CA on appeal from Chancery (Master Bragge) before Ward LJ; Arden LJ; Moore-Bick LJ. 29th March 2006.

Lord Justice Moore-Bick:

1. This is an appeal by the defendants against the judgment of Master Bragge delivered on 1st April 2005 on an inquiry as to damages suffered by the claimant, Mrs. Gorne, following the trial of an action in the Chancery Division in which judgment was delivered in November 2002. The action arose out of the dissolution in May 1993 of a partnership known as Seeds Direct between Mrs. Gorne and the first two defendants, Mr. Scales and Mr. Taylor, and the formation very shortly afterwards of a new partnership called TGS Seeds ("TGS") between Mr. Scales, Mr. Taylor and the third defendant, Mr. Gill.

2. The origin of the matter can be traced back to the early 1980s when Mr. Jonathan Stollery started trading in the business of cleaning and dressing farm-saved seed. Some time later he was joined by a Mr. John Wilsdon and together they ran a company known as W&S Agriculture Ltd. That company ceased trading at the end of 1990 when Mr. Stollery set up two complementary partnerships to continue the business, Seeds Processing International ("SPI"), which was formed with his brother Joseph in order to carry on the operational side of the business, and Seeds Direct, which was formed to carry on the marketing and administrative side. Although Mrs. Gorne was a partner in Seeds Direct, she did not take an active part in its affairs but, as the judge found, was representing the interests of Mr. Stollery. The intention was for Seeds Direct to enter into contracts for cleaning and dressing seed which would be performed by SPI as a sub-contractor.

3. From the time he started out in the seed cleaning business Mr. Stollery kept detailed records about his customers, including their addresses and telephone numbers, the quantities and types of seed he processed for them from year to year and the amounts he charged for the service. He kept this information on a card index which by the end of 1990 contained a continuous record of his business operations stretching over a period of nearly ten years. When SPI and Seeds Direct were formed in 1991 they both continued to make use of the premises previously used by W&S Agriculture. The card index remained in the offices where it always had been but effectively became part of the assets of Seeds Direct.

4. The business of SPI and Seeds Direct was reasonably successful during 1991, but in 1992 it deteriorated to the point at which SPI was unable to keep up the payments due in respect of its leases of seed cleaning equipment. Eventually during February and March 1993 that equipment was repossessed by the lessors and in April 1993 SPI stopped trading altogether. The financial difficulties and eventual collapse of SPI together with the unwillingness of Mr. Scales and Mr. Taylor to fund any further investment inevitably meant that Seeds Direct could no longer continue to function. Indeed, Mr. Scales and Mr. Taylor had obviously become concerned about the financial stability of the business before the end of 1992 because in December of that year Mr. Scales withdrew his capital without warning from the partnership account and in April 1993 Mr. Taylor followed suit. Unbeknown to Mr. Stollery or Mrs. Gorne they were already making arrangements to set up a new business in collaboration with Mr. Gill, but that only came to light on 17th May 1993 when Mr. Stollery discovered a printer's proof of a flysheet prepared for distribution to potential customers announcing the formation of TGS.

5. Once their plans were out in the open Mr. Scales and Mr. Taylor had little choice but to give notice to Mrs. Gorne dissolving Seeds Direct, which they duly did the same day. Since Seeds Direct was a partnership at will, the notice of dissolution was effective immediately. A short time later Mr. Scales and Mr. Taylor sent round to all the customers of Seeds Direct a notice of its dissolution together with a copy of the flysheet announcing the formation of TGS. At about the same time he and Mr. Taylor took the card index from the offices of Seeds Direct for use in the new business. At the end of May or the beginning of June TGS bought from the lessors the majority of the equipment previously used by SPI, including seven of its ten seed-cleaning lorries, and took on many of SPI's former employees. It also managed to buy the computer previously used by Seeds Direct which still held some of its business records. Armed with all that, as well as the knowledge of the business that Mr. Scales and Mr. Taylor had previously acquired, TGS was able to set up business on its own account in time for the start of the 1993 season in the latter part of July. TGS was formally established on 22nd June 1993 with effect from 18th May 1993.

6. Attention was then directed to winding up the affairs of Seeds Direct and it was not until some time later that disputes began to arise over the ownership of the card index. Mr. Stollery, who by then had broken off his previous relationship with Mrs. Gorne, started proceedings against the defendants in May 1999 claiming that it belonged to him and the next day Mrs. Gorne started the present proceedings claiming that it was the property of Seeds Direct in which she held a 50% interest. She sought to recover from the appellants damages for misuse of confidential information or an account of the profits made by TGS through its use.

