under Lord Cairns's Act, as in that case, or at common law – are normally to be assessed at the date of breach (see paras 17-18). On this basis he expressed the view (at para 29) that:

> "post-valuation events are normally irrelevant; but, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account."

247. It is noteworthy that this statement does not seek to prescribe any inflexible rule that events occurring after the date of breach must be ignored. On the contrary, Neuberger LJ expressly contemplated that the judge may take such events into account "where there are good reasons". It is also notable that subsequent events were taken into account in the *Lunn Poly* case itself. Thus, Neuberger LJ thought it "disproportionate, almost absurd, to introduce so much technicality, artificiality and complexity into the negotiations when one knows perfectly well what the outcome of the actual forfeiture waiver and relief proceedings was" (see para 31).

248. The absurdity that results in the present case from excluding knowledge of subsequent events seems to me to be illustrated by the assumptions made by Marathon's

valuation expert, Mr Bezant. In particular, as described earlier, these assumptions included an assumption that the Global team (comprising Mr Seddon, Mr Bridgeman, Mr Mort and also Ms Keeling) would launch a competing business as soon as they left Marathon in December 2012. I do not think that on the evidence it would ever have been realistic to expect that a new business would be launched immediately, but it is a known fact that this did not happen. Mr Seddon, Mr Bridgeman and Mr Mort (without Ms Keeling) founded Seculum in the early part of 2013, but it never got off the ground. A fund was launched by Seculum in July 2013 but it never attracted any investor. Furthermore, by the time the abortive Seculum fund was launched, Mr Bridgeman had already returned the files that he had removed from Marathon (apart from the file containing his email account, which he believed was inaccessible and returned not long afterwards). It was not until a year later, in July 2014, that a new business involving the three former members of the Global team and Mr Hosking began actively to compete with Marathon. Mr Bezant's valuation was therefore conducted on the basis of assumed facts which are known to be false.

249. In the course of argument at the trial, there was a good deal of discussion of what has been called the "*Bwlffa*" principle after the decision of the House of Lords in *Bwlffa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 which articulated the principle that a court assessing damages should not speculate about what might have happened when it is known what actually happened. As Lord Toulson said in *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] Bus LR 987 (at para 86):

> "I see no virtue ... in the court attempting some form of retrospective assessment of prospective risk when the answer is known."

Likewise, in *The Golden Victory* Lord Bingham observed that it is in many contexts a sound approach in law as in life that "you need not gaze into the crystal ball when you can read the book": see *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The "Golden Victory")* [2007] 2 AC 353, 396-7, para 79. A similar analogy was also used by Justice Cardozo J in giving a famous opinion of the US Supreme Court when he described subsequent experience, when it is available "to correct uncertain prophecy", as "a book of wisdom that courts may not neglect": see *Sinclair Refining Co v Jenkins Petroleum Process Co*, 289 US 689, 698 (1933).

250. The "rule" that damages for breach of contract – when awarded in the ordinary way as compensation for loss – should normally be assessed at the date of breach is based on the assumption that there is an available market in which the injured party can immediately obtain a substitute for the defendant's performance in order to mitigate its loss: see e.g. *The Elena d'Amico* [1980] 1 Lloyd's Rep 75, 87-89 (Goff J); *Hooper v Oates* [2013] EWCA Civ 91, para 38; *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] Bus LR 987, paras 16-17 (Lord Sumption) and paras 78-82 (Lord Toulson); Treitel, *The Law of Contract* (14th Edn, 2015) para 20-071; *Chitty on Contracts* (32nd Edn, 2015) vol 1, para 26-088. If that is not the case – for example, because the claimant did not discover the breach until a later date or because there was no readily available market in which the claimant could obtain a substitute performance, the so-called "breach date" rule does not apply. Similar principles govern the assessment of damages in tort, as discussed for example by the House of Lords in relation to

damages for deceit in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254. As Oliver J explained in *Radford v de Froberville* [1977] 1 WLR 1261, 1286:

> "It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the inquiry — at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation? ... [T]he proper approach is to assess the damages at the date of the hearing unless it can be said that the plaintiff ought reasonably to have mitigated by seeking an alternative performance at an earlier date, in which event the appropriate measure would seem to me to be the cost of the alternative performance at that date."

