Neutral Citation Number: [2023] EWHC 1456 (KB)

Case No: QB-2022-001604

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 June 2023

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

WASTE MANAGED LIMITED

Applicant/Claimant

- and -

(1) STEPHEN WILCE
(2) KATHRYN DRAKE
(3) STEVEN FEE
(4) MARKETING POSITION LIMITED
(5) ANTHONY GREEN
(6) BETTER WASTE SOLUTIONS LIMITED

Respondents/Defendants

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- -

Mr David Reade KC and Mr James Green (instructed by **Sintons LLP**) for the **Applicant**
Mr Simon Goldberg KC and **Mr Michael Haywood** (instructed by **Gibson & Co. Solicitors Limited**) for the **First, Fourth, and Sixth Defendants**
Mr Paul Kerfoot (instructed by **Swinburne Maddison LLP**) for the **Second** and **Fifth Defendants**
Mr Morgan Brien (instructed by **Richard Reed Solicitors**) for the **Third Defendant**

Hearing dates: 13-14 October 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 15 June 2023 at 10:30 am.

Mr Justice Murray :

1. This hearing has been listed to consider a pre-trial application for an interim injunction by the claimant, Waste Managed Limited ("WML"), relating to its claim against six defendants, Mr Stephen Wilce, Ms Kathryn Drake, Mr Steven Fee, Marketing Position Limited ("MPL"), Mr Anthony Green, and Better Waste Solutions Limited ("BWSL").

2. Mr Wilce, Ms Drake, and Mr Fee are former employees of CheaperWaste Limited ("CWL"), a provider of outsourced commercial waste removal services to businesses. On 25 November 2021, WML purchased the assets, business, and goodwill of CWL. References to "the claimant" in this judgment in relation to events occurring prior to that date refer, unless context indicates otherwise, to CWL.

3. WML issued this claim on 20 May 2022 and served its Particulars of Claim on 6 June 2022. According to WML, the claim is brought to prevent misuse of specified confidential information of WML ("Confidential Information") by Mr Wilce, Ms Drake, and Mr Fee, acting in concert with MPL and Mr Green, to set up BWSL in competition with the claimant. The causes of action encompassed in the claim include alleged breach of contract, breach of fiduciary duty, misuse of confidential information, inducing breach of contract, unlawful means conspiracy, and misrepresentation.

4. WML alleges that Mr Wilce has spearheaded a team who have replicated the claimant's confidential business model ("the Confidential Business Model"), as a result obtaining a significant unlawful advantage, taking prospective customers from WML, and causing WML loss and damage. The claimant also seeks damages for an alleged breach by Mr Wilce and MPL of a lead referral agreement dated 19 December 2019 ("the LRA") entered into between CWL, MPL and Mr Wilce.

The Injunction Application

5. By application notice dated 8 June 2022, WML has applied for an interim injunction pending trial ("the Injunction Application"), seeking interim prohibitory and mandatory injunctive relief, together with a draft order ("the Draft Order"). The claimant seeks the following injunctive relief pending trial, namely, that:

    i) the defendants must not, directly or indirectly, use or disclose any Confidential Information (paragraph 5 of the Draft Order);

    ii) the defendants must not, directly or indirectly, use or disclose the Confidential Business Model (paragraph 6 of the Draft Order);

    iii) the defendants must deliver up certain specified items ("Listed Items") in their possession or control save for any computer or hard disk integral to any computer (paragraph 8 of the Draft Order);

    iv) the defendants must, in relation to any Listed Item that exists only in computer readable form, cause the Listed Item to be printed out or copied onto an electronic storage medium and given to the claimant's solicitors before a specified date (paragraph 9 of the Draft Order);

v) the defendants must preserve any Listed Item in their possession or control, but without prejudice to their obligations under paragraphs 8 and 9 of the Draft Order (paragraph 10 of the Draft Order); and

vi) the defendants must, by a specified date, serve witness statements giving full particulars of the use or disclosure of Confidential Information other than on behalf of the claimant (paragraph 11 of the Draft Order).

6. A further element of interim prohibitory injunctive relief, sought against Mr Wilce and MPL under paragraph 7 of the Draft Order, preventing them, until at the latest 23 September 2022, from performing lead generation activities for any person providing waste management services anywhere in the world (except for the United States) is no longer pursued for self-evident reasons.

7. The Draft Order includes a schedule, designated "Schedule A", setting out three important defined terms, including the term "Confidential Business Model", which is defined by cross-reference to confidential Schedule B to the Draft Order ("Confidential Schedule B").

8. Confidential Schedule B sets out the Confidential Business Model in a series of descriptive paragraphs, under the headings "marketing and lead generation", "sales and customer onboarding", "customer billing", "supplier terms", and "customer terms". It is WML's case that the Confidential Business Model differs in important ways from ordinary practice in the industry and that it contains confidential elements that would not be apparent to a member of the public or a potential competitor, the effect of those differences being to invert what, if standard industry practices were followed, would be a cash flow negative model into a highly cash generative model, creating a viable business out of lead generation.

9. Schedule A also contains the defined terms "Confidential Information" and "Listed Items". "Confidential Information" is defined by specifying various types of allegedly confidential information that WML seeks to protect from direct or indirect use or disclosure by the defendants. "Listed Items" is defined by specifying the various documents and stored data said to contain Confidential Information in respect of which WML seeks delivery up or preservation, as the case may be. In this judgment, the terms "Confidential Business Model", "Confidential Information", and "Listed Items" are each used in the sense given to the term in Schedule A.

10. The extent of the confidentiality of the Confidential Business Model, the Confidential Information, and the Listed Items (to the extent containing Confidential Information) is a matter of dispute and will be a matter for the trial of the claim.

11. In order to protect the confidentiality of the Confidential Business Model, WML is also seeking an order that a non-party to these proceedings may not obtain a copy of:

i) the confidential schedule to the Particulars of Claim;

ii) Confidential Schedule B; and

iii) certain other documents included in the agreed bundle for this hearing.

12. It is not necessary for me to set out in this public judgment (or in a confidential annex) the detail of the competing submissions of the parties regarding the different elements of the Confidential Business Model in relation to the question of whether there is a serious issue to be tried. It is sufficient for present purposes to indicate the general thrust of those submissions, the full detail of which I have taken into account for purposes of determining the Injunction Application.