7. On 29th October 2002 issues relating to liability in both actions came on for trial before Mr. Kevin Garnett Q.C. sitting as a Deputy Judge of the Chancery Division. In a judgment delivered on 14th November he rejected Mr. Stollery's claim altogether and held that Mrs. Gorne, Mr. Scales and Mr. Taylor were equal partners in Seeds Direct. He held that the card index and the information it contained, as well as the information held on the computer that had formerly belonged to Seeds Direct were assets of the partnership which they and Mr. Gill had wrongfully taken and used for their own purposes. Mr. Garnett directed that there be an enquiry by the assigned Master as to the loss and damage suffered by Mrs. Gorne by reason of the wrongful interference with the card index itself and the misuse of the confidential information contained in both the card index and the computer.

8. Thus it was that the matter eventually came before Master Bragge on 3rd November 2004. After a trial lasting three days the Master reserved judgment which he delivered on 1st April 2005. He held that Mrs. Gorne was entitled to damages in the sum of £152,341 in respect of her one third interest in the card index together with interest in the sum of £106,638.70 making a total of £258,979.70. It is against that decision that the defendants now appeal.

9. The notice of appeal in this case contains no less than twenty-two separately identified grounds, but many of them are little more than different reflections of one central point, namely, that the method of valuing the card index put forward by Mrs. Gorne's expert witness and adopted by the Master as the basis of his decision did not reflect the correct approach in law to assessing the value of the confidential information to Seeds Direct in late May 1993. In order to understand that complaint it is necessary to look a little more closely at the evidence that was before the Master and the way in which the arguments developed.

10. It may help to begin by clarifying three matters. The first concerns the card index itself. Mrs. Gorne made claims in respect of the wrongful interference with the physical property represented by the card index as well as in respect of the misuse of the confidential information it contained. However, by the time of the enquiry before the Master it was recognised by all concerned that the cards themselves had no intrinsic value; such value as they had was entirely derived from the confidential information they contained. Accordingly, attention was directed solely to that information and references to the index, both in the Master's judgment and in this judgment, can be taken as references to that confidential information. The second is that, although TGS obtained the computer that had previously belonged to Seeds Direct, the information it contained was of minimal value and can also be disregarded for present purposes. The third is that Mrs. Gorne elected to seek a remedy in damages rather than an account of profits and it was common ground, therefore, that her loss was to be measured by reference to the value of the confidential information at the time when it was wrongly removed by the defendants from Seeds Direct's offices during the latter part of May 1993. The only dispute that remained, therefore, was how that should be ascertained.

11. At a case management conference at which directions were given for the preparation of the case for trial both sides were given permission to call expert evidence, but unfortunately insufficient consideration appears to have been given at that stage to the kind of evidence that would be likely to assist the court. In the event Mrs. Gorne called an accountant, Mr. Maurice Land, who had considerable experience of valuing small businesses. He considered that the card index represented the bulk of the goodwill of Seeds Direct's business, and he therefore proposed to calculate its value by valuing the business of Seeds Direct as a whole and deducting from it the value of its other assets so as to produce a value for the goodwill. It would then be a matter of judgment precisely what proportion of the goodwill should be attributed to the index. However, Mr. Land did not think that the accounts of Seeds Direct for the period up to 17th May 1993 provided a representative view of its position so he decided to make use of the trading accounts of TGS for the 14 months to 31st July 1994 in order to obtain the information he needed. He considered it appropriate to resort to the trading experience of TGS because he regarded it as a continuation of the business of Seeds Direct.

12. The expert witness called by the defendants, Mr. Michael Taub, was also an accountant. His approach to valuing the card index was to regard it as an income generating asset for which a purchaser would be willing to pay a multiple of the annual maintainable positive cashflow. His method of valuation therefore fell into two separate stages: the first was to assess how much income the index could be expected to generate annually for someone in the business of cleaning and dressing farm-saved seed; the second was to assess what multiple of that sum a purchaser would be willing to pay in order to acquire it. In Mr. Taub's view the main factors likely to influence a purchaser were the historical sales and gross profits achieved by Seeds Direct, the extent to which the information in the card index was available from other sources, his own capacity to provide a service of cleaning and dressing seeds and the volume of sales he expected to make to customers who had not been obtained through the use of the index. In order to assess how many new customers might be derived from the index and the profit margin to be expected from them Mr. Taub carried out an analysis based on TGS's first year of trading using information provided to him by Mr. Scales.

