IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2023] EWHC 3153 (IPEC)
Date: 08 December 2023

Before :

HER HONOUR JUDGE MELISSA CLARKE
sitting as a Judge of the High Court

- -

B E T W E E N :

Claim No: IP-2021-000114

PSN RECRUITMENTS LIMITED
(t/a COSMOPOLITAN RECRUITMENT)

Claimant

- and -

(1) GRAEME LUDLEY
(2) GREENSCAPE SPECIALIST RECRUITMENT LIMITED

Defendants

- -
- -

Mr Nicholas Goodfellow (instructed by Gaby Hardwicke Solicitors) for the **Claimant**
Mr Ashley Roughton direct access counsel for the **Defendants**

Hearing dates: 2 and 3 October 2023

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JUDGMENT

Her Honour Judge Melissa Clarke:

A. Introduction

1. In early 2021 the Defendant, Mr Ludley, was employed as a recruitment agent by the Claimant, which is a specialist recruitment agency in the landscape, horticulture and gardening sector trading under the name 'Cosmopolitan Recruitment'.

2. In late May and early June, unbeknownst to his employer, Mr Ludley began forwarding to his own accounts various of the Claimant's documents and data. For example, on 17 May 2021 Mr Ludley emailed himself two of the Claimant's spreadsheets, one entitled 'Live Jobs' and one entitled 'Financials' ("**Claimant Spreadsheets**"). On 21 May 2021 he used a third-party mail management account called MailChimp to export to himself various of the Claimant's folders. These included a folder named 'Campaigns' which contained names, organisations and contact details of individuals who had received previous marketing campaigns of the Claimant ("**Claimant Client List**").

3. On 16 June 2021 Mr Ludley gave the Claimant one week's written notice of his resignation, stating in his letter that he had obtained an *"alternative position in a larger company, with a managerial and training bias"*. This was untrue. In fact, he intended to, and did a few days later on 21 June 2021, before his notice to the Claimant had expired, incorporate the Second Defendant Greenscape Specialist Recruitment Limited ("**Greenscape**") as a vehicle for working as a recruitment agent on his own account. Mr Ludley is the sole director and the sole shareholder of the Second Defendant

4. On 27 June 2021, in what he described in oral evidence as *"the stupidest thing I have done for at least 10 years"*, Mr Ludley sent an email to over 500 client contacts from the Claimant Client List misrepresenting that the business of the Second Defendant was a new name for the business of the Claimant ("**27 June Email**"). This read as follows:

GreenScape. A New Name

> *A change of name and location, but no change in our commitment to matching the best candidates to jobs that will develop and advance their careers!*
>
> *We never liked the name "Cosmopolitan Recruitment". It sounds like a cocktail, has no connection with what we do, and it's difficult to use on the telephone.*
>
> *So, as we are more likely to have a pint and we work exclusively in the Landscaping and Gardens sector we felt that GreenScape was a much better alternative.*
>
> *The contact number remains the same BUT the address and, importantly the e-mail have changed. GreenScape wasn't available as a domain so we've added an 'r' on the end for recruitment and become GreenScaper (graeme@greenscaper.co.uk).*

5. The Claimant claims in passing off. It also claims in breach of confidence in under Mr Ludley's contract of employment with the Claimant and also in equity.

6. In relation to the claim in passing off, the Defendants accept that the Claimant has goodwill in the unregistered mark 'Cosmopolitan Recruitment' and that the 27 June Email amounts to a misrepresentation that the services of the Second Defendant were those of the Claimant, but they deny that any damage was caused by the 27 June Email and so plead that the Claimant's case in passing off fails for causation. Their case is that none of those who were emailed were in truth misled to the extent that when they did business with GreenScape they thought they were dealing with the Claimant. They plead that they 'suspect' that the 27 June Email was simply ignored by those to whom it was sent.

7. In relation to the claims in breach of confidence, the Defendants deny that the Claimant Client List utilised to send the 27 June Email is confidential information. They plead it is no more than *"a collection of well-known contact details which are generally available from trade publications, email finders and cannot be described as a secret which can be protected"*.

8. It is convenient to note here that various other matters pleaded by the Claimant (including unlawful means conspiracy and other alleged breaches of contract) and Mr Ludley's counterclaim for unpaid wages are no longer pursued.

B. Issues

9. At a case management conference on 8 December 2022, His Honour Judge Hacon directed that there be a first trial to determine the following issues:

   i) In relation to the Claimant's passing off claim, whether the Claimant has suffered loss and damage and if so, how much; and

   ii) Whether the Defendants are liable to the Claimant for breach of confidence.

C. Witnesses

10. I heard three live witnesses. These were Mr Philip Hilbeck and Mr Erik Chapman for the Claimant, and Mr Ludley for the Defendants. Each filed a witness statement and were cross-examined and re-examined.

11. Mr Hilbeck is the sole director of the Claimant. He is also the sole director of an associated company called PL London Ltd ("**PL London**") which trades as 'Panoramic Landscape Contractors' and provides commercial soft landscaping services to building contractors in and around London and across the South East. He filed a witness statement dated 31 July 2023 and also signed the Claimant's pleadings, which stand as evidence. He attended Court and was cross-examined and re-examined. Although controlling a nonetheless evident anger at Mr Ludley and what he says is the catastrophic effect that Mr Ludley's actions have had on the Claimant's established landscape recruitment business, I consider that he was a good witness, straightforward, credible and reliable.

12. Mr Chapman has been the Recruitment Manager of the Claimant since 4 August 2021. He had previously worked for the Claimant as Recruitment Consultant, and then Recruitment Executive, between 18 November 2019 and 12 June 2021. He therefore worked alongside Mr Ludley at the Claimant for almost the entirety of Mr Ludley's employment, but left the Claimant's employ a week or so before Mr Ludley handed in his notice. Mr Chapman filed a witness statement dated 7 August 2023, was cross-examined and re-examined. Mr Chapman was a very good witness, in my assessment. He clearly came to court to give honest evidence to the best of his recollection and I am satisfied he was both credible and reliable.

13. Mr Ludley filed a witness statement dated 31 July 2023 and also signed the Defendants' pleadings which stand as evidence. He was cross-examined and re-examined. Mr Ludley comes to court as an admitted wrongdoer, on the back foot as it were. I have been alive to that, and careful to assess him fairly. To his credit he made a number of admissions at an early stage and in oral evidence made a number of concessions and admissions which undermined his case, as I will come to set out. However he has also destroyed evidence and he has provided surprisingly limited evidence as I will go on to discuss. I found him to be very keen to argue and advocate, and he was unwilling to make some very obvious concessions, namely:

    i) That if a competitor gained access to the Claimant's client list it would be in a better position to compete with it. Mr Ludley attempted to justify his position in oral evidence by arguing, hopelessly, that everyone knows who supplies Tesco as they can see the products on the shelves. There are many criticisms that can be made of that argument, not least that it confuses customers with suppliers. A better analogy would be if a competitor gained access to Tesco's clubcard database, but that certainly would not strengthen the Defendants' case that such information is not confidential;

    ii) That knowing to whom to address a marketing email like his 27 June Email was key to generating marketing leads from it. He opines in his witness statement that sending a marketing email was a *"wide scattergun approach*" and "*generally pointless*". However he sought to avoid the question of why he had taken the client database from MailChimp and used it to send the 27 June Email if he thought it was pointless and unlikely to generate any useful marketing leads, saying only *"we do an enormous number of pointless things*". He eventually conceded in answer to a direct question from the Court that when he sent the 27 June Email that he hoped it might generate marketing leads for his new venture;

    iii) That he knew that pursuant to his employment with the Claimant he owed it a duty of confidentiality in respect of confidential information. He maintained this position despite his attention being drawn to: (i) the confidentiality provisions at clauses 46 and 47 of his contract of employment; (ii) the

requirement in clause 50 of his contract of employment to familiarise himself with and comply with the Claimant's policies and procedures; and (iii) the confidentiality obligations in the Employee's Handbook, which he had signed accepting receipt and acknowledging that he had a responsibility to read and comply with it. He said he hadn't seen it, but I am satisfied that it is more likely than not that he did.