The Strike-out Application

13. By application notice dated 27 September 2022, Mr Green applied to have the claim against him struck out on the grounds that the Particulars of Claim disclosed no reasonable cause of action against him or, in the alternative, for summary judgment on the basis that the claim had no reasonable prospect of success ("the Strike-out Application"). The Strike-out Application was not formally listed before me at this hearing, but as each of WML and Mr Fee were prepared to deal with it in their skeleton arguments and in oral submissions before me, and no other party has objected to my dealing with it, I will also determine the Strike-out Application.

The claimant

14. The claimant, WML, like its predecessor, CWL, is a provider of outsourced commercial waste removal services to businesses. The services are "outsourced" in the sense that WML subcontracts with independent third-party providers to carry out the waste collection services that it has agreed to supply to its customers.

The first, fourth, and sixth defendants

15. The first defendant, Mr Wilce, was employed by CWL from 1 April 2017 to 31 December 2017 in the role of Quality Director. From 1 January 2018 until 7 November 2018 Mr Wilce was engaged by CWL through his company, MPL, the fourth defendant, then known as Wilce Business Services Ltd. Mr Wilce is the sole director of MPL. From 7 November 2018 until 29 November 2019, Mr Wilce was again directly employed by CWL with the job title Director of Information Systems, under a contract of employment dated 15 October 2018.

16. During his employment with CWL, directly and through MPL, Mr Wilce held a senior position at CWL with responsibility for its information technology ("IT") and related systems. Mr Wilce was also responsible for CWL's relationship with Push Group Limited ("Push Group"), a specialist digital marketing agency that developed, among other things, the landing pages and quotation forms for CWL for its website and managed CWL's pay-per-click ("PPC") advertising with Google, Bing, Facebook and LinkedIn.

17. The sixth defendant, BWSL, was incorporated by Mr Wilce on 8 April 2020 and commenced trading in 2020. BWSL operates in the same field as the claimant, namely, as a provider of outsourced waste management services. It operates a website with the domain name "betterwaste.co.uk" ("the Better Waste Solutions website").

The fifth defendant

18. Initially, the sole shareholder and director of BWSL was the fifth defendant, Mr Green, although Mr Wilce held a call option on the shares of BWSL that entitled him to acquire the shares at any time.

19. On 24 September 2021 in response to CWL's letter before action, Mr Wilce, through his solicitors, disclosed to CWL that he was the "controlling mind" of BWSL.

20. On 4 May 2022, Mr Wilce exercised his call option to acquire Mr Green's entire interest in BWSL as shareholder, and he became its sole director.

The second defendant

21. The second defendant, Ms Drake, was employed by CWL from 2 March 2015 until 13 February 2020. She was employed as Human Resources and Office Manager until 24 April 2017, then as Customer Operations Manager until 24 November 2017, then as Compliance and Project Manager until 14 January 2019, and then finally as Service Delivery Manager until she left CWL. During part of Mr Wilce's employment by CWL, Ms Drake reported to him. On 1 September 2020, Ms Drake joined BWSL as an employee.

The third defendant

22. The third defendant, Mr Fee, was employed by CWL as its Digital Marketing Manager from 12 March 2018 until 31 October 2018. Since 31 October 2018, Mr Fee has worked for MPL as its Digital Marketing Manager. As part of this role, he worked for a time on some projects for CWL from within its offices.

Additional factual background

23. The claimant uses digital marketing, including PPC advertising, to obtain clients. Mr Wilce's role, as an employee of CWL and when engaged by CWL through MPL, was principally concerned with obtaining clients for CWL via digital marketing. CWL and MPL used Push Group to assist with this aspect of their work.

24. Mr Wilce developed a website called Business Cost Comparison ("the BCC website") through which MPL or Push Group generated client leads for CWL. MPL or Push Group placed PPC advertisements directing potential clients to the BCC website, which in turn directed those clients to CWL. It is WML's case that the BCC website and related activities ("the BCC business") were created by Mr Wilce on the instruction of and for the benefit of CWL, which funded all of the activities of the BCC business.

25. On 19 December 2019, upon Mr Wilce's departure from CWL, CWL entered into the LRA with MPL. Mr Wilce was also a party to the LRA for certain purposes. On the same day, Mr Wilce entered into an employment termination agreement with CWL, intended to compromise certain claims that Mr Wilce had intimated he might have against CWL as well as other related claims or potential claims. The LRA was for an initial fixed term of three years.

26. MPL used the BCC website, which is registered to Mr Wilce, to refer potential clients to CWL on an exclusive basis, in return for referral fees. The LRA contained provisions preventing MPL or Mr Wilce from generating leads for any other entity providing waste management services during the term of the LRA and for a period ending six months after its expiry or termination.

27. During the course of 2020, after BWSL was incorporated and the domain name "betterwaste.co.uk" was registered, CWL began to be concerned that BWSL was using all or part of its confidential information to compete with CWL. It began to investigate, including commissioning an investigation by SRM Digital Forensics. CWL eventually concluded that the defendants were involved in a conspiracy against it, encompassing various forms of wrongdoing, as set out in the Particulars of Claim. These are summarised in WML's skeleton argument and in its evidence supporting the Injunction Application, broadly as follows:

    i) Ms Drake, without CWL's knowledge, was working for Mr Wilce on the BCC business during the course of her employment with CWL, including reviewing service contracts for prospective third-party clients, pursuing leads from a marketing campaign for the BCC business and raising invoices for it, generating payments that were made into MPL's account so as to divert funds away from CWL;

    ii) various domain names were registered by or for the benefit of Mr Wilce with assistance from, at least, Ms Drake, including the domain name "betterwaste.co.uk", the ownership of which was deliberately hidden from CWL by the incorporation of BWSL with Mr Green as the sole director and shareholder;

    iii) as at December 2020, the Better Waste Solutions website had similarities with the BCC website such that CWL suspected that code from the BCC website had been used in setting up the Better Waste Solutions website, these suspicions being subsequently confirmed by the investigation it commissioned from SRM Digital Forensics, which also confirmed that Mr Fee, a former employee of CWL, had been involved in building the Better Waste Solutions website;

    iv) analysis of the PPC strategy and volume of website traffic of BWSL strongly suggested that the defendants were working with Push Group to use the claimant's confidential information in order to compete against it; and

    v) WML had reason to believe that a number of elements of the Confidential Business Model had been replicated in the business of BWSL such that:

        a) Mr Wilce, Ms Drake, Mr Fee, and MPL had breached contractual and equitable obligations to CWL;

        b) Mr Wilce, Ms Drake, Mr Fee, and MPL had taken a number of steps to conceal their wrongdoing; and

        c) Mr Green had been complicit in the unlawful actions of the other defendants and in their concealment of the same.

