Fairstar Heavy Transport NV v Adkins & Anor.

[2013] EWCA Civ 886

Court of Appeal (Civil Division).
Mummery, Patten and Black L JJ.
Judgment delivered 19 July 2013.

Agency – Property rights – E-mails – Claimant sought access to e-mails relating to its business sent and received by defendant in his capacity as its then chief executive officer – Defendant employed by management company which supplied his services to claimant under agreements governed by Dutch – Claimant wishing to see e-mails sent and received by defendant on claimant's business held on defendant's personal computer in England – Preliminary issue whether claimant had enforceable proprietary claim to content of e-mails – No need to decide whether content of e-mails property – Judge ought to have made order for inspection of e-mails on defendant's computer – Principal entitled to require production by agent of documents relating to affairs of principal during and after termination of agency.

This was an appeal by a Dutch company (Fairstar) from a decision that it was not entitled to an order requiring its former chief executive officer (PA), after the termination of his appointment, to give it access to the content of e-mails relating to its business affairs.

Fairstar carried on business from Rotterdam transporting very heavy and valuable cargoes by sea on specially constructed vessels. It had been taken over following a hostile bid by another Dutch company (Dockwise). Dockwise dispensed with the services of PA, who was a US citizen not directly employed by Fairstar but through a Jersey management company. The agreements for the supply of his services provided for Dutch law and jurisdiction. Fairstar had brought a civil action in the Amsterdam District Court alleging that PA had mismanaged the business and claiming to enforce a restrictive covenant not to compete. Dockwise had also started proceedings against PA in the Dutch courts.

It appeared that e-mails addressed to PA at his Fairstar e-mail address were automatically forwarded to his private e-mail address and deleted from the Fairstar server. E-mails sent by PA on Fairstar business were sent from his private e-mail address. Fairstar sought access to e-mails sent and received by PA on Fairstar's business which were stored on his personal computer in England. He refused and Fairstar applied to the court.

Fairstar's case was that the content of e-mails created by, or coming into the possession of, an agent while acting for the principal was the property of the principal and remained so after the termination of the agency relationship.

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PA argued that the content of the e-mails was 'information', that information was not recognised by the law as property and that a proprietary claim to the content was misconceived.

The judge decided as a preliminary issue that Fairstar did not have an enforceable proprietary claim to the content of the e-mails sent or received by PA acting on behalf of Fairstar.

Fairstar appealed arguing that it was entitled, as principal, to inspect and copy its business correspondence held by its agent in whatever form, whether hard copy or electronic, even after termination of the agency. The action was brought to enforce that right to the content of the e-mails.

Held, **allowing the appeal:**

Fairstar's assertion of a right to inspect and copy the content of the e-mails on PA's computer relating to its business affairs arose from the legal incidents of an agency relationship that survived its termination. That claim could be decided, as between those parties, without a jurisprudential debate about the legal characteristics of 'property', or whether the content of the e-mails was 'information' in which property existed in this case or could exist at all. The distinction drawn in the preliminary issue between an electronic communication and the content of it and the claim to a proprietary right in the content was not the real point at issue. The e-mails and their content stored and held in the computer either were documents or should be treated as documents, and the judge ought to have made an order for inspection of the e-mails on the computer. He was not prevented from doing so by his conclusion that there was no proprietary right in the content of the e-mails. The relationship between Fairstar and PA had been that of principal and agent. As a general rule, it was a legal incident of that relationship that the principal was entitled to require production by the agent of documents relating to the affairs of the principal. That included e-mails. The form of recording or storage did not detract from the substantive right of the principal as against the agent to have access to their content. Irrespective of the existence or non-existence of property in content, PA was under a duty, as a former agent of Fairstar, to allow it to inspect e-mails sent to or received by him relating to its business.

The following cases were referred to in the judgment:

Boardman v Phipps [1967] 2 AC 46.
Chantrey Martin & Co v Martin [1953] 2 QB 286.
Ellis & Ellis, Re (1908) 25 TLR 38.
Equitas Ltd v Horace Holman & Co Ltd [2007] EWHC 903 (Comm).
Gomba Holdings (UK) Ltd v Minories Finance Ltd [1988] 1 WLR 1231.