13. Although he regarded both expert witnesses as experienced and keen to present fair-minded evidence, the Master preferred the evidence of Mr. Land whom he considered to have more experience of valuing small businesses. He also considered that Mr. Taub had relied quite heavily on information provided by the defendants, particularly Mr. Scales, which he did not think reliable. In particular, whereas Mr. Taub had worked on the basis that between 5% and 15% of TGS's customers in the first year had been obtained through the use of the card index, the Master found that the proportion was between 40% and 45%. Largely for these reasons, therefore, he accepted the valuation method and (with some adjustments) the figures put forward by Mr. Land. On the basis of that evidence he found that the value of the card index at the end of May 1993 was £457,024. He therefore held that Mrs. Gorne was entitled to recover damages in the sum of £152,341.

14. The defendants' primary ground of appeal is that the Master was wrong to accept the method of valuing the card index put forward by Mr. Land because it was fundamentally flawed. Mr. Scott, who appeared on their behalf, submitted that the correct way to assess the value of the index was to ascertain the price at which it could have been sold by Seeds Direct in the open market under the circumstances which existed at the end of May 1993, whereas the method adopted by Mr. Land involved valuing it as part of the assets of a going concern and doing so, moreover, by reference to the profits actually earned by TGS. The result, he contended, was to award

Mrs. Gorne by way of damages an amount that in reality represented a share of the profits that TGS had earned from its use of the index and to value it at a figure far in excess of what anyone, including TGS, would have been willing to pay for it in May 1993.

15. In section 3 of his first report Mr. Land explained his choice of method for valuing the card index. Having expressed the opinion that it represented a large proportion of the goodwill of the business of Seeds Direct, he moved on to consider methods of valuing the business as a whole. Three widely recognised methods of valuing a business were available to him: the discounted cashflow basis, the net assets basis and the earnings basis. He rejected the use of the discounted cashflow basis because it depends on the ability to project cashflow with reasonable accuracy, which he thought was not possible in this case. He also rejected the net assets basis because intangible assets of the kind with which he was concerned are not reflected in the balance sheet. As a result he was left with an earnings method, that is, a multiple of the maintainable earnings of the business discounted for uncertainty. Mr. Land recognised that the valuation of a business by this last method would normally be based on several years' accounts, but in the present case Seeds Direct had traded for only a little under two years. Moreover, in his view the first year was unrepresentative because time would have been spent building up the business and the second year was also unrepresentative because the two partners who were responsible for its trading activities were making preparations for their new venture. Furthermore, he regarded TGS as merely a continuation in trading terms of Seeds Direct and he therefore considered that it would be more appropriate to value the index by reference to the trading experience of TGS. In the event he used a combination of the first year of Seeds Direct's trading and the first 14 months of TGS's trading to calculate a figure for maintainable earnings which he used as the basis for the rest of his calculations.

16. Although Mr. Land's method of valuing a business cannot be criticised as such, I think that the method he chose to ascertain the value of the card index in this case was liable to lead to an unsound conclusion. In the first place, it proceeded on the assumption that Seeds Direct was a well established and stable business capable of being valued as a going concern whose earnings could be expected to continue in a broadly consistent manner over a period of some years. One can see that most clearly from paragraphs 3.43 and 3.44 of the report in which he sought further information about TGS's trading results for the first two years and explained that it was appropriate in his view to consider the trading results of both businesses because they were in reality the same business. It was on that assumption that he considered that the card index could be regarded as a substantial and very valuable part of the goodwill of that business.

17. In fact, however, although the business of TGS was the same as that of Seeds Direct in the sense that it offered the same services to a similar range of customers using the same equipment and many of the same employees, it was not the same business in the sense of having been taken over as a going concern from Seeds Direct. Seeds Direct's business had collapsed largely as a result of the failure of its business partner, SPI, on which it was entirely dependent for its ability to perform the services it offered to farmers and the unwillingness of at least two of its three partners to make any further investment in it. By the end of May 1993 SPI's equipment had been repossessed and most of it had been sold to TGS. At that stage, therefore, Seeds Direct itself could not continue in business, nor could its business be sold as a going concern. The only asset of any significance that remained to it was the card index, the value of which depended entirely on what a purchaser would be prepared to pay for it. TGS had created a new business for itself by picking up from a variety of sources the pieces left after the demise of SPI and by doing so had been able to recreate broadly the same enterprise.