251. Even when the claimant's loss is assessed by reference to a market price or other measure of the cost of an alternative performance at a particular date, this does not mean that the court is forbidden to look at subsequent events. It only means that subsequent events are not relevant because the claimant's loss is calculated by reference to what it would have cost to purchase an alternative performance on that date, whether or not the claimant in fact did so. If the claimant chooses not to do so, later losses or gains are treated as consequences of that choice and not of the defendant's breach.

252. Although licence fee damages do not involve compensating the claimant for any actual loss and are, in my view, correctly understood as requiring the defendant to surrender a gain made from its breach of duty, it seems to me that treating the date of breach as the appropriate date at which to assess the defendant's gain rests on a similar assumption: namely, that the defendant could reasonably be expected to have obtained lawfully at that date the benefit which the defendant in fact obtained – either by purchasing a licence from the claimant or by going into the market to purchase an equivalent benefit. I have suggested that, where this criterion is not met, the just response is to award either an account of profits or licence fee damages which represent the proportion of the defendant's profits that ought fairly to be attributed to the wrong. In either case it is essential to have regard to subsequent events.

253. If I had accepted that it is correct to value the benefit to the defendants of acquiring unlimited use of all the confidential information contained in the files copied by the defendants as Marathon contends, then I would have sought to apply the principles which I have outlined at paragraphs 232-236 above to value each item of confidential information. As it is, however, I have concluded that there is a fundamental reason why Marathon's approach to the assessment of licence fee damages is flawed. This consists in a failure to identify accurately the wrong for which licence fee damages are being sought and to match the remedy to that wrong.

Matching the remedy to the wrong

254. I found earlier that there were three respects in which Mr Bridgeman was in breach of duties of confidence owed to Marathon (both in contract and under the general law). The first was in copying files containing confidential information; the second was in

retaining those files until 8 July 2013 (or, in the case of his email account, 11 September 2013); and the third was in making use of confidential information contained in the files to the limited extent that he did. In formulating its claim for licence fee damages, Marathon has chosen to focus on the first of these breaches. It is entitled to do so. But if the wrong for which a remedy is sought is limited to the copying of files, was complete when the copying took place and does not include any other breaches of duty committed afterwards, then the remedy awarded must respond only to that wrong. It cannot include redress for Mr Bridgeman's other subsequent breaches of duty in retaining and making use of the files that he copied. Still less can the remedy include redress for subsequent breaches of duty which might have been feared or anticipated at the time when Mr Bridgeman was copying files by someone aware of that fact, but which he never in fact committed.

255. If the breach of duty for which licence fee damages are being awarded is the copying of Marathon's files and not any subsequent breach of duty, then the relevant question to be asked in quantifying the damages is what price would reasonably have been agreed simply to permit the defendants to copy the files onto USB drives – without releasing them any further from their obligations. The obvious answer is that no reasonable person in Marathon's position would have sought to charge more than a token sum for such a release, as copying files containing confidential information onto USB drives would not, without more, involve any detriment to Marathon. Equally, no reasonable person in the defendants' position would have agreed to pay more than a token sum for such permission, as copying the files would not by itself confer a benefit of any value if there was no right to use the files for any purpose other than Marathon's purposes.

256. The notion that the outcome of the hypothetical negotiation would be an agreement to pay a substantial sum of money depends on assuming that the subject matter of the negotiation is not merely a licence to copy Marathon's files but a licence to make unrestricted use of them subsequently. That, however, involves detaching the assessment of damages from the breach of duty for which the damages are to be awarded. It offends the basic principle that any remedy granted by the court must be a response to the defendant's wrong and not a response to some other possible wrong which the defendant did not commit.