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Beresford (Lady) v Driver (1851) 51 ER 335; (1852) 51 ER 728.
Lamb v Evans [1893] 1 Ch 280.
Pennwell Publishing (UK) Ltd v Ornstien [2007] EWHC 1570 (QB).
Universal Thermosensors Ltd v Hibben [1992] 1 WLR 840.
Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1994] CLC 1212; [1995] QB 174.

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Peter Susman QC and James Palmer (instructed by Ince & Co) for the appellant.

Richard Spearman QC (instructed by Schillings) for the first respondent.

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JUDGMENT

Mummery LJ: Introductory

1. The issue on this appeal is whether the appellant company is entitled to an order requiring its former Chief Executive Officer, after the termination of his appointment, to give it access to the content of e-mails relating to its business affairs. The relevant e-mails, which are stored on his personal computer in England, were sent or received by him on behalf of the company.

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2. Fairstar Heavy Transport NV (Fairstar) was incorporated in the Netherlands and is based in Rotterdam. It wants to retrieve and read its electronic business correspondence stored on the personal computer of its former Chief Executive Officer, Mr Philip Adkins. The computer is held by his solicitors (Schillings) in accordance with an undertaking to the court. Fairstar seeks an order for inspection of the content of the relevant e-mails, initially by an independent IT person. Ultimately it wants to be given copies of the e-mails. Fairstar asserts that access to the electronic correspondence is essential for the conduct of its business.

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3. At end of the hearing below Counsel reached agreement on the wording of a preliminary issue. Edwards-Stuart J, who had asked counsel to produce a form of words stating clearly the issue that he was invited to determine summarily, set out the agreed wording in paragraph 11 of his judgment:

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> 'Does Fairstar have an enforceable proprietary claim to the content of the e-mails held by Mr Adkins (and/or Claranet) insofar as they were received or sent by Mr Adkins acting on behalf of Fairstar?'

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4. The words 'enforceable proprietary claim to the content of the e-mails' are a description of Fairstar's claim. They make it clear that it is neither a pure contractual claim nor a mere procedural step (e.g. disclosure of documents) in substantive proceedings based on another cause of action. The claim to property in 'content' was the main area of contention.

A 5. There is no express contract of employment between Mr Adkins and Fairstar, which contracted for his services under a written agreement with a company controlled by Mr Adkins. His contract of employment is with his creature company. A clause in the written contract between that company and Fairstar provides that the contract is governed by Dutch law and that the Dutch courts have exclusive jurisdiction.

B 6. When the judge gave his answer to the preliminary question agreed and drafted by counsel he naturally did so in the light of the way in which they had argued the issue.

7. For Fairstar the case was that the content of e-mails created by, or coming into C the possession of, an agent while acting for the principal was the property of the principal and remained so after the termination of the agency relationship.

8. For Mr Adkins the argument was that the content of the e-mails was 'information', that information is not recognised by the law as property and that the purely proprietary claim to the content was for that reason misconceived.

D 9. Edwards-Stuart J gave the answer 'No' to the question in [3] above. He concluded that the content of the e-mails was information, which was not capable of being 'property.' He dismissed the action on the basis that Fairstar had failed to establish an enforceable proprietary claim. Nothing else was left in the action for E decision by the English courts. Fairstar appeals from the order to that effect dated 6 December 2012 following the reserved judgment handed down on 1 November 2012. Tomlinson LJ granted permission to appeal.

10. Mr Peter Susman QC appearing for Fairstar accepted that the preliminary issue was not based on any allegation by Fairstar of wrongful conduct on the part F of Mr Adkins. That was an issue in civil proceedings brought by Fairstar in the Netherlands. The preliminary issue in this action was confined to an assertion by Fairstar of a proprietary right to the content of e-mails relating to Fairstar's business. That assertion is based on the fact that e-mails stored on the personal computer were received by and sent by Mr Adkins in his capacity as the then Chief Executive Officer G of Fairstar. It is argued on the appeal that Fairstar was and is entitled, as principal, to inspect and copy its business correspondence held by its agent in whatever form, whether hard copy or electronic. The action is brought to enforce that right to the content of the e-mails, and not as a claim for breach of contract committed by Mr Adkins in his management of Fairstar's affairs as its CEO.