28. On 23 July 2021, CWL sent a letter before action to Mr Wilce in his personal capacity and in his capacity as a director of MPL and to Ms Drake, whom CWL believed then to be the controlling mind of BWSL. Each of these letters before action alleged that the relevant defendants were misusing confidential information of CWL, including in relation to the Confidential Business Model, in order to create the Better Waste Solutions website and related business.

29. On 24 March 2022, WML terminated the LRA.

30. On 20 May 2022, WML issued this claim, which was served on 26 May 2022. The Particulars of Claim were served on 6 June 2022.

31. The Injunction Application was issued on 9 June 2022. It was not possible to find a hearing slot in June or July 2022 that was suitable for all parties' counsel.

32. On 20 July 2022, WML made an application for the Injunction Application to be listed as vacation business. That application was heard and dismissed by HHJ Simpkiss, sitting as a High Court Judge, on 28 July 2022.

33. As a matter of background only, I note that on 16 August 2022 MPL issued a claim against WML, its directors, and others for conspiracy to injure arising out of what MPL alleges are unlawful acts by WML in seeking to circumvent the terms of the LRA by diverting potential clients of MPL to other entities in which the directors of WML are interested.

The evidence

34. In support of the Injunction Application, WML has filed two witness statements of Mr James Jukes, the founder and Chairman of WML, the first dated 7 June 2022 and the second dated 5 October 2022. Various documents are exhibited to each witness statement. The second witness statement includes two confidential annexes and a "Confidentiality Table". The Confidentiality Table is discussed further below.

35. The evidence filed in opposition to the Injunction Application is:

    i) on behalf of Mr Wilce, MPL, and BWSL, a witness statement dated 1 July 2022 of Mr Wilce, exhibiting various documents, and a second witness statement dated 7 October 2022, exhibiting various documents and appending a confidential annex;

    ii) on behalf of Ms Drake, her witness statement dated 12 September 2022, exhibiting various documents;

    iii) on behalf of Mr Fee, his witness statement dated 15 July 2022, exhibiting various documents; and

    iv) on behalf of Mr Green, his witness statement dated 7 September 2022.

The undertakings offered by the defendants in relation to Confidential Information

36. Paragraphs 5 and 6 of the Draft Order read as follows:

> "5. Until judgment at the end of the trial of the action or earlier order the Respondents must not whether directly or indirectly use or disclose any Confidential Information.
>
> 6. Until judgment at the end of the trial of the action or earlier order the Respondents must not whether directly or indirectly use or disclose the Confidential Business Model set out in the confidential Schedule B to this Order which it is directed is not to be made public. "

37. "Confidential Information" is defined in Schedule A as follows:

> "'Confidential Information' means:
>
> a) The proprietary software, analytics platform and automated technology and processes produced by CheaperWaste and/or the Applicant, their respective corporate groups and any constituent part thereof;
>
> b) The data associated with the PPC campaigns including but not limited to keywords and search data;
>
> c) Analytics data produced or received by CheaperWaste and/or the Applicant and their respective corporate groups concerning web traffic, advertising performance and key performance indicators;
>
> d) Information concerning the financial modelling of CheaperWaste and/or the Applicant, including results and forecasts, sales targets and statistics, market share and pricing statistics, profit margins, price lists, discounts, cost data, credit and payment policies and procedures;
>
> e) Information relating to and details of customers, prospective customers, suppliers and prospective suppliers including their identities, business requirements and contractual arrangements (including licensing agreements) and negotiations with CheaperWaste and/or the Applicant;
>
> f) Information relating CheaperWaste and/or the Applicant's business operational methods including its methods of obtaining customer leads and generating customer business, as set out in the confidential Schedule B to this Order."

38. On 16 June 2022, in response to a letter dated 10 June 2022 from the claimant's solicitors, the first, fourth, and sixth defendants offered unconditional undertakings

not to use or disclose Confidential Information falling within categories (a), (c), and (d) and a qualified undertaking in relation to category (e). They were unwilling, however, to give undertakings in relation to the categories (b) and (f), in essence, on the basis that each was too broadly defined.

39. In relation to category (e), the first, fourth, and sixth defendants offered an undertaking subject to clause 5.2 of the LRA, which expressly permits that "Shared Personal Data" (as defined in clause 5.1.5 of the LRA) may be used by the parties for the "Agreed Purposes" (as defined in clause 5.1.1 of the LRA). Shared Personal Data includes details of customers, prospective customers, their identities, and business requirements, and therefore those parts of category (e) would be excluded from the offered undertaking.

40. In a letter dated 18 August 2022 from the solicitors for Ms Drake and Mr Green to the solicitors for WML, Ms Drake offered undertakings as to Confidential Information falling within categories (a), (c), and (d), provided that it was clarified that the data, software, and so on referred to in the undertakings included only such data, software, and so on as existed at the point of the termination of her employment with CWL. In relation to category (b), Ms Drake said that she did not have the information referred to and therefore was willing to give an undertaking provided that it was clarified that the PPC campaigns referred to were CWL campaigns only. In relation to category (e), she was willing to give the same undertaking as the other defendants on condition that the undertaking related only to information that had come directly from CWL. She said that this was important in light of her ongoing involvement in the industry and the fact that some of the information referred to by that category was not confidential and would come into her possession naturally. She was not willing to offer an undertaking in relation to category (f) on the basis that she did not accept that BWSL used the same business model and she did not accept that the Confidential Business Model was confidential.

41. In the same letter, no undertakings were offered on behalf of Mr Green on the basis that he "knows nothing of this matter, holds no confidential information and never has and has no access to such information".

42. In a letter dated 23 June 2022 from the solicitors for Mr Fee to the solicitors for WML, Mr Fee offered to provide unconditional undertakings in respect of Confidential Information falling within categories (a), (c), and (d) and a qualified undertaking in relation to category (e) on the same basis as offered by the first, fourth, and sixth defendants. Mr Fee was not prepared to offer any undertaking in respect of categories (b) and (f).

43. The defendants say that WML failed to respond to these offers of undertakings by the defendants, despite repeated requests for a response, until the service of the second witness statement of Mr Jukes, served a week before the hearing, in which he described the defendants' offer of undertakings as "entirely ineffective", due to their refusal to acknowledge that the Confidential Business Model is confidential and their refusal to give an undertaking in relation to Confidential Information falling within category (b).