257. The critical importance of matching any award of licence fee damages to the wrong for which they represent redress is confirmed by authority. In *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 the Court of Appeal rejected an argument that licence fee damages for trespass (by a tenant in placing air conditioning equipment on a roof) should be assessed on the basis of the defendant's intention when the trespass commenced that the installation would be permanent. Patten LJ, with whom the other members of the Court of Appeal agreed, accepted the defendant's submission that it was necessary to treat the subject matter of the licence as the actual period of the trespass (which was less than three years) because to do otherwise would disconnect the licence fee and therefore the damages from the legal wrong for which they were intended to provide a remedy. Counsel for the landlord, relying on the *Lunn Poly* case, had contended that the date when the trespass in fact ceased was a "post-valuation event" which for that reason should not be taken into account. Patten LJ explained why this contention was misconceived in the following passage (at para 21):

> "Although the hypothetical negotiations for a licence fee have been adopted as a convenient means of valuing the benefit to the trespasser (and, in that sense, the loss to the claimant) which results from the defendant's tortious conduct, its accuracy depends upon the negotiations centering on the period and extent of the trespass which actually occurred. The nature and duration of the trespass is not a valuation event in the sense in which that term was used in *Lunn Poly* but rather it is what dictates and shapes the nature of the valuation exercise. It is therefore wrong to say that the parties would not have known at the commencement of the trespass how long it would last. The valuation construct is that the parties must be treated as having negotiated for a licence which covered the acts of trespass that actually occurred. The defendant is not required to pay damages for anything else."

See also *Mayor & Burgesses of the London Borough of Enfield v Outdoor Plus Ltd* [2012] EWCA Civ 608 at para 49.

258. Marathon did not dispute this principle. Indeed, in closing submissions Mr Kitchener QC for Marathon produced a list of propositions of law which expressly advanced it. Proposition 3 on this list was that, in order to quantify the damages, "the court first needs to identify the scope of the breach – and this is the exercise from which all else then progresses".

259. On the basis of the *Eaton Mansions* case, Mr Kitchener accepted in argument that it is necessary to have regard to the length of time for which the defendants had Marathon's files in their possession. But he maintained that the fact that the files copied by Mr Bridgeman were returned in July 2013 (or, in the case of the file containing his email account, September 2013) rather than being retained permanently makes no material difference to the quantification of Marathon's claim. It was Marathon's case that the outcome of the hypothetical negotiation would have been much the same whether the defendants were bargaining for the freedom to use Marathon's confidential documents indefinitely or only until July or September 2013. The justification given for this was that the documents would have their greatest value at the time of starting up a new business. Counsel relied on the evidence of Marathon's valuation expert, Mr Bezant, that the critical period for any start-up is the period before launch and immediately following launch. Mr Bezant also assumed in his report that, if the period for which the defendants could retain and use Marathon's files was limited to the period to July or September 2013, the defendants would organise themselves in such a way as to maximise their use of the information contained in the files during this period.

260. Again, however, Marathon's argument fails to match the remedy to the wrong. If the breach of duty for which damages are being assessed is the retention of Marathon's files, but not any use actually made of the files, then the relevant question to be asked in assessing licence fee damages is what price would have been agreed in a hypothetical negotiation simply to permit the defendants to retain the files on USB drives until the dates when the files were returned – without releasing them any further from their obligations. Again, the plain answer is that no reasonable person in Marathon's position would have charged more than a token sum for such a release, as

keeping files containing confidential information on USB drives would not, without more, involve any detriment to Marathon. Equally, no reasonable person in the defendants' position would have agreed to pay more than a token sum for such permission, as possessing the files would not by itself confer any benefit of any value, if there was no right to use the files for any purpose other than Marathon's purposes.