14. I also am satisfied Mr Ludley has been untruthful in his evidence about why he sent the 27 June Email. In his witness evidence he seeks to paint it as a mistakenly humorous attempt to distinguish his new business from that of the Claimant, saying that he did not want to pretend to be the Claimant. In cross-examination he repeated that it wasn't his intention to portray his company as the Claimant, whilst accepting that it was entirely misleading, but he sent it as "*displacement activity because I was bored of doing what I should be doing"*. This is not credible, in my judgment and the manner in which he gave that evidence was such that I have no doubt he knew it was not credible. I am satisfied that he sent it with the intention of directing the Claimant's business leads to his new venture, Greenscape. I found Mr Ludley to be more focussed on dismissing and arguing against the Claimant's evidence than assisting the Court with evidence of his own. A proportion of his evidence is in the form of self-serving generalised statement and opinion which does not stand up to scrutiny, in my judgment. I treat the remainder of his evidence with great caution unless it is supported by other credible and reliable evidence or the inherent probabilities.

D. Evidence

Mr Ludley's employment

15. Mr Ludley began working for the Claimant's business in January 2020 but did so initially pursuant to a contract with PL London. At the time he signed that employment contract with PL London he also signed a receipt form acknowledging receipt of, and agreement to comply with, the Claimant's Employee Handbook. There is no dispute that on or around 19 August 2020 Mr Ludley's employment transferred to the Claimant, and he was issued with a new contract of employment

which was, so far as is relevant to the dispute, in identical terms as that with PL London.

16. Paragraphs 46 to 49 of the employment contract are under the sub-heading 'Confidentiality'. They provide:

> 46. For the purposes of this Agreement:
>
> …
>
> b. **Confidential Information** means any information disclosed by or on behalf of the Employer (or any Group Business) to the Employee during their employment that at the time of disclosure (whether in writing, electronic or digital form, verbally or inspection of documents, computer systems or sites or pursuant to discussions or by any other means or other forms and whether directly or indirectly) is confidential in nature or may reasonably be considered to be commercially sensitive, and which relates to the business and affairs of the Employer (or any Group Business) including but not limited to: (a) all Employment IPRs (b) all Employment Inventions and (c) all analyses, compilations, studies and other documents prepared by the Employee which contain or otherwise reflect or are generated from the information referred to above.
>
> c. **Employment IPRs** means Intellectual Property Rights you create in the course of employment with us (whether or not during working hours or using our premises or resources) that:
>
> i. relate to any part of (or demonstrably anticipated business of) the Employer of any Group Business; or
>
> ii. are reasonably capable of being used by the Employer or in any part of a Group Business.
>
> …
>
> e. **Group Business** means any business owned or operated by us or an associated employer or all of those businesses together, as the context allows;
>
> f. **Intellectual Property Rights** means without limitation all existing or future intellectual and industrial property rights anywhere in the world, including… copyright and related right[s],… trade name,… trade secret, database right,… right in get-up, right in goodwill or to sue for passing off and any other right of a similar nature…
>
> 47. During your employment, you may have access to Confidential Information concerning us and our business. During and after your employment, you must not use or disclose or allow anyone else to use or disclose any of our Confidential Information, except:

> a. as necessary to perform your duties for us, properly, or
>
> b. with our consent; or
>
> c. as required by law or ordered by a court that has jurisdiction; or
>
> d. to make a protected disclosure within the meaning of Section 43A of the Employment Rights Act 1996.
>
> 48. As soon as your employment ends, however that happens, or earlier if we request it, you must:
>
> a. return to us, all property that you have or control that belongs to us or relates to our business including but not limited to all documents and… swipe cards, laptops and mobile phones
>
> b. delete any such property and confidential information from any electronic device which belongs to you.
>
> 49. You agree that if you do not comply with this clause, damages would not be an adequate remedy and we can apply for an injunction to prevent any (further) breach, without prejudice to any other remedy that we might pursue, including but not limited to claiming damages.

Development of the Claimant's customer relationship management database

17. In his witness statement Mr Chapman said that early in 2020 he became aware of flaws in the customer relationship management system then being used by the Claimant, and so he started to create excel spreadsheets and workflows that the Claimant could use alongside its existing system to trade and record information more efficiently. He said that the complexity of those spreadsheets and workflows developed over time to include "*vast amounts of information, including details of businesses, contacts, live jobs, salary arrangements, fee percentages and targets*".

18. Mr Chapman said that one of his main responsibilities was to carry out online research of businesses in the landscaping sector for the purpose of compiling the Claimant's prospective client database. He said he would identify a relevant business, make contact with it by telephone to introduce himself and the Claimant, and ask for the direct contact details of relevant directors or senior managers. Once obtained he would store those on the Claimant's systems "*which do not contain any information that can be obtained publicly or through publicly available sources*". In cross-examination, he conceded that some of the information in it might be available on LinkedIn, if the relevant individuals at the companies had

actively posted their contact information on there. He further accepted that some of that information might be available on subscription business contact services.

19. It became apparent during the course of his oral evidence that by denying that any of the data could be obtained through 'publicly available sources' Mr Chapman meant 'publicly available free sources'. He maintained his position that considerable work in time and effort had gone into compiling the customer relationship management system, and that it would not be easy to replicate, although he conceded that an experienced recruiter would be able to do it.

20. Mr Ludley conceded in cross-examination that the Claimant must have expended time gathering the data in the database, although he thought he could do it in three hours. He said that the database could be recreated easily using the Rocketreach website and the website of the British Landscapers Association. However, he conceded that those sources would be unlikely to include 39 contact details within one organisation, as the Claimant's database had for one of its clients, Idverde.

21. It is, of course, easier and quicker to recreate a database when you know what it contains, than create a database from scratch. However I do not consider that Mr Ludley's time estimate to recreate it is credible and on balance I am satisfied that is a significant under-estimation. I accept Mr Chapman's evidence about the time and effort he expended in gathering and ordering the data in the database, that most of it was not publicly available data, and that publicly available data may not be correct whereas he checked the information he input into the database.