44. The defendants submit that paragraph 6 of the Draft Order is otiose on the basis that it is covered by paragraph 5 of the Draft Order in relation to Confidential Information

falling within category (f). WML accepts that there is an overlap between the two provisions but invites the court nonetheless to make the order as sought given the central importance of the alleged misuse of the Confidential Business Model.

45. During the course of the hearing, WML and the first, fourth, and sixth defendants exchanged revised versions of category (b), with a view to narrowing their differences regarding this category. WML's revised version of category (b) was set out in an undated note provided to the other parties and the court on the first day of the hearing. In the event that the parties were unable to agree an undertaking on this narrower formulation of category (b), WML invited the court to grant the injunctive relief sought by paragraph 5 of the Draft Order in relation to category (b) on the revised version of category (b) that it proposed.

The legal principles

46. By paragraphs 5, 6, and 10 of the Draft Order, WML seeks interim prohibitory injunctive relief. By paragraphs 8, 9, and 11 of the Draft Order, WML seeks interim mandatory injunctive relief.

47. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 406B-409C, Lord Diplock set out the classic statement of the principles that govern interim prohibitory injunctive relief. The two most important stages are the determination of:

    i) whether there is a serious issue to be tried; and

    ii) if so, whether the balance of convenience favours granting or refusing the interim relief sought.

48. It is clear in *American Cyanamid* (at 408A-E) that determining whether damages would be an adequate remedy for either party is part of the assessment of the balance of convenience. Lord Diplock makes clear consideration of the balance of convenience begins with the question of the adequacy of damages for the claimant. If damages would be adequate, then "normally" no interim relief should be granted "however strong the … claim appeared to be at that stage" (408C). If damages would be adequate for the defendant if interim relief is granted and the claimant is in a position to pay them, then there would be no reason on this ground to refuse interim injunctive relief (408E).

49. If there is doubt about the adequacy of damages for the claimant, then the balance of convenience more generally must be considered. At that stage, there is a balancing of the factors arising in the case that are relevant to the decision as to which course, granting or not granting the interim injunctive relief sought, "… appears to carry the lower risk of injustice if it should turn out to have been 'wrong'.": *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 (ChD), 680 (Hoffmann J). Each case turns on its own specific facts. No particular factor at that stage is necessarily determinative. If, for example, on a particular application for interim prohibitory injunctive relief, it is determined that damages would not be an adequate remedy for the claimant, it does not necessarily follow that the relief sought must be granted.

50. In relation to the interim mandatory injunctive relief sought by WML, the principles to be applied are those summarised by Chadwick J in *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468 (ChD), approved by the Court of Appeal in *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354 (CA), 366. In *Zockoll Group*, Phillips LJ commended, as "all the citation that should in future be necessary", the following passage from Chadwick J's judgment in *Nottingham Building Society* at 474:

> "In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffmann J [in *Films Rover International*].
>
> Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.
>
> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
>
> But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

Submissions

51. Mr David Reade KC, counsel for the claimant, submitted that having regard to the Particulars of Claim and the evidence of Mr Jukes, it is clear that there is a serious issue to be tried in relation to the involvement of each of the defendants in one or more of the pleaded causes of action, namely, breach of contract and/or fiduciary duty, misuse of confidential information (in particular, misuse of the Confidential Business Model), inducing breach of contract, unlawful means conspiracy, and, in relation to Mr Wilce, misrepresentation.

52. As to the balance of convenience, Mr Reade submitted that the "irremediable damage" caused to the claimant's business by the alleged wrongdoing is demonstrated by the forecasting carried out by WML, as detailed and explained in Mr Jukes's evidence. At the core of the case, is the allegation that the Confidential Business Model has been wrongfully used to establish BWSL in competition with the claimant.

53. WML accepts that some elements of the Confidential Business Model are not, in themselves, confidential but asserts that the effectiveness of the Confidential Business Model lies in the combination of these elements, which is confidential. During the hearing, Mr Reade appeared to qualify this "sum of the parts" approach by suggesting that some parts of the Confidential Business Model, short of the whole, are confidential, in particular the PPC campaigns that evolved a defined and refined strategy for the use of keywords to gain potential customers accessing the landing pages of the sites used. The confidential elements of the Confidential Business Model were, he submitted, "teased out" in the sub-parts of the definition of "Confidential Information".

54. Mr Reade noted that the skeleton argument for the first, fourth, and sixth defendants accepted at paragraphs 69-70 that there was a serious issue to be tried as to the confidentiality of the Confidential Business Model as a whole but not that there had been misuse by the defendants. The latter proposition was, however, firmly rejected by WML.

55. In his first witness statement at paragraphs 48-50, Mr Wilce set out his position in relation to the Confidential Business Model, which is that it is composed of elements that are (i) not used by any of the defendants (and therefore cannot be said to have been "misused") and/or (ii) not confidential in any event as being in the public domain (for example, the claimant's publicly available terms and conditions of business) or composed of general concepts that are business common sense and not the kind of information attracting the legal protection of confidentiality. He exhibited to his first witness statement (at page 100 of Exhibit SW1) a table prepared with the assistance of Ms Drake ("the Wilce Table"), in two sections:

    i) The first section sets out in the first column on the left of the table under the heading "Statement of Pleading", each of paragraphs 41.2-41.7 of the Particulars of Claim on a separate row. The next column to the right is headed "Not confidential and/or used by other competitors" and then to right of that a third column headed "Not used by MPL/Better Waste".

    ii) The second section sets out on each row of the first column on the left of the table each of the paragraphs of the Confidential Schedule to the Particulars of Claim, omitting the final paragraph ("Conclusion"), which is, in essence, the same as the description of the Confidential Business Model set out in Confidential Schedule B, with two columns to the right, each with the same headings as for the first section.

56. The Confidentiality Table, to which I referred at [34] above, is Mr Jukes's response to the Wilce Table. It was prepared by Mr Christopher Penfold, WML's Special Projects Director, but signed on 5 October 2022 by Mr Jukes with a statement of truth. It reproduces the Wilce Table, with the addition of a fourth column on the right side with the heading "Waste Managed Comments".

57. A significant part of the skeleton arguments for the claimant and the first, fourth, and sixth defendants, respectively, and a significant part of the hearing were devoted to airing the positions of these parties on the different elements of the Confidential Business Model. Mr Reade suggested that it was significant, in this regard, that the defendants had failed to provide a transparent statement of how BWSL operates. He

submitted that the Confidentiality Table demonstrated clearly that there is a serious issue to be tried in relation to misuse of the Confidential Information comprised in the Confidential Business Model.