261. It is only if and to the extent that any use was actually made of any of the files that it might be possible to show that any significant benefit was obtained by the defendants from wrongful use of Marathon's confidential information. I have indicated at paragraphs 240-242 above how, in my view, it would in principle be appropriate to assess licence fee damages for any such misuse. As I have explained, however, Marathon has chosen not to seek a remedy for any use actually made by Mr Bridgeman of any information in the files which he copied and to seek licence fee damages based solely on his breaches of duty in (i) copying the files and (ii) retaining the files until the dates when they were returned.

262. The exercise undertaken by Marathon's valuation expert, Mr Bezant, reflects Marathon's legal case and is in my view flawed for the same reason. As mentioned earlier (see paragraph 147 above), Mr Bezant was instructed to value the right to make commercial use of the information contained in the files which Mr Bridgeman copied and removed, assuming no limitation on such use and without regard to the extent to which the defendants made any actual use of the information. For the reasons given, that was in my opinion an incorrect approach to adopt. The effect was to value the benefit which the defendants would have obtained had they made the maximum possible wrongful use of Marathon's confidential information in starting up a competing business rather than any benefit which they in fact gained.

Allocation of risk

263. In closing submissions Marathon sought to overcome this stumbling block by arguing that, although the defendants did not in fact make as much use of the information contained in the files as they could have done, the risk that they would derive less benefit from their wrongdoing than they might have done was a risk which they assumed when they unlawfully copied Marathon's files. Reliance was placed on *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB), [2014] Bus LR 1338, a claim for breach of a warranty given in a contract for the sale and purchase of a company's shares. The seller warranted the fairness and accuracy of the company's audited accounts, which included figures for bad debts which should have been higher if the accounts had been properly prepared. The seller argued that, in assessing damages for breach of the warranty, the court should take account of the fact that the incidence of bad debts had proved to be better than anticipated at the date of the acquisition. This argument was rejected by the court on the ground that, if the subsequent performance of the business in relation to bad debts had turned out to be better than had been expected, that benefit should enure to the buyer. As Popplewell J emphasised (at para 38):

> "... it is important to keep firmly in mind any contractual allocation of risk made by the parties. Party autonomy dictates that an award of damages should not confound the allocation of risk inherent in the parties' bargain. It is not therefore sufficient merely that there is a future contingency which plays

> a part in the assessment. It is necessary to examine whether the eventuation of that contingency represents a risk which has been allocated by the parties as one which should fall on one or other of them. If the benefit or detriment of the contingency eventuating is a risk which has been allocated to the buyer, it is not appropriate to deprive him of any benefit which in fact ensues: it is inherent in the bargain that the buyer should receive such benefit."

264. Counsel for Marathon submitted that this principle is applicable in the present case. They argued that the risk of what use might or might not be made of the confidential information contained in the files which were wrongfully copied and retained by the defendants and what benefit might or might not be gained from such use is a risk allocated to the defendants in the price which the court is required to fix. If the defendants chose not to use the information, or were unable in the light of subsequent developments to make profitable use of the information, that is no more relevant than how the company subsequently performed was relevant in the *Ageas* case.

265. This argument, however, does not address the basic flaw in Marathon's case because it invites the court to proceed as if the defendants had purchased the right to use Marathon's files. As already discussed, that is an incorrect approach. What has to be assessed is not the value of a right which the defendants never acquired but the value of the benefit gained by the defendants from their violations of Marathon's right to exclusive use of the information. As Marathon acknowledged, for that purpose it is necessary first to identify the actual violations of Marathon's right, from which the valuation exercise then progresses. It is a fallacy to proceed as if the defendants had actually bought the right in question.

CF Partners

266. Marathon further argued that its approach is supported by the decision of Hildyard J in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch).

267. In *CF Partners* the claimant (CFP) identified an opportunity to make a profit from purchasing a company (Tricorona) which owned a valuable portfolio of carbon emission rights. CFP approached Barclays for debt financing and Barclays thereby learnt in confidence of the value embedded in Tricorona. No agreement for debt finance was reached but Barclays went on to form a strategic relationship with Tricorona (in November 2009) and subsequently acquired the company (in June 2010), which led to Barclays making a very substantial profit. Barclays was found liable for misusing CFP's confidential information and licence fee damages were awarded. Hildyard J approached the assessment by postulating a hypothetical negotiation in January 2009, which was when Barclays began to use the information received by them in confidence for their own advantage. He treated the subject matter of the hypothetical negotiation as the price that would reasonably have been paid in January 2009 "to enable the exploitation of the opportunity free of restrictions and with an open mind (and some uncertainty) as to where that might lead" (see para 1247).