18. Secondly, the method of valuation adopted by Mr. Land inevitably introduces a substantial measure of hindsight inasmuch as he made use of the actual trading results of TGS for the period up to July 1994 in order to calculate what Seeds Direct would have earned from the business if it had been able to continue. If Mr. Scales and Mr. Taylor had been liable for the failure of Seeds Direct and Mrs. Gorne had been awarded damages in respect of the loss of the business, it might well have been appropriate to look to the results of TGS for some guidance as to the profits that would otherwise have been enjoyed, but that is not this case. The defendants have been held liable for wrongly depriving Seeds Direct of valuable property and must pay damages sufficient to compensate Mrs. Gorne for her share of its value. What use they managed to make of it thereafter is of little relevance given that the position of TGS was so different from that of Seeds Direct. It appears that Mr. Land may have failed to keep this distinction clearly in mind because in the section of his report beginning at paragraph 3.35 he set out to value the income that Mrs. Gorne lost as a result of not benefiting from part ownership of the index and he comments in paragraph 3.36 that *"As the Index was an asset of Seeds Direct, [Mrs. Gorne] is entitled to a third share of any profits generated from its use, either in Seeds Direct or TGS Seeds"* (emphasis added).

    Moreover, in paragraph 3.39 he recognised that his method of valuing the index reflected the profits it was capable of generating in the hands of TGS since he commented that *"By calculating the value of the index as at May 1993, the need for calculating any loss of profits suffered by [Mrs Gorne] is negated, since this "future income" is inherent in the goodwill of the business at that date."*

    His reliance on the trading experience of TGS is further borne out by his request for additional information relating to first two years' trading to which I referred earlier.

19. Mr. Scott on behalf of the appellants criticised Mr. Land's method on the grounds that by making use of hindsight in the form of TGS's trading results he had moved away from the position in which any potential purchaser of the card index would have found himself in May 1993. In my view that is a powerful point. Anyone who was considering a purchase of the index at that time would have had to assess its value to him on the basis of the

profits he expected to make from its use. To do that he would have had to look carefully at his existing business in order to decide to what extent access to the information it contained would enable him to increase his earnings. That would depend in part on whether he was already engaged in a similar business, whether he already held some of the information and whether he already had, or could acquire, the capacity to exploit it. An existing competitor might be prepared to buy the index to prevent its falling into other hands. A potential purchaser might well have wanted access to Seeds Direct's accounts in order to see what profits the business had generated in the past, but at that stage final accounts only existed for the first year's trading. At all events, the one thing he could not have known was how TGS or anyone else would actually be able to exploit the index in the future.

20. As Mr. Land and Mr. Taub both recognised, although the information contained in the index was undoubtedly an asset, it was an asset with a limited life since its value would be progressively eroded as more recent information became available over the course of a few seasons. That is something that might reduce its value to any potential purchaser, although if it enabled him to capture a significant share of the market at the outset, he might regard it as providing a longer term benefit.

21. In my view the exercise that a potential purchaser would have had to carry out in order to decide how much to pay for the card index in May 1993 is an exercise of a fundamentally different kind from that undertaken by Mr. Land who set out to value it as an asset forming part of a business that was a going concern. It would have been based on different information and would necessarily have involved a large element of judgment, even an element of speculation. Moreover, the inherent uncertainties would be likely to make him err on the side of caution. In my view it is an exercise that would have been likely to lead to a significantly different conclusion.

22. Mr. Davenport submitted, however, that there was a significant degree of similarity between the approaches of the two experts in that they had both sought to place a value on the index by capitalising its value as a profit-earning asset. Mr. Land had done it by valuing the business as a whole and deducting the value of the other assets; Mr. Taub had done it by identifying the earnings which it was capable of sustaining. The real difference between them lay in the extent to which they considered that the use of the index had contributed to the profits generated by TGS in its first years of trading and their differing views as to the correct multiplier to adopt. These, he submitted, were issues on which the Master's findings were not open to challenge. Viewing the matter more broadly, he argued that the Master had correctly identified the legal principles applicable in a case of this kind and had made findings that were open to him on the evidence he had heard.

23. In the course of his argument Mr. Davenport reminded us of a passage in the judgment of Peter Smith J. in ***Crown Dilmun v Sutton*** [2004] EWHC 52 (Ch) where the learned judge said in paragraph 49 *"It is particularly significant that, on the authorities, where a fiduciary obtains a benefit in breach of his fiduciary duty thus defined, he is liable to account even if the beneficiary could not itself have obtained that benefit or opportunity; see for example **IDC v Cooley** [1972] 1 WLR 443."*

24. That case was also drawn to the Master's attention because in paragraph 15 of his judgment one finds the following passage: *"In summary Mrs. Gorne's principal case is that she is entitled to £208,715, being a third share of the value of the Index including her share of the profits of TGS generated by [the] use of it; this is based in part on the submitted analogous proposition of law that where a fiduciary obtains a benefit in breach of duty he is liable to account, even if the beneficiary could not himself have benefited. A claimant is entitled, by way of general principle, to such damages as would put a claimant in the position he would have been in had the breach of confidence not taken place. The aim is to award fair compensation. If a claimant would have himself used the information there is entitlement to damages based on a loss of profit and if it could have been sold he is entitled to his share of the value of the information."*