H 11. The difference between the parties about the legal basis of the claim was accentuated when, in support of the appeal, Mr Susman QC sought leave to file a supplemental skeleton argument. It is principally an update on the progress of the civil proceedings commenced in the Netherlands against Mr Adkins and others. Mr Richard Spearman QC, who appeared for Mr Adkins on the appeal, as well as at first instance, opposed the submission of the supplemental skeleton. He objected

that Fairstar's claim was now being put on a completely different legal basis. It was argued before Edwards-Stuart J as a purely proprietary claim to the 'content' of the relevant e-mails. All other possible bases of claim were either unsustainable or were subject to Dutch law and to the exclusive jurisdiction on the Dutch courts.

12. New authorities produced by Fairstar relate to duties arising from the agency relationship, in particular the duties of the agent to produce to the principal books and documents during and after the termination of the relationship. What was argued as a broad claim to 'property in content' below was being argued after judgment as a narrower new claim to 'agency documents' taking the case into areas of Dutch contract and company law justiciable exclusively in the Dutch courts. There was even, Mr Spearman QC suggested, a change of tack at the hearing below. The judge commented on a 'fairly substantial shift' on the application for permission to appeal, which he refused.

13. Mr Susman QC denied moving his ground. At the hearing and on this appeal Fairstar pursued the claim that it has always made – a proprietary right to the content of the e-mails. He contended that Fairstar had the right, as principal, to require Mr Adkins, as agent, to produce and deliver up documents held by him as former agent for Fairstar, so that it could inspect them and copy them. That duty continued after the termination of the agency relationship. The fact that the materials are on a personal computer, which may also store private e-mails of Mr Adkins, was irrelevant. It was not a valid reason for refusing the relief sought by Fairstar to inspect and copy e-mails relating to its affairs. E-mails relating to the personal or private affairs of Mr Adkins would be excluded from the order.

14. I would allow the supplemental skeleton to be filed. Fairstar has throughout asserted a legal right to the content of the e-mails in the context of an agency relationship between the parties. That right, to which the label 'proprietary' was attached, was to inspect and take copies of electronic correspondence. As explained later, the asserted 'proprietary' character of the claim was not, in my view, necessary for its success. I do not think that reliance on the post-termination duties of an agent has raised a new claim which either alters the substance of the case or which has taken Mr Adkins and his advisers by surprise.

The issues

15. Any lingering confusion about the claim can be dispelled by stating what it is not about.

16. Fairstar makes no claim against Mr Adkins in these proceedings (a) to ownership of the computer in which the e-mails are stored, or to the server, or to a USB stick, or to any electronic medium, or to any sheets of paper, original or photocopy, or, indeed, to any other physical thing or material relating to the form or

A storage of the e-mails; (b) to ownership of confidential information in the e-mails, it not even being alleged that the content is confidential, or is being misused by Mr Adkins in breach of confidence; (c) to ownership of copyright or other intellectual property right in the content of e-mails; or (d) to any breach of contract or breach of fiduciary duty in respect of or arising out of the content of the e-mails or the withholding of them by Mr Adkins.

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17. In brief, Fairstar claims an enforceable right, described by it as 'proprietary', to the content of business e-mails sent and received by Mr Adkins while Fairstar's CEO and stored by him on his personal computer. That right entitles it to inspect and make copies of the content of the e-mails, either directly or through an independent person C instructed for that purpose.

18. The nature of the prior legal relationship between Fairstar and Mr Adkins as one of agency is not disputed. E-mails to and from third parties came into existence and into the possession of Mr Adkins in the course of that relationship. Although stored on his personal computer, the relevant e-mails relate to Fairstar's business, not D to private affairs of Mr Adkins. By means of electronic operation the e-mails can be retrieved from storage on the computer. Retrieval may either take the form of display on a screen or of a print-out in document form. Fairstar wishes to exercise its right as principal to inspect the electronic documents, either by reading them on screen or by the printing out of hard copies of them. That, it is contended, is the same right that E it would undoubtedly have in respect of books and paper documents created by or coming into the possession of the agent in similar circumstances. Even if the e-mails are not printed out on paper, the same legal principles apply to access to the content of electronic documents as would apply to access to the content of printed paper versions of them.