268. I accept that the approach adopted in *CF Partners* is consistent with the approach advocated by Marathon in the present case of taking the date when the defendant first

made wrongful use of confidential information and estimating what sum would reasonably have been agreed at that date for the right to use the information in the future without any restriction on such use. In my view, however, for the reasons already given, that is a wrong approach which is contrary to principle and to the decision of the Court of Appeal in the *Eaton Mansions* case (which was handed down after the close of argument in *CF Partners* and therefore was not cited to the court). As confirmed by the *Eaton Mansions* case and accepted by Marathon, the correct starting point is to identify the wrongful acts which have taken place for which damages are to be awarded. In a case where confidential information has been misused, this requires the court to start by identifying the extent of the misuse. Having done that, the next step is to value the benefit to the defendant of this misuse. The only circumstance in which it is relevant to consider *future* misuse of confidential information is where, at the time of the court's decision, the defendant still possesses and is threatening to misuse the information and the court is considering whether to grant an injunction to prevent such misuse or to award damages instead of an injunction.

The ability to use information

269. In closing submissions counsel for Marathon advanced a different argument for maintaining that Marathon is entitled to a substantial award of damages irrespective of any use actually made of its confidential information. This was that the files copied and removed by the defendants constituted a library of information and that possession of this library and the factual ability to use the information in the files as and when the defendants chose was itself a valuable benefit which did not depend for its value on the use actually made of the information. In support of this argument, Mr Kitchener QC relied heavily on two analogies: the analogy of a concrete mixer and that of a dictionary.

The concrete mixer

270. The analogy of the concrete mixer comes from *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713. I have outlined the facts of that case at paragraph 226 above. As discussed already, this was a case in which the measure of damages applied was the market rate for renting the apartments which the defendant occupied unlawfully, and the extent to which the defendant made any actual use of the apartments or derived any income from such use was regarded as irrelevant. Lord Lloyd, who gave the judgment of the Privy Council, supported the decision with the following example (at 718F-G):

> "If a man hires a concrete mixer, he must pay the daily hire, even though he may not in the event have been able to use the mixer because of rain. So also must a trespasser who takes the mixer without the owner's consent. He must pay the going rate, even though in the event he has derived no benefit from the use of the mixer. It makes no difference whether the trespasser is a professional builder or a do-it-yourself enthusiast."

271. On behalf of Marathon, Mr Kitchener submitted that the same applies to the confidential files removed by Mr Bridgeman. He argued that, having taken the files without Marathon's consent, Mr Bridgeman (and, as regards the 33 files which he

helped to remove, Mr Seddon) must pay a reasonable licence fee for the period until the files were returned, regardless of whether or not they made any use of the information in the files during that period or derived any benefit from such use.

272. I not accept the validity of this analogy. A concrete mixer is an item of property which can be hired in the market. In those circumstances, as discussed earlier, it will generally be reasonable to treat a trespasser who takes and detains the property without the owner's consent as having obtained a benefit equivalent to the market cost of hiring such a machine. Moreover, as Lord Lloyd indicated in the passage quoted, the normal market practice when equipment is hired is that hire is charged for each day that the hirer has possession of the equipment and does not depend on the amount of use made of the equipment during the hire period. It is, for this reason, not relevant in valuing the benefit received by the trespasser to inquire into what use he actually made of the concrete mixer during the period that it was in his possession.