58. As to the adequacy of damages, Mr Reade referred me to the second confidential annex to Mr Jukes's second witness statement, which sets out a prospective analysis of the impact on WML if the interim injunctive relief sought is granted and, in the alternative, if it is not granted. This illustrates, he submitted, the impact on WML of the unfair competition by BWSL using the Confidential Information. Mr Jukes maintained that the failure to grant the injunctive relief sought carries with it the possibility of WML's becoming insolvent, with among other consequences the loss of a significant number of jobs.

59. Mr Reade submitted that Mr Jukes's evidence also shows that the position would not be the same for BWSL if interim injunctive relief were granted. BWSL would not be stopped from continuing to maintain and derive revenue from its existing customer base (although there would, of course, be some wastage and the need for new customers). The interim injunction would prevent BWSL from using the Confidential Business Model, but it could use the model that CWL had used before it developed the Confidential Business Model, namely, buying customer databases and cold-calling. BWSL would therefore be able to maintain its operations and develop its business.

60. Mr Reade submitted that the defendants had failed to put forward any evidence to support their assertion that the injunction would put BWSL out of business. Mr Reade also argued, on the basis of Mr Jukes's analysis, that it would be relatively easy to quantify BWSL's damages if it is determined at trial that the injunction should not have been granted. It would be a matter of comparing the revenue generated on the first, fourth, and sixth defendants' case from March 2021 with the revenue generated from the start of the interim injunction.

61. Mr Reade submitted that on *American Cyanamid* principles, if damages are not adequate for the claimant, one does not reach the balance of convenience. As I indicated at [48]-[49] above, for the reasons given there, I do not believe that is a correct reading of *American Cyanamid*.

62. Mr Reade submitted that, if the balance of convenience is reached, the defendants' case primarily relies on the claimant's alleged delay in making the Injunction Application. He then made submissions on three cases relied on in the skeleton argument for the first, fourth, and sixth defendants dealing with the issue of delay, namely, *Planon Ltd v Gilligan* [2022] EWCA Civ 642, *Amob Machinery Ltd v Smith-Hughes* [2022] EWHC 1410 (QB), and *Blinkx UK Ltd v Blinkbox Entertainment Ltd* [2010] EWHC 1624 (Ch). He submitted that, for various reasons, these cases are of limited assistance to the defendants.

63. The better authority on the question of delay, Mr Reade submitted, was *Legg v Inner London Education Authority* [1972] 1 WLR 1245 (ChD), where Megarry J noted at 1259H-1260A that the key question was "not so much the length of the delay per se, but whether the delay has in some ways made it unjust to grant the injunctions claimed". The defendants, he submitted, had failed to articulate how they had been disadvantaged by the alleged delay in bringing the Injunction Application before the

court. They would not be deprived by the proposed injunction of the unlawful advantage that they have had since March 2021 in building up their customer base. They would merely be prevented from continuing to use the claimant's Confidential Information, including the Confidential Business Model, and have to rely on the more traditional approach of buying customer databases and cold-calling.

64. Mr Reade further submitted in relation to delay that a significant part of the claimant's case is the concerted effort made on behalf of the defendants to conceal from the claimant the true reality of the development of the business of BWSL. This concerted effort diminishes the weight of the alleged delay as a factor in favour of refusing the interim relief sought. Mr Reade gave a number of examples of alleged misleading behaviour by Mr Wilce prior to September 2021, when, as already noted, Mr Wilce acknowledged through his solicitors to the claimant that he was the "controlling mind" of BWSL. Mr Reade highlighted, in this context, the role played by Mr Green in the effort to mislead the claimant. On any analysis, Mr Reade submitted, Mr Green, as shareholder and sole director of BWSL, "wore the mask" of the true owner, misleading the claimant, therefore, as to the extent of Mr Wilce's involvement in the business of BWSL.

65. In relation to the paragraphs 8 and 9 of the Draft Order, seeking delivery up of Listed Items, and paragraph 11, seeking witness statements from the defendants, Mr Reade accepted that the *Zockoll Group* principles applied.

66. In relation to paragraphs 8 and 9 of the Draft Order, Mr Reade submitted that it was relevant to the determination of the greater risk of injustice that the claimant was not asking for deletion of any Listed Item. (On the same basis, he disputed a submission made on behalf of the first, fourth, and sixth defendants that, by these paragraphs of the Draft Order, WML was asking to be given on an interim basis the final relief it was seeking.) Mr Reade submitted that paragraphs 8 and 9 of the Draft Order would, therefore, involve no significant hardship for the defendants.

67. In relation to paragraph 11 of the Draft Order, Mr Reade referred to *Aon Ltd v JLT Reinsurance Brokers Ltd* [2009] EWHC 3448 (QB). Although on the facts of that case, the court had discharged an order for the provision of witness statements at that stage, Mackay J set out at [17]-[24] the jurisdictional basis and supporting authorities for making such an order in an appropriate case. If the Confidential Information has been misused and/or disclosed to others, then WML needs to establish that sooner rather than later. For that reason, Mr Reade submitted, it is proportionate to order the defendants to provide witness statements at this stage that are limited to setting out which Confidential Information was disclosed, on what date, to whom, and in what medium, the current whereabouts of the relevant Confidential Information, and "each and every" use that has been made of the Confidential Information. Mr Reade referred me to paragraphs 14.137-14.138 of *Bloch & Brearley Employment Covenants and Confidential Information* (4th edn) for a discussion of authorities following the principles set out in *Aon Ltd*, and underlining that orders of the type sought by WML are regularly made.

68. Mr Simon Goldberg KC, counsel for the first, fourth, and sixth defendants, began his submissions by noting that his clients had offered undertakings three days after receiving service of the Injunction Application. In their solicitors' letter dated 16 June 2022, as I have already noted, the first, fourth, and sixth defendants offered

unconditional undertakings in relation to Confidential Information falling within categories (a), (c), and (d), a qualified undertaking in relation to category (e), and an explanation of their refusal to provide undertakings in relation to categories (b) and (f). It was striking, Mr Goldberg submitted, that WML did not respond to the offer of undertakings until it served Mr Jukes's second witness statement a week before the hearing. Had it been true, as WML claimed, that it was facing an existential threat from the activities of BWSL, Mr Goldberg submitted, one might have expected WML to have immediately accepted the undertakings offered, which covered the majority of the protection WML is seeking.