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19. *Bowstead & Reynolds on Agency* (19th edn) Article 50(3) and paragraph 6-093 were cited in support of the general proposition a principal is entitled, at the termination of the agency, to require his agent to produce or deliver up to him books and documents concerning his affairs prepared or held by the agent for him for the purpose of the agency relationship. It is submitted that the differences of *form* in G which business correspondent is recorded, transmitted, sent, received, held or stored is, in principle, irrelevant to the *substance* of Fairstar's legal right to inspect *and* copy their content during or after termination of the relationship. The rationale for that right as an incident of agency is the same.

20. Mr Susman QC observed that, as the contemporary world is in near-universal H electronic communication, it would be chaotic if a principal (or an employer) were denied the kind of relief sought in this case for inspection of documents relating to their affairs held by the other party to that relationship, simply because the materials were in a paperless form rather than on paper that could be physically delivered up under a court order.

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Brief background

21. Fairstar carries on business from Rotterdam. It provides the service of transporting very heavy and valuable cargoes by sea on specially constructed vessels. On 14 July 2012 it was taken over following a hostile bid by Dockwise White Martin Limited (Dockwise), which is also incorporated in the Netherlands.

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22. Dockwise terminated the services of Mr Adkins on 14 July 2012. He is a US citizen employed by Cadenza Management Limited (Cadenza), a company controlled by him and registered in Jersey. His services were supplied to Fairstar under Service Agreements with Cadenza dated 29 June 2010 and 2 July 2010. The agreements were governed by Dutch Law and contained an exclusive jurisdiction clause for the Dutch courts. No express contract of employment was made directly between Fairstar and Mr Adkins.

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23. A Settlement Agreement was made between Fairstar and Cadenza dated 14 May 2012 subject to Dutch Law and with a Dutch exclusive jurisdiction clause. A civil action brought by Fairstar has been proceeding in the Amsterdam District Court since November 2012. Claims are made in it that Mr Adkins mismanaged the business. There is a claim to enforce a restrictive covenant not to compete. Orders are also sought for the handing over of e-mails, not on the ground of Fairstar's property in their contents, but as a matter of Dutch company law and contract. No application has been made in those proceedings for service out of the jurisdiction of process seeking relief relating to the e-mails stored on a server in England. Dockwise has also started proceedings against Mr Adkins in the Dutch courts.

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24. Although Claranet Limited, the second defendant, provides internet services to Cadenza and holds electronic copies of the e-mails, it has taken no part in the proceedings.

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25. The system set up by Fairstar was that all the e-mails addressed to Mr Adkins at his Fairstar e-mail address were automatically forwarded to his private e-mail address. They were automatically deleted from the Fairstar server without retaining copies. So Fairstar is ignorant of the content of e-mails concerning its business.

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26. As Mr Adkins refused to comply with Fairstar's request for access to the e-mails, Fairstar applied to the court for an order that copies of e-mails created on or after 1 January 2011 relating to or referring to Fairstar's business be provided to Fairstar. It was claimed that such e-mails were and remain the property of Fairstar.

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27. On 7 September 2012 Coulson J made an ex parte order to lodge electronic copies of the e-mails with Schillings in a manner that prevents any tampering with their content. That order was complied with. On 14 September 2012 Eder J varied that order. An order is now sought that in the first instance the e-mails be inspected by an

A independent IT expert instructed by Fairstar to be followed by an order that Fairstar be entitled to inspect and copy e-mails received or sent on its behalf.

Judgment

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28. In essence Edwards-Stuart J's conclusion was that the content of the e-mails to which Fairstar claimed a proprietary right was 'information'; that according to the authorities there is no property in information; and that Fairstar did not have the proprietary right on which it based its claim.

C 29. That was the point on which the parties concentrated in their competing contentions before him. That appears from the authorities cited to the judge and reviewed by him, such as *Lamb v Evans* [1893] 1 Ch 280 (printing blocks and materials obtained by defendant while in employment of, or as agent for, the plaintiff could not be used against employer/principal, who was entitled to property in them) and *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 (documents D improperly retained after end of employment). The judge analysed those authorities as decisions on the ownership and use of *physical* materials: they did not assist him on the question whether or not the intangible informational content of the e-mails held on a server in the possession of Mr Adkins could be characterised as property.