273. It is possible to conceive of circumstances in which it would be appropriate to value the benefit of unlawfully obtaining access to information by reference to a market rate which does not depend upon the extent of actual use. Suppose that access to an online database is available on payment of a monthly subscription (which is not dependent on the amount of use actually made of the database); and suppose that somebody, without paying the subscription, hacks into the database from time to time over a period of six months. It would seem reasonable in this example to treat the hacker as having obtained a benefit equal to the cost of a six month subscription and to award damages in such an amount. By contrast, if the database was operated on the basis of a fee charged for each minute of access or for each document accessed, the benefit obtained by the hacker should be valued in the same way.

274. In the present case it cannot be said that the defendants have avoided payment of a going rate. The documents which Mr Bridgeman copied and retained were not a repository of information which was available (and only available) to be accessed lawfully by paying a monthly (or other periodic) subscription. The same applies to the sub-set of those documents which Mr Seddon provided to Mr Bridgeman. I therefore do not consider that the example of the concrete mixer affords a relevant comparison.

The dictionary

275. The analogy of the dictionary is drawn from *Force India Formula One Team Ltd v Aerolab SRL* [2013] EWCA Civ 780, [2013] RPC 36. The defendants in that case (“Aerolab”) had misused certain CAD (computer-aided design) files which were confidential to the claimant relating to the design of the claimant’s Formula One racing car. The designs (for various parts of the claimant’s car) contained in these files had been used by Aerolab in producing a model car for another client for the purpose of testing in a wind tunnel. Arnold J awarded licence fee damages measured by reference to what it would have cost Aerolab to commission a consultant to produce designs equivalent to those used. The claimant contended that, in determining the price that would be agreed in a hypothetical negotiation, the appropriate subject matter of the negotiation was the entire aerodynamic design of the claimant’s car on the basis the whole design was available to Aerolab to use as a reference, even if they only actually used a small proportion. The judge rejected this

contention as he thought it "contrary to principle, authority and fairness" that Aerolab should pay the same licence fee regardless of the extent of the misuse.

276. The Court of Appeal dismissed an appeal from this decision. Marathon nevertheless relied on the following *dicta* in the judgment of Lewison LJ (at para 96):

> "Whether Aerolab's aerodynamicists and CAD draftsmen regarded themselves as free to use the CAD files as they thought fit is essentially a question of fact, which turns on the state of mind of the people in question. … I do not consider that we are in a position to make a finding of fact that the judge did not make. That said, if the judge had made that finding, then it seems to me that compensation should have been assessed on the basis of the value to Aerolab of the whole corpus of information. After all, if A wrongfully retains B's dictionary, it does not matter that he only looked up a few definitions."

Counsel for Marathon argued that, on the facts of the present case, the defendants regarded themselves as free to use the files saved on Mr Bridgeman's USB drives and the damages should in these circumstances be assessed on the basis of the value to Marathon of the whole corpus of information contained in the files. It does not matter that Mr Bridgeman only in fact accessed a small proportion of that information and Mr Seddon never accessed any of it at all.

277. The observations quoted above are not binding as they did not affect the decision of the Court of Appeal in the *Force India* case and I confess that I cannot see how the quantum of licence fee damages can turn on the wrongdoer's state of mind. As already discussed, I think it clear in principle and from the *Eaton Mansions* case (which I note was not cited to the Court of Appeal in *Force India*) that, in assessing licence fee damages, the subject matter of the licence must be the wrong actually committed by the defendant. In the *Force India* case the Court of Appeal declined to interfere with the judge's findings that Aerolab did not copy or take the design of the claimant's entire aerodynamic system and that the only misuse of confidential information by Aerolab consisted in using certain particular CAD files. It was therefore the benefit of using those particular files which had to be valued. I cannot see how the value of the benefit of using those files could be affected by whether or not Aerolab's personnel regarded themselves as free to use other CAD files which they did not in fact use. In the *Eaton Mansions* case the Court of Appeal rejected as irrelevant in assessing licence fee damages the fact that, when his trespass commenced, the defendant intended it to last for longer than it in fact did. It seems to me that it must be equally irrelevant whether a person who misuses confidential information intends to make (or intends to make if he thinks fit) wrongful use of more information than he in fact does.