22. Mr Ludley also made the following concessions and admissions in cross-examination:

    i) That the customer relationship management database from which the Claimant's Client List was derived had a value, although he did not accept that it was a significant one;

    ii) That a recruitment company would pay for a copy of the database, but he said that would be no more than £200-£300, as they could recreate it easily. However (a) I have found that he has underestimated the time (and so cost) or recreating it; (b) I note he had sent an email to Kerry Thompson of Select

Databases in July 2022 asking about buying a database of phone numbers for £499 plus VAT; and (c) he accepted that a paid-for list would not be as targeted, focused or useful as one built up by a business over time;

iii) That if he didn't have a database he would not have been able to send the 27 June Email; and

iv) He knew he was not free to simply take and use the Claimant's Client List.

Events of June 2021

23. Mr Chapman left the employment of the Claimant on 12 June 2021 after working his notice period. I am satisfied that he did so to explore more senior opportunities. Mr Chapman says that as Mr Ludley was the Recruitment Manager he had no promotion prospects at the Claimant and left to find a management-level role elsewhere. In cross-examination Mr Ludley denied that he saw Mr Chapman's departure as an opportunity to present himself, falsely, as the continuing face of the Claimant's business as he said that he had been thinking about leaving the Claimant before, but said it had *"precipitated a decision I was considering making"*.

24. I have already set out the chronology of Mr Ludley's transfer of the Claimant Spreadsheets and Claimant Client List to himself in May 2021 and his resignation on 16 June 2021 and termination of employment on 22 June 2021. Mr Ludley accepted in cross-examination that his reasons for leaving the Claimant provided in his resignation letter were "*entirely untrue"* and accepted that his reason for lying was that he did not want Mr Hilbeck to find out about his plans to start a new recruitment company in the same sector.

25. Mr Hilbeck sets out at para 21 of his witness statement details of further information emailed by Mr Ludley from his Claimant email account to his personal email account, which includes information about individuals being put forward for roles within clients, and the Claimant's subscriptions to two very large recruitment websites, Indeed and Totaljobs (the latter including the Claimant's Recruitment Contract Agreement) on 9 June 2021. I do not understand Mr Ludley to deny that he did so.

26. Both the day before and the day after Mr Ludley's employment terminated, on 21 June 2021 and again on 23 June 2021, the Claimant's financial manager emailed him asking for the return of all devices, systems and website logins that he had used whilst working for the Claimant. It is Mr Hilbeck's evidence, which I accept, that he failed to do so. Mr Hilbeck says that because both Mr Chapman and Mr Ludley had left, the Claimant went into a period of being unable to trade until new hires were made. I am satisfied that Mr Ludley was well aware of that, and that provides the context of what happened next.

27. Mr Ludley accepted that he emailed from his Greenscape email address three people at the Claimant's then largest client, Idverde, on 22 June 2021 about recruitment for various roles, using information from the Claimant's Client List. There is no suggestion in those email that he was working for a new company. One of those roles was a named individual who had already been placed by the Claimant and was due to start at Idverde on 30 June 2021.

28. On 24 June 2021 Mr Ludley also communicated from his Greenscape email account with another key client of the Claimant called Scotscape, without stating that he was no longer employed by the Claimant.

29. On 27 June 2021 Mr Ludley sent the 27 June E-mail which he has pleaded as *"an idiotic moment of madness for which he apologises"*. I do not accept this characterisation as it seems to have been the culmination of a careful plan, the execution of which began at least 5 weeks earlier with the transfer of the Claimant Spreadsheets and Claimant Client List, and which continued with the transfer in early June of various other information from the Claimant and then the email communication with the Claimant's contacts from his new Greenscape email address.

30. Both Mr Hilbeck and Mr Chapman estimate that there were around 500 names and email addresses in the Claimant's Client List at the time the 27 June Email was sent, and that the MailChimp 'campaign' folder exported by Mr Ludley contained all the email addresses stored on the Claimant's customer relationship management system maintained by Mr Chapman until he left, although they did not know this

until MailChimp confirmed what had been exported, which was not until October 2021. I accept that evidence.

31. Mr Ludley's evidence is that his 27 June Email "*evinced no responses*", which he said was not surprising, "*because recruitment mass mailings are generally an ineffective though not hopeless marketing tool."* I have already set out my concerns with his evidence on this point.

32. The Claimant became aware of the 27 June Email almost immediately as the Claimant's Client List included the Claimant's HR administrator, who received it and immediately forwarded it to Mr Hilbeck.

Letter of claim and response

33. On 30 June 2021 the Claimant sent Mr Ludley a letter of claim seeking, *inter alia*, undertakings including in relation to the delivery up of the Claimant's confidential information, followed by deletion of such information that remained in the possession of the Defendants.

34. On receipt of this letter it is Mr Ludley's evidence that:

i) on 1 July 2021 he installed Erasure software and irrecoverably deleted all the information he had taken from the Claimant; and

ii) on 2 July, he shut down the MailChimp account he had used to send the 27 June Email, without keeping or delivering up copies to the Claimant. On the Claimant's request, MailChimp could only inform the Claimant of the date and time of the export from the Claimant's MailChimp account on 21 May 2021, and the name of the three folders sent in that export ('Campaigns', 'Reports' and 'Gallery').

35. I accept this evidence. Accordingly, there is no evidence before the Court showing to whom he had sent the 27 June E-mail, as that evidence has been destroyed by Mr Ludley.

36. Mr Ludley responded to the Claimant's solicitors on 1 July 2021 stating that he needed time to obtain legal advice before providing a substantive response to the

letter before action, and although he notably failed to inform them that he was busy deleting evidence on that day and proposed to continue doing so the next, it appears he did also seek legal advice from Bayfields Employment Solicitors. On 6 July 2021 Bayfields responded to the letter before action on his behalf but did not agree to provide the undertakings which the Claimant had sought, and were silent as to the deletion of information by Mr Ludley.

37. Mr Ludley's oral evidence is that as soon as he received the Claimant's solicitor's letter of 1 July 2021, he realised that his 27 June Email was a mistake and so he was "*very careful to explain to clients on the phone that I was nothing to do with the Claimant and that Greenscape was an entirely separate entity. Apart from anything else I need[ed] to ensure that they set up a new supplier account for Greenscape so that any payments would come to my bank*". In his written evidence he said that he "*actively promoted"* his company as Greenscape and *"disassociated both myself and Greenscape from the Claimant"*. It was put to him in cross-examination that this was untrue, and he denied it. As he accepted in cross-examination, Mr Ludley provides no documentary or witness evidence from any client to support his assertion that he sought to reassure clients that Greenscape was not the same as Cosmopolitan Recruitment/the Claimant and there is evidence to suggest the opposite. For example, he emailed Scotscape on 6 July 2021 referring to terms "which were fundamentally the same as those we have previously used" in reference to terms used by Scotscape with the Claimant. For those reasons, I am satisfied his evidence on this point is untrue.

38. Mr Ludley also stated that as he had closed the MailChimp account and erased the database, "*I could not send another bulk email correcting my mistake*". He was asked in cross-examination why he did not do so before deleting the MailChimp account, and he had no real answer to give. I do not accept that the 27 June Email was a mistake. I am satisfied it was deliberately phrased and sent to the full Claimant's Client List in order to divert business from the Claimant, and he did not send a correction because it suited him not to correct that misrepresentation.