E 30. In the light of those and other authorities cited the judge found no basis for the submission that, for example, information contained in a letter, as distinct from the letter as a physical object, was capable of being the subject of a proprietary claim. For the proposition that, in general, information is not property he cited the majority opinions in *Boardman v Phipps* [1967] 2 AC 46 in particular passages at pp. 89, 102 and 127. He concluded that the preponderance of authority pointed 'strongly against F there being any proprietary right in the content of information' and that that applied to the content of an e-mail. He rejected the submission of Mr Susman QC that the content of an e-mail was a form of property, which ought realistically to be recognised by the courts in the case of agency and employment.

G 31. On analysis of the implications of that proposition the judge held that 'he could find no practical basis for holding that there should be property in the content of an e-mail even if [he] thought that it was otherwise open to [him] to do so.' He considered that English law provided the protection required against misuse of information contained in e-mails in the action for breach of confidence and the law of copyright. He therefore determined the agreed preliminary issue against Fairstar H and rejected the application to inspect the e-mails based on that ground. Finally, he commented that he did not view the result 'with any enthusiasm in the circumstances of this particular case', though he made it clear that he expressed no view on whether or not there was any other ground upon which the application could have been made in this jurisdiction.

Fairstar's submissions

32. In an initial skeleton argument in support of the application for permission to appeal Mr Susman QC argued that the decision of the judge should be reversed on the ground that 'a principal is entitled to inspect and copy correspondence held by its agent whether in hard copy or electronically.' It was settled law that, if a principal wants the opportunity to inspect and copy the content of documents held by his agent acting on his behalf, the principal is entitled to require the agent to produce or deliver up the documents. It was also submitted that, on a proper analysis, the principal has a proprietary interest in the content of written documents and that the right to delivery up of the original documents for inspection and copying is an incident of that proprietary interest.

33. The argument was developed as a proposition that the same principle applies in similar circumstances to the content of electronic business correspondence. The judge had fallen into error by confusing the incidents of agency with the different principle that a claim for misuse of confidential information does not rest on a proprietary right to confidential information and by then deciding that, as the contents of the electronic e-mails was information, it was not the subject of a proprietary right.

34. If the judge was right, Fairstar was left with no alternative remedy. The judge's ruling had far-reaching consequences for principals and employers in similar circumstances. Fairstar had no contract with Mr Adkins and its contract with his employer was subject to Dutch law and exclusive Dutch jurisdiction.

35. In support of the claim to a proprietary right to documents in the agent's hands, other than the agent's working papers, Mr Susman QC cited the general principle extracted from the authorities in *Bowstead & Reynolds on Agency* (19th edn) at Article 50(3). He cited, in addition to the cases in the judgment below, *Lady Beresford v Driver* (1851) 51 ER 335 and (1852) 51 ER 728 (ex-land agent ordered to deliver up documents to former principal relating to her estate and its management), *Re Ellis & Ellis* (1908) 25 TLR 38 (former solicitors ordered to deliver up payment vouchers to trustee in bankruptcy of former client), *Chantrey Martin v Martin* [1953] 2 QB 286 at 294 (professional working papers of accountants not property of client, but letters and other papers created by accountants as agent for client were client's property), *Gomba Holdings (UK) Ltd v Minories Finance Ltd* [1988] 1 WLR 1231 at 1233C (as between principal and agent all documents prepared or received by agent belong to principal and had to be delivered up on termination of agency on basis of ownership of them), and *Equitas Ltd v Horace Holman & Co Ltd* [2007] EWHC 903 (Comm) at [27] and [28], as illustrations of the rule that a principal or employer is entitled to delivery up of original documents (or other property) retained or removed by an agent or employee and relating to transactions done as agent. The cases drew no distinction between a document and its content, only between, on the one hand, professional working papers created by and belonging to the agent, which

A did not have to be delivered up, and, on the other hand, other documents to which the principal was entitled.