69. Instead, WML refused to accept any undertakings. The reason for this, Mr Goldberg noted, is set out in paragraph 61 of Mr Jukes's second witness statement, where Mr Jukes said that that the defendants' offer of undertakings was rejected on the basis that it was "entirely ineffective" due to the defendants' refusal to acknowledge that the Confidential Business Model is confidential and their refusal to agree to an undertaking in relation to Confidential Information falling within category (b). Mr Goldberg noted, however, that it now appeared to be acknowledged by WML that undertakings would be acceptable and that category (b) was too widely drawn.

70. Mr Goldberg referred to the alternative revised versions of category (b) that were exchanged during the hearing between the claimant and the defendants. He said that the court was not asked to arbitrate on the wording. Instead, he submitted, the court should simply dismiss the Injunction Application as it relates to category (b) on the basis that WML have not put forward a pleaded case that the defendants have misused the data associated with PPC campaigns.

71. In relation to Confidential Information falling within category (e), Mr Goldberg noted that the first, fourth, and sixth defendants were prepared to give an undertaking provided that it was clear that this was subject to clause 5.2 of the LRA. In the skeleton argument for WML, it was argued that there should be no such qualification because that clause was simply concerned with data processing. Mr Goldberg noted, however, that "processing" as defined by section 3(4) of the Data Protection Act 2018 includes at clause (c) "use" and at clause (d) "disclosure". Mr Reade had submitted that clause 5.2 must be read as subject to clause 4.5 of the LRA, which reads:

> "No party shall use any other party's confidential information for any purpose other than to perform its obligations under this Agreement."

72. Mr Goldberg noted that the term "confidential information" in clause 4.5 of the LRA is not defined. Accordingly, he submitted, in circumstances where the parties have not sought to define "confidential information" for the purposes of the LRA but at clause 5.2.3 have agreed that the first and fourth defendants may process the Shared Personal Data for the Agreed Purposes, there is no serious issue to be tried that Shared Personal Data has the status of confidential information as between WML, on the one hand, and MPL and Mr Wilce, on the other hand.

73. Mr Goldberg submitted that, in addition to the overlap between paragraphs 5 and 6 of the Draft Order in relation to Confidential Information falling within category (f), his clients were also concerned about the breadth and ambiguity of the introductory words of category (f), namely, "Information relating to …".

74. In relation to the Confidential Business Model, Mr Goldberg submitted that the claim was pleaded as a "sum of the parts" case. It had come as a surprise when Mr Reade during his oral submissions at the hearing had asserted that something short of the sum of the parts was confidential. Mr Goldberg submitted that it was not open to WML to run its case in support of the Injunction Application on this basis. He also submitted that Mr Reade had not clearly identified which combination of constituent parts, short of the whole, was allegedly confidential. For the most part, the elements of the Confidential Business Model are in the public domain. Mr Goldberg accepted, however, that, just because this is the case, it does not mean that the "sum of the parts" loses its arguably confidential character. Accordingly, his clients accepted that there was a serious issue to be tried on the confidentiality of the Confidential Business Model viewed as a whole, but not on any subset of it, given that there was no pleading to that effect.

75. Furthermore, Mr Goldberg submitted, WML has failed to establish that there is a serious issue to be tried in relation to misuse of the Confidential Business Model by the defendants. He submitted that, both in the Particulars of Claim at paragraphs 95-100 and in its responses to Part 18 requests for further information, WML had failed to plead with sufficient particularity how BWSL was alleged to be misusing the Confidential Business Model. Mr Goldberg rejected the criticism made of his clients by Mr Reade that they had failed to provide "chapter and verse" as to all the elements of BWSL's own business model. That was not required of the respondents to an application for injunctive relief in these circumstances.

76. In relation to the alleged misuse by his clients of PPC data, Mr Goldberg submitted that it was clear from the evidence of Mr Wilce that BWSL does not place PPC advertisements and has no role in the PPC advertisements placed on its behalf by the Push Group. It is the defendants' pleaded case that they had no knowledge of, control over, or involvement in the choice of keywords used by Push Group in its PPC campaigns throughout the duration of the LRA and for six months thereafter. There is no pleaded case, Mr Goldberg submitted, that Push Group were acting as agents of any of the first, fourth, and sixth defendants or otherwise under their direction and control. Hence, there is no serious issue to be tried that there was misuse of information confidential to the claimant in relation to PPC data.

77. In relation to delay, Mr Goldberg submitted that the delay by WML in making the Injunction Application was so significant and so inadequately justified that it should weigh heavily in the assessment of the balance of convenience. He reviewed the chronology in some detail in his skeleton argument and in oral submissions. By 24 September 2021 at the latest, CWL knew that Mr Wilce was the "controlling mind" of BWSL and had already asserted that BWSL was misusing the Confidential Business Model in order to generate waste leads for BWSL.

78. In a nutshell, Mr Goldberg submitted that failure to make the Injunction Application until 9 June 2022 was not adequately explained by WML. It is of note, he submitted, that WML's application for the Injunction Application to be heard as vacation business was rejected by HHJ Simpkiss on 28 July 2022 on the basis that WML's delay in issuing the application meant that it could not be said to be so urgent as to justify a vacation listing.

79. As to the cases cited in his skeleton argument in relation to the issue of delay, namely, *Planon Ltd*, *Amob Machinery*, and *Blinkx UK*, Mr Goldberg submitted that it was not suggested that any of these were "on all fours" with this case. These cases had been cited only for the principles relevant to delay and the way those principles had been applied in those cases. An important point demonstrated by the cases, in particular, *Amob Machinery* and *Blinkx UK*, is that a "wait and see" approach (as WML appeared to have adopted, judging by correspondence) is not an explanation for delay in making an application for injunctive relief that is likely to find favour with the court.

80. Mr Goldberg rejected the "bold" submission that his clients had suffered no impact as a result of the delay. It was Mr Wilce's evidence that BWSL had been spending £24,000 per month on marketing, as part of its own business model, which it had been using successfully and was the only business model the company had ever known. Injunctive relief preventing BWSL from operating its current business model would be more disruptive now than would have been the case had the Injunction Application been made promptly.