Return of Mr Chapman to the Claimant's employ

39. Meanwhile, Mr Chapman says that only a few weeks after leaving his employment with the Claimant, he was contacted by Paul Hitchcott who was the Managing Director for PL London, the Claimant's sister company. Mr Hitchcott told him that Mr Ludley had left and set up Greenscape in direct competition with the Claimant, and told him about the 27 June Email. He offered Mr Chapman to return to the Claimant in the role of Recruitment Manager and Mr Chapman accepted, returning to the Claimant on 4 August 2021. His evidence is that on his return, he quickly understood how detrimental the 27 June Email had been on the Claimant's business. Mr Hilbeck describes it as taking *"a dramatic downturn immediately following the 27 June Email"*.

40. Mr Chapman says Mr Hilbeck asked him to, and he did, send an email to the Claimant's clients on 13 August 2021 apologising for the 27 June Email and informing them that the Claimant had not changed its name ("**August Email**").

41. Mr Hilbeck explained in cross-examination that the 7 week delay in discovering that Mr Ludley had sent the 27 June Email and Mr Chapman sending out the August Email rebutting it, was due to the Claimant taking legal advice and needing to get a Recruitment Manager in place before going to clients to explain that Mr Ludley's email was untrue. He did not agree that 7 weeks was a long time to address the issue with customers. Given the fact that the Claimant had been left with no recruitment consultants on Mr Ludley's departure, and given the fairly swift efforts that were made to get Mr Chapman employed by the Claimant again, and given that at this time the Claimant had no way of knowing how many and which clients the June 27 Email had been sent to because Mr Ludley had destroyed instead of disclosing that evidence, and given that MailChimp did not assist with what Mr Ludley had taken until October 2021, I accept that evidence and am satisfied that the delay was unfortunate but justified.

Claimant's client response to August Email

42. In his written evidence Mr Chapman said that the August Email "*gained very little if any traction in reversing the damage that had already been caused*". In his written evidence, Mr Chapman provided details of, and exhibits, an email from Deborah Sinner of Gardenlink Limited, an existing client, on 18 August 2021

responding to the August Email. In it, she confirms having received the 27 June Email and says that she believed the Claimant had changed its name.

43. The Claimant also relies on an email from Gina Di Gregorio of Landform to Mr Chapman dated 8 September 2021 responding to an email from him, which states *"I have seen that you are still writing from the Cosmopolitan email address. I thought it had changed its name to Greenscaper, as we received an email from Graeme Ludley about it"* and Mr Chapman's account in his witness statement of a conversation he had with Phil Miner of Practicality Brown Limited in January 2022, a client of the Claimant, *"who expressed to me his confusion over the name change… he did not realise the Claimant and [Greenscape] were separate companies"*. He exhibits an email that he sent to Mr Milner after that conversation reconfirming the Claimant's terms of business.

44. The Claimant submits these examples are illustrative of clients remaining confused as to the true position even months after the 27 June Email. I accept they are. The Defendants accept that the former appears to show that Ms Di Gregorio believed that the Claimant had changed its name, but they say that this does not evidence whether there has been any diverted trade from Landform to Greenscape nor whether it caused any damage to its perception of the Claimant, and the Claimant has not called or adduced any evidence from Ms Di Gregorio on these points. I will return to that question.

45. In oral evidence, Mr Chapman said that he did have other conversations with clients about the August Email after he sent it, including Oxford Garden Design and Davinder at Scotscape. He did not mention these conversations in his witness statement but gave details in oral evidence. Mr Chapman also said that he spoke to Ron Leto of Green Oak who told him that he thought that Greenscape was a name change and so the Claimant as Cosmopolitan was no longer around and that he *"had continued using Greenscape believing that he was still dealing with the Claimant"*. As I say, I have no concerns about Mr Chapman's credibility, and I am satisfied that this evidence was honestly given.

46. Mr Chapman says that it was not until 6 October 2021 that he received an email from MailChimp which set out what folders Mr Ludley had exported from the

Claimant's account to his own account. He says that the documents Mr Ludley exported enabled him to retain contact details of all the Claimant's clients on its customer relationship management system, which numbered just short of 500 around the relevant time. The list of contacts has been disclosed to the court as a confidential exhibit.

Financial impact on Claimant and Defendants

47. The Claimant's case is that immediately after the 27 June Email, its business suffered immediately. Mr Hilbeck's evidence in cross-examination is that from showing a steady growth in the previous 18 month period, the Claimant's landscaping income *"stopped overnight and Greenscape started to bank £10,000 for July 2021. Our trading results prove that after the email we suffered an instant downturn"*.

48. At paragraph 25 of his witness statement Mr Hilbeck set out a. list of 14 clients from which, he says *"business has almost certainly been lost by the 27 June email"* showing amounts invoiced: in the 12 months before the 27 June Email; between 28 June 2021 and 27 June 2022: and between 28 June 2022 and 27 June 2023. That shows that 13 of those clients who were invoiced between about £2000 - £12,000 each in the 12 months before the 27 June Email have produced no work for the Claimant in the following two years. Five of those clients are known from the Defendants' disclosure to have placed business with Greenscape.

49. The 14th, and main client who was invoiced some £71,000 in the 12 months before the 27 June Email was Idverde. The Claimant invoiced Idverde c. £55,000 in 2021/22 and £33,000 in 22/23, an overall reduction in billings of some £84,000 in the first year after the 27 June Email and £106,000 the next. The Defendants disclose that Greenscape invoiced Idverde almost £50,000 over two years.

50. Mr Chapman provides evidence of a phone call he received from Laurence Vincent, Operations Director of Idverde on 22 August 2021 querying an invoice received from Greenscape for placement of a named individual, who had been put forward for the position by Mr Ludley when he was employed by the Claimant so the Claimant should have raised the bill. Mr Chapman describes that as a *"clear example of the [Defendants] diverting business secured by the Claimant"*. Mr

Ludley accepted in cross-examination that he was not entitled to invoice Idverde for that placement and ended up issuing them with a credit note. However he said that the Claimant's loss of business from Idverde was as a result of Idverde's business difficulties which resulted in them imposing a recruitment freeze in 2021. This is unsupported by any documentary or other supporting evidence and given that Greenscape invoiced Idverde £45,000, and the Claimant £55,000, there does not appear to have been a freeze as the word is usually understood.

51. The Defendants set out a list of their clients who were clients of the Claimant at the time of the 27 June Email. In cross-examination Mr Ludley accepted that it was not a complete list as it does not include Scotscape, who Greenscape has invoiced £11,000. I am satisfied that it also omits Sky Garden.