278. I would explain the dictionary example given by Lewison LJ differently. If A on a few occasions wrongfully uses B's dictionary (to bring the example more closely into line with the facts of the *Force India* case), then it is no doubt appropriate to value the benefit obtained by A on the basis of the cost of a whole dictionary. As I see it, this does not depend on A's state of mind. It does not matter whether or not A regarded himself as free to use the dictionary as he thought fit. The reason why the cost of a whole dictionary is the appropriate measure is that, in order to do lawfully what he did

unlawfully, A would have had to buy a whole dictionary. That in turn is a consequence of the fact that there is no market for separate parts of a dictionary. To look up any definition at all (at least in a physical dictionary), it is therefore necessary to buy the entire item. So the cost that A would have had to pay to look up a single word was the same as the cost of looking up a hundred words.

279. I do not need to examine what similarity or lack of similarity there was between the dictionary example and the facts of the *Force India* case. It is sufficient to note that, on any view, the example bears no analogy to the facts of the present case. The information contained in the files copied and retained by Mr Bridgeman was not a single corpus of information any part of which could only have been obtained lawfully by incurring the cost of acquiring all the information contained in those files. The files were a disparate collection of individual documents. In order to value the benefit of using one of the files, it would not be necessary or relevant to assess what it would have cost to obtain lawfully the information contained in the entire collection. It would only be relevant to assess what it would have cost Mr Bridgeman to obtain lawfully the information which he in fact used.

280. I conclude that the dictionary analogy and the *dicta* in the *Force India* case from which it is drawn also provide no support for Marathon's case.

Should damages be assessed on an alternative basis?

281. Having rejected the case on damages put forward by Marathon, I have considered whether – despite the fact that no alternative case has been advanced – I should nevertheless attempt to value the use which Mr Bridgeman actually made of Marathon's confidential information and make an award of damages on that basis. No such award could be justified in Mr Seddon's case, since the only breach of duty for which I have found him liable consisted in helping to copy some files which were never afterwards accessed. But Mr Bridgeman did make some subsequent use of a few of the many files which he unlawfully copied and removed. There is no scientific way to attribute an economic value to the benefit of such use. But that need not prevent a court from making an assessment by applying what Lord Shaw described in a case mentioned earlier as "the exercise of a sound imagination and the practice of the broad axe": see *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* [1914] SC (HL) 18 at 29-30. Nicholls J did as much in *Universal Thermosystems Ltd v Hibben* [1992] 1 WLR 840 when, in calculating damages payable to the defendants he deducted an amount on account of the time, trouble and expense which they had saved themselves by making wrongful use of the plaintiffs' confidential information.

282. Had Marathon advanced an alternative case of this kind, such an exercise could have been carried out. But Marathon, as I have emphasised, chose not to advance such a case and instead went all out for what the Court of Appeal in a similar situation described as "jackpot damages": see *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, 435. I have concluded that, in these circumstances, it would be wrong for me to award damages assessed on a basis which Marathon has expressly disavowed. Apart from anything else, had such an alternative case been advanced, it would have been necessary for Marathon to give Mr Bridgeman an opportunity to answer it in cross-examination and his counsel an opportunity to do so in submissions. It might also have affected what, if any, offer of settlement Mr Bridgeman was prepared to make, not least in order to protect himself

against liability for Marathon's costs. Given the way that Marathon's case has been presented, I do not think it would be just to adopt any other approach.

V. CONCLUSION

283. In the result, Mr Bridgeman has admitted liability and I have found that Mr Seddon is also liable for breaches of duties of confidence owed to Marathon in contract and under the general law to the extent summarised in paragraph 142 of this judgment. But I have rejected the (only) basis on which Marathon has claimed substantial damages. Marathon has therefore missed the jackpot and is entitled only to nominal damages. Judgment will be entered for Marathon against Mr Bridgeman and Mr Seddon, in each case for a sum of £1.