36. An important feature of e-mails, as with other electronic documents, is that there is no original physical document to be delivered up. The principal can only see the content of an e-mail if it is displayed on a screen or if it is printed out on paper by B the printer. But that process does not present any practical obstacle to the principal's exercise of the right to inspect and copy it. It is on that aspect that Mr Susman QC contended that the principal has a 'proprietary' right to the contents of the e-mail or other electronic document. He also cited *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1994] CLC 1212 at C 1219-20; [1995] QB 174 at 186–7 as an instance of the court recognising the right of a principal to inspect and copy the content of both computerised and hard copy records of former underwriting agents as an incident of the agency relationship independent of any contractual term conferring a right to inspect and copy. See also *Pennwell Publishing (UK) Ltd v Ornstien* [2007] EWHC 1570 (QB).

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37. Mr Susman QC forcefully argued that it would be an absurd situation if a principal has the right as against an agent to inspect an original or copy letter, or an e-mail that has been printed out, but not an e-mail that the agent declines to print out or display on the screen of his computer.

E 38. As for the judge's ruling that the content of the letter was information in which there was no proprietary right, the judge had erroneously rejected Fairstar's contention that the right of a principal to inspect the contents of documents in the hands of his agent was distinguishable from a claim to protect confidential information, which was not being made in this case. The judge's discussion of claims to ownership of information in letters and e-mails was irrelevant to the primary issue here, which was F whether Fairstar has a proprietary right as against Mr Adkins entitling it to inspect and copy the content of the e-mails held by Mr Adkins, whether sent by him or received by him, so long as they related to Fairstar's business affairs while he was its CEO.

39. Finally, Mr Susman QC rejected the criticism by Mr Spearman QC that the G case was now being advanced on a completely different basis. The transcript of the hearing of the application to the judge for permission to appeal showed that Mr Spearman QC fully appreciated that Fairstar's central argument always was that the right of access to information in e-mails pertaining to its business was claimed by the company. As for the supplemental skeleton argument, its purpose was to update the context of this action, not to advance a different case.

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Submissions of Mr Adkins

40. The submissions by Mr Spearman QC on behalf of Mr Adkins highlighted a number of points.

41. First, this action is not based on any alleged wrongful or unlawful conduct on the part of Mr Adkins, who is willing to preserve the e-mails to which the action relates. Mr Adkins had legitimately received and sent e-mails for work purposes.

42. Secondly, the core objection to Fairstar's claim is that it was misconceived from the outset, being based on a proprietary claim to non-existent property. The claim was to the content of the e-mails. That is information. There is no property in information. It was not alleged to be confidential or to be the subject of intellectual property rights or any other recognised exclusive rights in intangible property enforceable against all the world.

43. Thirdly, as for the agency relationship, the claim was not raised below and was not for core agency documents, such as accounting books and records: it was a claim to the content of individual items of correspondence in which, according to the authorities, Fairstar had no property. Following the rejection of the proprietary claim Fairstar then attempted to elide it with the legal rights and duties incidental to an agency relationship.

44. In the result Fairstar has no entitlement to inspect the e-mails by means of any property claim maintainable in the English courts. Mr Spearman QC described the proprietary claim to the content of the e-mails as of right as 'far-reaching', even 'breath-taking', and as involving an extension of the law, which was unwarranted in principle and authority and unworkable in practice.

45. Mr Spearman QC took no point either against the existence of a prior agency relationship or against the jurisdiction of the English courts to decide Fairstar's claim to inspect and obtain copies of the e-mails on the computer in England, though the English courts had no jurisdiction on contractual or company law issues. According to Mr Susman QC, the position taken by Mr Adkins in the Dutch proceedings is that the English courts have jurisdiction over the e-mails on his computer in England. The contention pursued by Mr Spearman QC is simply that Fairstar bases its claim on property in information in which there is no property recognised by English law.

Discussion and conclusions

46. In my view, it is unfortunate that the agreed wording of the preliminary issue introduced an unnecessary complication into the dispute. The reference to a 'proprietary right' was a distraction from the centrality of the agency relationship and its legal incidents. No competing claims of third parties are involved. Fairstar's claim is against Mr Adkins. The assertion of a right to inspect and copy the content of the e-mails on his computer relating to its business affairs arises from the legal incidents of an agency relationship that survive its termination. That question can be decided, as between those parties, without a jurisprudential debate about the legal characteristics of 'property', or whether the content of the e-mails was 'information' in which property existed in this case or could exist at all.