52. At paragraph 29 of his witness statement Mr Hilbeck set out a table which was produced by his Finance Manager showing the total sums invoiced for projects won by the Claimant since the June 27 Email against the Claimant's projected income figures. This purports to show that the Claimant suffered a loss referable to the June 27 email and its aftermath of £308,000 amounting to an approximate profit loss of £154,049, after deduction of overheads. In his oral evidence, Mr Hilbeck said that the overheads of the Claimant amounted to employee salaries, platform advertising, office rental and other general office expenses, but he was not able to provide any details as to those figures and they have not been evidenced. Mr Hilbeck's evidence in cross-examination was that without Mr Ludley's actions, there was no reason to think that the forecasted growth in the Claimant's budget would not be achieved. He denied that this amounted to wishful thinking and Mr Ludley confirmed in cross-examination that he does not challenge the figures for loss of revenue and profit in the table at para 29 of the Mr Hilbeck's witness statement.

53. It was put to Mr Hilbeck in cross-examination that the drop in business was because of the period of time that Mr Chapman was not working in the business until he returned in August 2021. Mr Hilbeck denied it, saying that anyone who called or emailed was being answered by the HR Manager Emma Patterson. It seems to me that Ms Patterson answering the phones was not going to get the job of recruitment done. Given Mr Hilbeck's evidence that when Mr Ludley also left

the Claimant effectively stopped trading until Mr Chapman returned, it seems likely that even if Mr Ludley had not sent the 27 June Email or taken the Claimant's information there was going to be some drop in income by the mere fact that there were no recruitment consultants available to carry out any work for a period of 6 weeks.

54. Mr Hilbeck accepted in cross-examination that in September, October and November 2021 the Claimant had an extraordinary increase in sales improving its financial position, but in re-examination he said that this was attributed to entering two new markets, engineering recruitment and the care sector. He said, *"We went from zero to £7-10k per month, a mix of landscaping, engineering and care"*. I accept this evidence.

55. It was put to him in cross-examination that by the time of the 27 June Email the Claimant had already started to diversify out of the landscaping sector and into engineering recruitment, but he denied it, saying: (i) that did not start until after Mr Chapman had returned as Recruitment Manager, in September or October 2021; and (ii) he did it out of desperation about how many landscape clients, and associated income, he had lost as a result of Mr Ludley's actions. Mr Chapman in cross-examination also said that they only diversified later from their *"bread and butter business in the landscaping sector"* because *"we had to"* following the 27 June Email, and the Claimant hired another recruiter, Ali, to do that work. It was put to both Mr Hilbeck and Mr Chapman that the Claimant was barely operating in the landscaping sector and had moved across to engineering, but they both gave convincing evidence that it continued to operate in both sectors, although the Landscaping sector had never fully recovered from the effects of the 27 June Email. I accept their evidence.

56. In cross-examination Mr Hilbeck also denied that PL London, a landscaping services company which trades as Panoramic Landscapes, competed with various of the Claimant's clients and this might afford an explanation as to why the Claimant's revenues from landscaping-related recruitment work had suffered such a deleterious downturn. This line of questioning was based on an email from a Sarah Dodd of Life Outdoors Limited to Mr Chapman, who said she would not engage the Claimant due to a potential conflict of interest. Although accepting that

she considered there was a conflict, Mr Chapman did not agree that it was seen as a competitor by most of the Claimant's clients, saying *"PL London operate in an entirely different sector to most of our clients"*. There does not seem to me to be any reason why a number of the Claimant's clients might suddenly object to PL London's business when they hadn't previously. This appears to be the Defendants seizing on this email about a specific conflict to seek an alternative reason for the Claimant's downturn in business other than what I am satisfied on the balance of probabilities was the primary one, which is that most clients took the 27 June Email at face value and continued to contact Mr Ludley on his new, Greenscape email address believing that Greenscape was the Claimant's rebranded business.

57. Mr Ludley's written and oral evidence is that his 27 June Email did not result in work coming to Greenscape, but rather he has gained work for that business from the fact that he cold-calls between 40 and 50 client prospects a day (and more when he first started Greenscape). He said that each time he reintroduces himself to clients and contacts, explains that he is now working for his own company and asks them for instructions to work on any vacancies that they have. His evidence that he has to reintroduce himself to clients and contacts each time is contradicted by his oral evidence in cross-examination that "*These [clients] aren't strangers. Most of them I have met, we have 2-3 calls a week, we discussed exactly what I was doing, they were happy to support me*" and that he counted some of them, including Davinder at Scotscape, as a *"close personal friend"*. He said "*In all cases where the client had a vacancy and used recruitment agencies, they were happy for me to work with them. Bear in mind however that no client ever works exclusively with one recruitment agency. A recruitment company will make a placement into only about 25% of the vacancies they work on*". It is also contradicted by the clear evidence of Ron Leto at Green Oak that he used Greenscape believing it was the Claimant.

58. In any event it is clear that the Defendants began working with clients of the Claimant almost immediately. For example, on 16 July 2021 he was putting forward candidates to Oxford Garden Design, who had three contacts on the Claimant's Client List (so who I am satisfied on balance were likely to have received the 27 June Email). Greenscape issued its first invoice to Scotscape, a

regular and frequent client of the Claimant, on 2 August 2021. It invoiced Green Oak, who Mr Ludley had worked for while at the Claimant as recently as May 2021, in September 2021. Mr Ludley said that he approached them after the 27 June Email and obtained work that way, but accepted there was no documentary evidence to support that and Mr Leto's email shows that even if he did, he used Mr Ludley believing he was working for the renamed Claimant. I am satisfied that it is more likely than not that the 27 June Email misrepresenting that Greenscape was a new name of the Claimant did cause confusion with some of the Claimant's clients which caused work to be diverted from the Claimant to Greenscape, and that Mr Ludley did nothing to correct that misrepresentation.

59. Finally the Claimant's evidence is that Mr Hilbeck has incurred wasted management time in dealing with the investigation of Mr Ludley's wrongdoings estimated at 15 hours since the 27 June Email, made up of time spent collating documentation for review, consulting with Mr Chapman over damage limitation and corresponding with the Claimant's solicitors, and Mr Chapman has likewise incurred 18 hours of wasted management time. I am satisfied that it can be no less time than this and accept their evidence.

E. Issue 1 – Passing off. Has the Claimant suffered loss and damage and if so, how much?

Law

60. The burden is on the Claimant to prove loss and damage to the civil standard to complete the cause of action in passing off, the Defendants having admitted reputation and goodwill.

61. The Claimant relies on *McGregor on Damages* 21st edition at Chapter 48 (Economic Torts and Intellectual Property Wrongs) Part II Section 2 Passing off. At 48-016 the editors set out the 'modern position' in respect of damage in passing off cases with reference to Goddard LJ's judgment for the Court of Appeal in *Draper v Trist*:

> "…in an ordinary action of deceit, the plaintiff's cause of action is false representation, but he cannot bring the action until the damage has accrued

> to him by reason of that false representation. In passing off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the claimant injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. **The law assumes, or presumes, that, if the goodwill of a man's business has been interfered with by the passing off of goods, damage results therefrom. He need not wait to show that damage has resulted. He can bring his action as soon as he can prove the passing off, because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage**… If it be necessary for a plaintiff in this class of case, before he can get more than nominal damages, to show that he has lost this, that, or the other order, one would have to put this class of case, I think, into a third division of law, a case in tort, in which nominal damages can be recovered, although no damage be proved. If, however, a plaintiff wants more than nominal damages, he will have to prove this, that and the other. However, I do not think that is the law." (my emphasis)