81. In relation to the financial impact on WML if interim injunctive relief were not to be granted, Mr Goldberg submitted that WML failed to make out a plausible case on causation. The assumptions on which Mr Jukes's modelling was based were not clearly set out, and the model was not adequately supported by data. The basis for Mr Jukes's projections was not clear. As to the financial impact on BWSL, it is common ground that if interim injunctive relief were granted, BWSL would have to change its business model. It would have to move from PPC advertising to cold-calling. That would self-evidently have a material and adverse effect on BWSL. It is common ground that cold-calling is much less effective than PPC advertising, which is why CWL had developed the Confidential Business Model.

82. In relation to the delivery up provisions of paragraphs 8 and 9 of the Draft Order, Mr Goldberg submitted that WML was, in effect, seeking final relief via the Injunction Application. That, in principle, is wrong. His clients had offered undertakings in respect of Confidential Information, except in relation to category (f), and had offered an undertaking to preserve Listed Items. There was no justification, Mr Goldberg submitted, for final relief to be offered on delivery up of Listed Items.

83. Finally, in relation to paragraph 11 of the Draft Order (delivery of witness statements), Mr Goldberg submitted that the court could not have a high degree of assurance on the evidence before it that WML would succeed at trial nor was there anything exceptional about this case that warranted a grant of interim mandatory injunctive relief in the absence of the court's having a high degree of assurance. He submitted that there was no pleaded allegation of dissemination of Confidential Information to anyone other than the defendants. Bearing in mind the willingness of the defendants to give undertakings in respect of most of the Confidential Information, the court had no good grounds for making the order sought by paragraph 11 of the Draft Order.

84. Mr Paul Kerfoot, counsel for second and fifth defendants, Ms Drake and Mr Green, dealt first with the position of Ms Drake. He noted that she was the Operations Director of BWSL but not a statutory director. She was a former employee of CWL, always had middle management roles at CWL, and in general reported to Mr Jukes,

Mr Wilce, or some other line manager. In other words, while an employee of CWL, she always acted under the direction of someone more senior. On the principal issues relating to whether there was a serious issue to be tried and on balance of convenience, Mr Kerfoot adopted the submissions made on behalf of the first, fourth, and sixth defendants.

85. Mr Kerfoot noted that Ms Drake offered undertakings as to categories (a), (c), and (d) of the definition of "Confidential Information", as well as qualified undertakings in relation to categories (b) and (e), none of which had been accepted. In relation to category (b), Ms Drake was happy to give an undertaking on the revised basis proposed by WML at the hearing.

86. In relation to whether there was a serious issue to be tried against Ms Drake, Mr Kerfoot submitted that the pleaded case against her was scant. WML had provided no evidence of any alleged misuse of confidential information by Ms Drake following her departure from CWL. Part 18 requests for further information from WML had failed to elicit anything of substance. There was therefore no serious issue to be tried in relation to Ms Drake's conduct following the termination of her employment.

87. In relation to the adequacy of damages for Ms Drake if interim injunctive relief were granted in the terms of paragraphs 5, in relation to category (f), and 6 of the Draft Order, Mr Kerfoot submitted that the injunction would seriously affect Ms Drake's ability to carry out her current role or, indeed, to work in the waste sector at all. Ms Drake in her witness statement had provided significant evidence of the impact of the injunction, particularly if BWSL were to become insolvent as a result of the injunction. This could mean the loss of her career within the waste industry, for which damages could not provide an adequate remedy. Mr Kerfoot noted that Ms Drake also relied on the long delay in the making of the Injunction Application as weighing heavily in the defendants' favour in assessing the balance of convenience.

88. Mr Morgan Brien, as counsel for Mr Fee, submitted that Mr Fee had a very small role in the matters before the court. He noted that Mr Fee was rarely mentioned in the claimant's skeleton argument and in the oral submissions made on the claimant's behalf. Mr Fee had offered undertakings on the same basis as the first, fourth, and sixth defendants. He was an employee of MPL, involved in marketing, reporting to Mr Wilce. Mr Fee accepted that he had built part of the Better Waste Solutions website. WML did not allege that Mr Fee was continuing to use, operate, or develop that website such that he needed to be restrained from doing so.

89. Mr Brien submitted that it was questionable whether there was a serious issue to be tried as against Mr Fee that he was misusing Confidential Information. Mr Fee, in common with the other defendants, denied that the Confidential Business Model was, in fact, confidential. In relation to Confidential Information falling within category (b), Mr Fee never maintained or managed PPC or Adwords accounts specific to the waste industry. He would therefore never be in a position to know whether he was breaching this undertaking.

90. Mr Brien submitted that if WML was granted interim injunctive relief, but the court later found that it should not have been granted, damages would not be adequate to compensate Mr Fee given the effect that the grant of the injunction would have on his reputation in the industry.

91. As to the balance of convenience more generally, Mr Brien submitted that it was almost three years since Mr Fee had worked for CWL, and he did not work for BWSL. There was therefore no need for Mr Fee to be involved in this litigation. Specifically on the question of delay, Mr Brien submitted that the fact that the claimant had continued to operate without an injunction in place for well over a year since becoming aware of the essential facts on which it bases its case provided strong support for the proposition that WML could continue to operate until trial without it.

Discussion and conclusions on interim injunctive relief

92. In relation to the interim prohibitory injunctive relief sought, it is common ground that there is a serious issue to be tried as to whether the Confidential Business Model as a whole is confidential on a "sum of the parts" basis. There is no clear basis on this application for concluding that some subset of the Confidential Business Model is confidential and requires protection. The individual elements of the Confidential Business Model, set out in numbered paragraphs in Confidential Schedule B, are matters of publicly available information or descriptions of straightforward business practices, many of which are already common in the waste industry.

93. I am not persuaded that there is a serious issue to be tried that the defendants have misused the Confidential Business Model, notwithstanding the detailed comments of WML set out in the Confidentiality Table and the detailed submissions of Mr Reade. Admittedly, WML is hampered by not having a detailed exposition of BWSL's current business model, but the defendants are not obliged to provide one in response to the Injunction Application. What WML makes is a highly inferential case, with a number of gaps that will need to be filled by disclosure and by evidence at trial. It is a case based on various suspicions of the claimant, supported by alleged correlations that may, or may not, be indicative of causation. For the purposes of the Injunction Application, WML has not done enough, in my view, to establish that there is a serious issue to be tried that the defendants have replicated the Confidential Business Model for the business of BWSL. This conclusion does not depend on my taking a view about the role of Push Group and whether it can properly be described as an "agent" of BWSL (or any other defendants) or acting under its (or their) direction and control. Given these conclusions, the interim injunctive relief must be refused.