A 47. Everybody knows that 'property' differentiates between things that are mine and things that are not mine. The law lays down criteria for determining the boundary between, on the one hand, those rights that are only enforceable against particular persons and, on the other hand, those rights attaching to things that are capable of being vindicated against the whole world. The claim to property in intangible information presents obvious definitional difficulties, having regard to the criteria of B certainty, exclusivity, control and assignability that normally characterise property rights and distinguish them from personal rights.

48. In my judgment, the court should decline to enter into a controversy of that kind when it is not necessary to do so in order to decide the case on its particular C facts. It would be unwise, for example, for this court to endorse the proposition that there can never be property in information without knowing more about the nature of the information in dispute and the circumstances in which a property right was being asserted. Some kinds of information, such as non-patentable know-how, are more akin to property in their specificity and exclusivity than, say, personal information about private life.

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49. The conclusion that I have reached on this appeal makes it unnecessary to explore the question whether information in the content of the e-mails is property owned by Fairstar, either as a matter of fact or law. The distinction drawn in the preliminary issue between an electronic communication and the content of it and the E claim to a proprietary right in the content was not the real point at issue. It has led to some confusion in the arguments advanced and to error in the outcome. As explained below, the position is that e-mails and their content stored and held in the computer are, in my view, either documents or should be treated as documents, for the purposes of determining the scope of the legal incidents of the agency relationship that survive its termination.

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50. In my judgment, the judge ought to have made an order for inspection of the e-mails on the computer. He was not prevented from doing so by his conclusion that there was no proprietary right in the content of the e-mails. The absence of a proprietary right would not affect the legal right of the principal to an inspection and G copying remedy against a former agent in respect of the e-mails. It was not necessary to decide the property issue in order to make the order for inspection or copying. To ask in a case like this the questions such as 'Is there property in an e-mail?', or 'Who owns the content of an e-mail?' is not a helpful way of stating the real issue, which is not one of ownership of property claimed against the world. The issue is one of enforcement, as between the parties, of particular rights of access by a remedy H of inspection and copying, which is based on rights and duties incidental to the relationship that existed between the parties at the relevant time.

51. In brief, Fairstar is entitled to the relief claimed by it against Mr Adkins for the following reasons:

52. First, their former relationship had been that of principal and agent.

53. Secondly, as a general rule, it is a legal incident of that relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal.

54. Thirdly, as Black LJ observed in the course of argument, 'documents' may, depending on context, include information recorded, held or stored by other means than paper, as is recognised in the Civil Procedure Rules. In CPR 31.4 'document' means 'anything in which information of any description is recorded' and 'copy' means, in relation to a document, 'anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.' Those follow the same definition used in legislation. According to the notes to CPR 31.4:

> 'While the word [document] in non-legal usage is commonly associated with information recorded only on paper, the true meaning of the word is far wider, reflecting its derivation from the Latin "documentum" referring to something which instructs or provides information. The term extends to electronic documents, including e-mails: see Practice Direction 31B, para 1'.

In that context content cannot be separated from form, since a blank sheet of paper providing no information would not be a document and a blank electronic communication would not be an e-mail.

55. Fourthly, materials held and stored on a computer, which may be displayed in readable form on a screen or printed out on paper, are in principle covered by the same incidents of agency as apply to paper documents. The form of recording or storage does not detract from the substantive right of the principal as against the agent to have access to their content.

56. Fifthly, as for the authorities cited to the judge and in this court on whether there can be property in confidential information, or whether there is property in the content of a letter, as distinct from the paper on which it is written, they relate to a point that does not need to be decided. Quite apart from the existence or non-existence of property in content, Mr Adkins was under a duty, as a former agent of Fairstar, to allow Fairstar to inspect e-mails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship.

57. Finally, no objection was taken to the jurisdiction of the English court, as distinct from the Dutch courts, to decide a claim to the content of the e-mails. The objection was that the claim had no legal foundation, as it was advanced as a purely proprietary claim to ownership of information contained the e-mails. The judge ought to have rejected that objection for the reasons given above.

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Result

58. I would accordingly allow the appeal.

B

59. Counsel are requested to draft an agreed order in the light of our judgments. In the event of failure to agree each party should supply in draft a form of order with supporting written submissions.

Patten LJ:

C

60. I agree.

Black LJ:

61. I also agree.

D

(*Appeal allowed*)

E

F

G

H