62. At 48-017 of *McGregor on Damages* the editors identify *Spalding v Gamage* (1915) 84 L.J.Ch 449 HL and *Draper v Trist* [1939] 3 All E.R. 513 CA as "*the only cases of general importance*" on the question of assessment of damages in passing off cases, noting that "*The principal head of damage is the loss of business profits caused by the diversion of the claimant's customers to the defendant as a result of the defendant's misrepresentation; beyond this, damages may be awarded for any loss of business goodwill and reputation resulting from the passing off. Damages under both these heads were held to be properly awarded in Spalding v Gamage, a result which has never since been doubted.*"

63. On the facts of the case in *Draper v Trist*, loss of profits was found not to be a relevant consideration and the Court of Appeal awarded a sum of £2,000 for loss of reputation: see 524E-525A, where Sir Wilfred Greene MR stated:

> *"this court is entitled, as I think a jury would be entitled, to use ordinary business knowledge and common sense, and to consider that one cannot have deceptive trading of a considerable volume without inflicting, at any rate, some measure of damage on the goodwill. How long that will last,*

> *what its extent will be, is a thing which no evidence, except in the most exceptional case, could satisfactorily define, and the matter is reduced, as many of these matters are reduced, to the formation of a rough estimate in a way in which a jury could properly form one."*

Submissions and determination

Completion of the tort?

64. The Defendants say that the Claimant's case in damage is insufficiently pleaded. I find it convenient to deal with their submissions relating on this point first. The Defendants submit that:

i) damage to reputation and goodwill claimed in the Particulars of Claim is said to be as a result of the Landform transaction;

ii) lost sales by way of lost profits are also claimed and said to be as a result of the Landform transaction;

iii) there is no evidence at all of lost profit or of the expenses on which those profits might be calculated;

iv) further no *Wrotham Park*, exemplary or user principle damages are pleaded or claimed;

v) save for the figures contained at paragraph 28(2)(iii) of the Particulars of Claim which estimates that the revenue the Claimant has earned from placements in the period from 16 June 2021 to 31 October 2021 has reduced by a sum in the region of £44,000 by the Defendants' wrongdoing, giving a loss of profit in the region of £22,000 to 31 October 2021 and continuing, which the Defendants submit are 'opaque', no basis for the damages calculation has been claimed, pleaded or evidenced and there is no evidence that the Landform transaction resulted in lost profits of £44,000.

65. The Defendants' submissions are ill-founded, in my judgment. In relation to points (i), (ii) and (v), the Particulars of Claim do not plead that the loss of reputation/goodwill and loss of profits claimed arises out of the Landform

transaction. At paragraph 20 of the Particulars of Claim it pleads that it is a reasonable inference that the 27 June Email was sent to the entirety of the Claimant's 500 client contacts (as I have found) and at paragraph 21 that *"the Claimant's clients have been actively misled by the content of the said email"*. It refers to the Landform email as an exemplar of a client who was misled by its content and had understood that the Claimant had changed its name (as I have also found). In paragraph 23, in case there was any doubt, it pleads that *"For the avoidance of doubt, it is the Claimant's case that the extent of the Defendants' wrongdoing is not limited to that set out above and the Claimant reserves the right to amend these Particulars of Claim following disclosure"*. As Mr Goodfellow submits for the Claimant, and I accept, despite the work accruing to Greenscape almost immediately after the company started trading around the time of the 27 June Email, the Defendants have provided no documentary disclosure of how this work came to be generated, and indeed almost nothing in the way of witness evidence either, and so it is unsurprising that no application has been made to amend the Particulars of Claim as the facts are simply unknown to the Claimant. Mr Goodfellow in closing submissions described that new business as *"coming out of thin air from a disclosure perspective*", which I consider to be an apposite description.

66. Similarly it is not correct to say in point (iii) there is no evidence of lost profit. I have summarised evidence on the point contained in Mr Hilbeck's witness statement which was produced by his finance manager and Mr Ludley confirmed that he took no issue with those figures in oral evidence.

67. Mr Roughton in closing for the Defendants accepts the egregious nature of Mr Ludley's behaviour and accepts that any Court would find that he should face up to the consequences of his actions. However, he submits that at all times Mr Ludley was very well known in the specialised world of landscape and garden recruitment, some of his clients while at the Claimant were very close friends, and they would have followed him whether he had sent the 27 June Email or not. That is what Mr Ludley says, but there is no evidence to support it save perhaps evidence that Mr Ludley has had a fairly long career in the landscaping and gardening sector generally, albeit not always in recruitment. That is also not what I have found.

68. I have found that the Claimant's business underwent a significant and immediate decline after the 27 June Email was sent, that Mr Ludley sent that email not in a moment of madness but as the culmination of a plan of action to start his own business which started with transferring the Claimant's documentation and information for himself, that it was precipitated by Mr Chapman leaving the employ of the Claimant so that he was the only recruitment consultant left, that he sent the 27 June Email hoping that it would produce marketing leads for Greenscape and that Greenscape did immediately win new business such that he was invoicing a client of the Claimant just over a month after the 27 June Email. I have found that the 27 June Email caused confusion with some of the Claimant's clients which caused work to be diverted from the Claimant to Greenscape, and that Mr Ludley did nothing to correct that misrepresentation. That is damage amounting to both loss of profit and damage to reputation, in my judgment, sufficient to complete the tort of passing off.

Quantification of loss and damage

69. Turning then to quantification, I accept the Claimant's submission that the Defendants' approach to evidence which might be available to the Court on the question of loss and damage has been, through Mr Ludley, to seek to destroy (in the case of the 27 June Email recipients) or hide (in the case of the incomplete disclosure in the pleadings of the Claimant's clients for whom work has been carried out by Greenscape) or mislead (in the case of untruthful evidence given to the Court), and in those circumstances it seems to me right that although the burden is and remains on the Claimant, the Court should view the Claimant's attempts to quantify the loss benevolently, given its findings on the Defendants' approach to evidence. To do otherwise would be to reward the Defendant for that approach, which is to be deprecated.

70. In my findings of fact I have rejected the suggestion that the Claimant failed to mitigate any loss because of the delay between the sending of the 27 June Email and the August Email in correction. I have also rejected the suggestion that at the time of the 27 June Email the Claimant was moving out of the landscaping and garden sector to focus on Engineering recruitment instead, finding that it did so

"because it had to" after the 27 June Email caused the landscaping business to catastrophically decline.