94. If I am wrong, however, about whether there is a serious issue to be tried on the question of misuse of the Confidential Business Model, then I would have refused the injunctive relief sought on the basis of the balance of convenience, for the following reasons. I accept that damages would not be an adequate remedy for WML, however that is not the end of the analysis. I am concerned that damages would not be an adequate remedy for any of the defendants, particularly if BWSL were to become insolvent as a result of the making of the injunction.

95. Turning to the balance of convenience more generally, the two aspects that featured most prominently in submissions are (i) the alleged financial impact of the grant or non-grant of injunctive relief and (ii) the question of the delay.

96. In relation to the alleged financial impact on WML of not granting the injunctive relief sought, I am not particularly persuaded by Mr Jukes's modelling and projections that purport to show that WML will become insolvent if the injunction is not granted. The accuracy of a business or financial model depends, of course, on the

quality, reasonableness, and coherence of the assumptions on which it operates, as well as the quality and comprehensiveness of the data used. A model can be a highly effective, predictive tool, but, at least in this case, I do not find it particular compelling evidence that the failure to grant the injunctive relief sought would have the effect claimed by WML. The assumptions and data on which the model are based are not clear enough to support a conclusion on the causative effect of failing to grant the injunction sought.

97. I broadly accept the submissions made on behalf of the defendants that WML has failed to provide a convincing and adequately justified explanation for its delay in making the Injunction Application and that this weighs heavily in the balance of convenience against granting the injunctive relief sought. At least by 24 September 2021, when Mr Wilce acknowledged, in response to the claimant's letter before action, that he was the controlling mind of BWSL, the claimant had all the information that it needed to make this application. The relevant chronology after that is set out in the skeleton argument for the first, fourth, and sixth defendants at paragraphs 28-34.

98. It is not surprising, in my view, that HHJ Simpkiss rejected WML's application for the Injunction Application to be heard as vacation business in light of that delay. I am not persuaded that the reasons put forward by WML for the delay are sufficient ones, if the need for injunctive relief pending trial was as great as WML submits that it is.

99. I acknowledge that WML's case alleges conduct, in particular, by Mr Wilce, but also by Mr Green, that would have tended to allay its concerns about BWSL, however that provides little support for the reasonableness of the delay after 24 September 2021. The claimant's "mistaken belief" that damages would be an adequate remedy for any unlawful competition at that stage is difficult to gainsay, but I am not satisfied that, on WML's own case, objectively speaking, it has acted reasonably in waiting until 9 June 2022 to issue the Injunction Application. In effect, it appears that the claimant has adopted a "wait and see" approach, without sufficient justification.

100. I accept the submission made on behalf of BWSL that the delay has increased the potential adverse impact on BWSL if it were, as a result of interim injunctive relief being granted, suddenly constrained to adopt an "old school" business model, having operated from its inception on a significantly different business model.

101. Considering all of the evidence before me in the round, having regard to the undertakings that the defendants have offered as to Confidential Information and preservation of Listed Items, and balancing the relative factors for and against the grant of the interim prohibitory injunctive relief sought by the claimant, I consider that there is a greater risk of injustice if the interim prohibitory injunctive relief is granted against any of the defendants than if it is refused.

102. In relation to the interim mandatory injunctive relief sought by the claimant, there is the additional factor that I do not feel the necessary high degree of assurance that the claimant will succeed in establishing its claim at trial. There is, in my view, nothing exceptional about this case that would justify granting the injunctive relief sought in the absence of that high degree of assurance.

Confidentiality, case management, and form of order

103. I note paragraphs 84-85 of the claimant's skeleton argument, which set out what the claimant seeks by way of order to protect the confidentiality of various documents relevant to the case. It appears reasonable to make the confidentiality order sought pending trial. I do not understand the defendants to oppose it.

104. In relation to case management, as referred to in paragraph 86 of the claimant's skeleton argument, it may be that matters have moved on since the hearing. I trust that the parties can agree appropriate directions, failing which I will determine any necessary directions on written submissions or, if necessary, at a hearing.

105. I also trust that the parties can now agree an appropriate form of order, dealing with the foregoing matters, and recording the undertakings that the defendants have agreed to give, including the category (b) undertaking as most recently proposed on behalf of the first, fourth, and sixth defendants. In relation to the category (e) undertaking, as I do not consider it just and proportionate to impose an injunction in relation to that category, the undertaking should be recorded in the form in which each defendant is willing to give it.

The Strike-out Application

106. The Strike-out Application can be dealt with briefly.

107. In support of the Strike-out Application, Mr Kerfoot submitted that the case against Mr Green was entirely speculative. The case against him was a series of bare assertions, unsupported by evidence. The mere fact that he was the original shareholder and sole director of BWSL until Mr Wilce exercised his call option is not enough to support an arguable case that he was involved in an unlawful means conspiracy with Mr Wilce and the other defendants. There is no evidence that he ever received any Confidential Information, and no evidence of his having been party to an agreement to injure the claimant by unlawful means. Simply being a director is not an unlawful act. The claimant has not advanced a positive case against Mr Green, and therefore the case against him should simply be struck out.

108. On behalf of the claimant, Mr Reade submitted that on Mr Wilce's case, which is not denied by Mr Green, the purpose of Mr Green's appointment as the initial shareholder and sole director of BWSL, subject to the call option in Mr Wilce's favour, was precisely to conceal Mr Wilce's involvement with BWSL. Mr Wilce defends the reasonableness of having taken this course, but the purpose is not disputed. Given his statutory responsibilities as sole director, Mr Green will have had knowledge of the company, its corporate purposes, and its business. There is therefore a triable issue as to his role in the unlawful means conspiracy alleged by the claimant. This is not something that can or should be resolved by the court on the Strike-out Application.

109. I agree with the submissions made on behalf of the claimant. While it is true that "simply" being a director is not an unlawful act, there are triable issues of fact as to whether there was an unlawful means conspiracy and, if so, what the full purpose and precise terms of the conspiracy were, who was involved in it, and what was the role of each participant in it. Mr Green appears to have played an important role, as initial shareholder and sole director of BWSL, in Mr Wilce's decision to screen his

involvement in BWSL from its foundation. Mr Green has a case to answer, and therefore the Strike-out Application must be refused.

Conclusion

110. The Injunction Application is refused, and the Strike-out Application is refused. The parties are invited to agree a form of order to give effect to the conclusions reached in this judgment.