71. Mr Goodfellow suggests two potential approaches that the Court might take to quantification of loss of profit and sets them out at paragraph 33 of his skeleton. In his words, with minor changes for clarification and to reflect closing submissions and the facts as I have found them, they are:

i) **Firstly, the Claimant's preferred "top down" approach** to lost profits based on the revenue reduction in the landscaping sector the Claimant has suffered in the period following the sending of the 27 June Email, not limited to clients that have placed business with D2:

a) The 'revenue reduction' from landscaping clients in the years ending 27 June 2022 and 2023 (i.e. compared with the revenue for the previous year) amounts to £84,222.04 and £106,177.87 (a total of £190,399.91).

b) To this must be added in sums from three additional clients (Green Oak, Maylim and Belbederos) that gave work to Greenscape but do not appear in Mr Hilbeck's list of 14 clients.

c) Approaching matters in a broad-brush way, in the light of Mr Chapman's evidence as to what impact the 27 June Email has had on the Claimant's specific client relationships, the Court is invited to conclude that 40% of that turnover reduction was attributable to the Defendants' unlawful actions, and after applying an overhead reduction of 50%, the loss of profit amounts to the sum of **£38,079.98**.

ii) **Alternatively, a "bottom up" approach** being the lost chance of earning revenue from the clients that received the 27 June Email and subsequently placed business with D2:

a) It is not easy to say exactly how such clients would have behaved had Mr Ludley not misled them, but the Claimant submits that the likelihood that they would have instead chosen to stay with the

Claimant is significant, in the region of 60%. Further, when arriving at a suitable percentage, the Claimant should be given the benefit of any doubt in that regard.

b) Therefore, the Claimant claims for a sum of **£28,710.53** based on (i) the total revenue earned by Greenscape from such clients, deducting 50% for overheads per Mr Hilbeck's evidence (ii) applying a 60% chance that the business from clients who placed business with Greenscape commencing in summer/autumn 2021 would have used the Claimant for the placement instead, and (iii) applying a 40% chance that business from clients that first placed business with Greenscape in 2022 would have used the Claimant for the placement instead.

c) However, this *"bottom up"* method of calculating the loss does not adequately take into account all losses that the Claimant is likely to suffered, because it excludes clients that have no longer used the Claimant for placements but may well not have placed business via Greenscape.

72. The Defendant submits that the top-down approach relies on evidence from a single paragraph of Mr Hilbeck's witness statement which he accepts that he supported forcibly in cross-examination, but he describes as having very little substance to it. However, Mr Ludley took no issue with those figures. He further submits that the top-down approach takes no account of the fact that Mr Chapman was away for a period of time leaving the Claimant not trading, and I have found that this would have resulted in some loss of profit, although how much is difficult to assess. He further submits that Mr Ludley leaving would have caused some clients to move with him and I accept this is possible but so is it possible that Mr Chapman's return would have energised the business further.

73. In my judgment, the top-down approach gives a result which is more likely to compensate the Claimant adequately for the loss of profit suffered. The bottom-up approach relies too heavily on disclosure by the Defendants, which I have found to be inadequate. I have considered reducing the figure somewhat to reflect the likely loss of profit caused by Mr Chapman's absence, but set against that firstly that is

likely to be a fairly low figure which I do not have any real ability to assess and secondly I have the Claimant's evidence, which I accept, that the Landscape and Garden business still has not recovered from the hammer-blow dealt to it by the misrepresentation in the 27 June Email and these two matters can, I think, fairly be set against each other such that it is just for me not to amend the figure sought. This appears to me to be adopting a liberal approach in favour of the Claimant, whilst being careful not to punish the Defendants for their wrongdoing (applying the principles set out in *Harman* cited above). Accordingly I assess the damage for loss of profit at £38,079.93.

74. Mr Goodfellow acknowledges that it is tricky to arrive at a correct figure for damage to reputation. He submits that the £2,000 award in Draper and Trist in the late 1930s as a comparable means that the award sought by the Claimant of £20,000 is not unreasonable. Mr Roughton describes this as a stab in the dark. He does not suggest an alternative. I accept Mr Goodfellow's reasoning and assess damage for loss of reputation at £20,000.

75. The Claimant further seeks an award of £1,499.99 for loss of management time per Mr Hilbeck's and Mr Chapman's evidence calculated on time spent as a proportion of their annual salary. Mr Roughton submits for the Defendants that this is inadequately pleaded and amounts to a mere request, but there is not much more that can be said when what is sought is x days at a salary of y. I have accepted that Mr Hilbeck spent this time as a result of dealing with the 27 June Email, that is a loss arising from the passing off, and so I award the sum sought.

F. Issue 2 – Are the Defendants liable to the Claimant in breach of confidence?

Law

76. The leading case setting out the principles of the law of confidence in the context of an employer/employee relationship were set out by Neill LJ giving the judgment of the Court in *Faccenda Chicken v Fowler* [1987] Ch 117 at 136G onwards. Those include so far as is relevant to this case, that:

i) where parties are or have been linked by a contract of employment, the obligations of the employee are to be determined by the contract between him

and his employer (135G);

ii) it is only in the absence of any express term that the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms (135 G);

iii) there is an implied term of duty of good faith or fidelity on the employee during the course of employment (135H) which will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends, although except in special circumstances there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer (136A-B);

iv) the implied term after the determination of the employment is more restricted in its scope than that which imposes a duty of good faith during the employment, but includes that the ex-employee will not make use of the employer's 'trade secrets' or information with a sufficiently high degree of confidentiality to warrant the same level of protection (136C-D);

v) in order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an ex-employee, the Court must consider all the circumstances of the case (137B) including:

a) the nature of the employment;

b) the nature of the information itself;

c) whether the employer impressed on the employee the confidentiality of the information;

d) whether that information can be easily isolated from other information which the employee is free to use or disclose.

77. In *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 at page 260B Staughton LJ (with whom Butler-Sloss LJ agreed) defined a 'trade secret' as information:

i) used in a trade or business;

ii) which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret;

iii) in respect of which the owner has limited the dissemination of it or at least has not encouraged or permitted widespread publication;

and observed at 260C that 'trade secrets' include, in an appropriate case, "*the names of customers and the goods which they buy*." However he went on to note, "*But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret*."

78. In the context of customer lists, 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 – for example where a document presents a collection of information which, while in theory available generally in component parts, would be difficult or costly to source and collate: *Marathon Asset Management LLP v Seddon* [2017] 2 CLC 182 at [119] and [120].

79. On the topic of customer lists generally, see *Toulson & Phipps on Confidentiality*, 4th Edition (2020) at [13-028] – [13-035], where it is observed that if an employee is to be precluded from seeking the employer's custom, this must be by a non-solicitation covenant which satisfies the requirement of not being in unreasonable restraint of trade. However, the author notes this proposition *"does not give a licence to an employee who intends to leave their employment and work in competition with their employer, whether for a rival business or on their own account, to copy the current employer's customer list, or to retain a copy of it, with a view to using it for competitive purposes after they have left"*: see [13-030] and also the case of *Robb v Green* [1895] 2 QB 315 cited therein.

Equitable duty of confidence

80. Separately from any express or implied obligation arising in contract, the Claimant pleads breach of an equitable obligation of confidence. The classic case of breach of confidence involves the claimant's confidential information, such as a trade

secret, being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential: *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31 at [23] (also see [22] and [25]).

81. A duty of confidence may arise in respect of materials that have been constructed solely from materials in the public domain: *Coco v A.N. Clark (Engineers) Ltd* [1968] FSR 415 at page 420.

82. In *Trailfinders Limited v Travel Counsellors Limited and Ors* [2020] EWHC 591 (IPEC) HHJ Hacon stated at [42] "[*t]he short point is that the test regarding the defendant's appreciation of whether the information was confidential, is objective in the sense that it requires the claimant to show that the defendant ought to have appreciated that it was confidential, irrespective of her actual state of mind. This corresponds to the test as formulated by Megarry J in* Coco v A.N. Clark (Engineers) Ltd…:

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable duty of confidence."

83. HHJ Hacon went on to observe in *Trailfinders* at [43]:

> "I think that, consistently with the law on implied contractual terms of confidence, the balance will generally be achieved if a former employer is entitled to enforce an equitable duty of confidence to restrain the use of his confidential information by a former employee except where that information forms part of the experience and skills acquired by the former employee during the normal course of doing his or her job, held in mind at the time of leaving the employment."

84. In ***Trailfinders*** it was held that a former employee who had assembled a contact book containing the names, contact details and booking reference numbers of 136 customers (see [59]) had acted in breach of the equitable duty of confidence, and

also the implied duty of confidence owed in his employment contract (see [117]-[118]). It was further held that TCL (the corporate defendant) was liable for breach of confidence, in circumstances where HHJ Hacon observed *"[i]t is highly improbable that TCL believed that Trailfinders did not regard their customers lists, including the names and details of those customers who dealt with any one sales consultant, as being confidential…"*: see [121].

Submissions and determination

85. The Claimant pleads that the Claimant's Client List is Confidential Information as that term is defined at clause 46(b) in Mr Ludley's employment contract, and that by sending the 27 June Email he breached clause 47 of his employment contract.

86. It further pleads that it was a necessary implied term of Mr Ludley's contract of employment that he would serve the Claimant with good faith and fidelity, and that either as an incident of that duty, or pursuant to necessary implied terms of his contract of employment that he was obliged not to disclose or make use of any confidential or business sensitive information of the Claimant except in the proper exercise of his duties, whilst employed, and not to use any trade or business secret, or confidential information of sufficient sensitivity to warrant that level of protection, after his employee had terminated. It further pleads that both Mr Ludley and Greenscape owe the Claimant an equitable duty of confidence in respect of trade secrets or information warranting the same level of protection. It pleads that the Claimant's Client List was such information such that sending the 27 June Email was a breach by Mr Ludley of the implied contractual terms and a breach by Mr Ludley and Greenscape of the equitable duty of confidence.

87. The Claimant relies on the authorities set out above to submit that it is simply not credible for the Defendants to argue that they have not acted in breach of both the contractual and equitable obligations of confidence by retaining and misusing the Claimant's Client List, particularly in light of the admissions and concessions made by Mr Ludley in cross-examination, including that a mailing list is *"possibly"* something a recruitment company is likely to consider to be commercially sensitive information.

88. The Defendants submit that the information contained in the Claimant's Client List and the Claimant's Client List as a whole is not confidential information because it was available from public sources and could have been recreated at little cost and effort. They submit that even if it is confidential information it does not have the character of a trade secret and is information with a sufficiently high degree of confidentiality to warrant the same level of protection as a trade secret.

89. I am not with the Defendants for a number of reasons.

90. Firstly, there are extensive authorities that customer lists like the Claimant's Client List can be protectable as confidential information and as trade secrets, including *Lansing Linde*, *Marathon* and *Robb v Green*, all cited out above.

91. Secondly, *Trailfinders* is authority that it is no defence to an allegation of breach of confidence by taking information from confidential data held by an employer that the information could have been obtained from publicly available sources (see also *Coco v A. N Clarke* in relation to equitable duties of confidence).

92. Thirdly, I am satisfied that the nature of Mr Ludley's employment as a recruitment agent was such that it could only be carried out by regular and often cold-calling and emailing of clients to obtain instructions to search for a candidate to fill a job, or to put forward a candidate as suitable for employment at that client. That was Mr Ludley's own evidence.

93. Fourthly, I am satisfied that the nature of the information itself, being contact information for clients, is of key importance to such a business. Mr Ludley accepted in cross-examination that a database of client contacts is valuable to a recruitment business (although he sought to downplay that value, which I have not accepted).

94. Fifthly, I am satisfied that such a list as the Claimant's Client List would give competitors of the Claimant, and did give Mr Ludley and Greenscape, an advantage in competing with the Claimant compared to if they did not have such a list at all. This conclusion is supported by the fact that the Defendants sought to buy a commercial list after Mr Ludley destroyed his copy of the Claimant's Client List, and he accepted that such a purchased list would not be as targeted, focused

or useful as one built up by a business over time. It follows that I am satisfied the Claimant's Client List falls within the definition of "trade secret" or information of sensitivity which warrants the same level of protection;

95. Sixthly, I am satisfied that Mr Ludley knew that the Claimant's Client List was confidential (as he admitted in cross-examination he knew he was not free to simply take and use it), and that for the reasons given above, a *"reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence"* per *Coco v A. N Clarke*.

96. Finally, I am satisfied that Mr Ludley had actual knowledge of the terms of his contract of employment with the Claimant in which the Claimant expressly sought to control such confidential information.

97. It follows that:

i) I am satisfied that the Claimant' Client List was "Confidential Information" as defined in clause 46 of Mr Ludley's contract of employment being "*information which is confidential in nature or may reasonably be considered to be commercially sensitive and which relates to the business and affairs of the Employer*", and that his transfer of that information to his personal MailChimp account during the course of his employment and use of the Claimant's Client List by sending the 27 June Email after the determination of his employment were both in breach of clause 47 of that contract;

ii) Given that finding in relation to the express contractual terms, I do not need to go on to consider implied terms;

iii) I am further satisfied that both Mr Ludley and Greenscape are in breach of the equitable duty of confidence, as they have both used the Claimant's Client List, which is confidential information amounting to or akin to a trade secret (meeting all the requirements set out in *Lansing Linde*), inconsistently with its confidential nature, and I am satisfied that each of them received it in circumstances where they agreed (in relation to Mr Ludley), or ought to have

appreciated (in relation to Greenscape who is fixed with the knowledge of its sole director and shareholder Mr Ludley), that it was confidential.

98. It is convenient to note here that the Claimant seeks to rely on the case of *Le Puy v Potter* [2015] EWHC 193 (QB) at [40]-[45] where, in the context of the recruitment industry, Mr Richard Salter QC sitting as a deputy judge of the High Court considered whether there was a serious issue to be tried on the question of whether a previous employer could enforce certain post-termination restrictive covenants, including a confidentiality clause. He said it was "*well-arguable that there is value to a recruitment agency in knowing, in advance of making contact, the name of the particular person that they should be speaking to and how to make contact with that person directly. If recruitment agencies saw no value in this information, why would they collect it?*". He went on to hold that it seemed to him to be "*well arguable that [the confidential information] would be liable to cause real (or significant) harm to the previous employer, if disclosed to a competitor, by giving that competitor a real practical advantage in its attempts to compete… by comparison with the position that the competitor would have been in but for the disclosure*". Of course he did not finally determine the point, which was for another day, so this is not authority which binds me. However I set it out here as his preliminary assessment it is on all fours with the conclusions which I have independently arrived at in this case.

G. Summary

99. The Claimant has suffered loss and damage by the Defendants' passing off, quantified at £59,579.92.

100. The Defendants are liable to the Claimant for breach of confidence.