25. Later, in paragraph 19 the Master said this: *"As I have already indicated on this enquiry I need to consider in particular the extent and value of the defendants' use of the Index, and what damages, if any, are payable by reason of the fact that Mrs. Gorne was deprived of the use of the Index and, on her case, of an opportunity to realise its value by sale to a third party."*

26. These passages, together with a later passage in paragraph 87 in which he observed that an award of damages in the sum of £152,341 was consistent with his assessment of the value of the Index to TGS, suggest that the Master may have been under the impression that it was appropriate when assessing Mrs. Gorne's loss to have some regard to the use that TGS was able to make of the index, perhaps on the assumption that Seeds Direct could have benefited from it in the same way. However, Mr. Davenport accepted that in the present case Seeds Direct was in no position to make use of the index otherwise than by selling it on the open market and that therefore the loss suffered by Mrs. Gorne was to be assessed by reference to its value on the open market at the time of its removal from Seeds Direct's offices rather than by reference to the use to which it was subsequently put by TGS. It is of particular importance in the present case to keep the distinction clearly in mind, however, because it has an important bearing on the approach to assessing compensation.

27. Mr. Davenport reminded us of the limited range of circumstances in which this court will overturn findings of fact made by the judge below, particularly where he has had the advantage of seeing and hearing the witnesses. I fully accept that the court should be very slow to overturn the judge's findings of fact in such cases and if that were the only ground of appeal I should be very reluctant to interfere. However, the real ground of the challenge to the Master's decision is not simply that his findings were wrong, but that he was persuaded to adopt an approach to assessing damages that was wrong in principle.

28. Nonetheless, despite all that, Mr. Davenport submitted that it was too late for the appellants to say that Mr. Land's method of calculating the value of the index was wrong because they had failed to take the point clearly before the Master who was therefore by implication invited to consider the evidence of both experts on its merits and decide which he preferred. Given the nature of Mr. Scott's argument before us, I should certainly have expected the substance of it to have been put to Mr. Land in cross-examination and I should also expect it to have been given some prominence in his submissions to the Master as a reason for rejecting Mr. Land's evidence altogether. Similarly, I should have expected the Master to have dealt with it in terms in his judgment. If the arguments addressed to us were not advanced at the trial, I think Mr. Davenport's submission would have some force.

29. Although the Master said in paragraph 72 that he considered the valuation method suggested by Mr. Land to represent the correct approach, he did not explain why he had reached that conclusion, other than by saying that he felt that Mr. Land had more "hands on" experience of valuing of small businesses. One does not find there any reflection of a fundamental challenge to the method he was putting forward. However, Mr. Scott drew our attention to various passages in the transcript of his cross-examination of Mr. Land from which it is quite clear that he did put the points that lie at the heart of the present appeal to him and one can see from the defendants' written closing submissions below that they also formed quite a prominent part of their case. In the circumstances I do not think it can be said that they allowed the point to go by default.

30. Mr. Davenport was right in saying that there was a measure of common ground between the experts inasmuch as they were both seeking to value the index by reference to its potential for generating profits, as could no doubt be expected of any potential purchaser. What separated them, however, were the assumptions underlying their different approaches: Mr. Land set out to value the asset as part of a going concern; Mr. Taub set out to calculate what a purchaser would be willing to pay for the index on the basis of the maintainable cashflow it could be expected to generate in the context of its own business, as was reflected in paragraph 4.9 of his report. However, when it came to assessing the amount of business that the index could be expected to generate and its likely value Mr. Taub resorted to an analysis of TGS's operations during the period up to July 1994. To that extent he also introduced a measure of hindsight coupled with a significant degree of reliance on the evidence of Mr. Scales.

31. Against that background Mr. Davenport made two further submissions: first, that since both experts had relied to a greater or lesser degree on the trading results of TGS, it was not open to the defendants to complain of that now; second, that there was little difference between the figures produced by Mr. Land and those produced by Mr. Taub once one allowed for the Master's findings on the proportion of sales derived from the index and the appropriate multiplier.

32. In my view, the fact that both experts resorted to the trading results of TGS for certain purposes does not mean that they were carrying out the same exercise and is not in itself a sufficient ground for rejecting the challenge to the Master's judgment. For the reasons given earlier, I think that the method employed by Mr. Land was inherently likely to lead to a result that did not properly reflect the value of the index to Seeds Direct in May 1993. If both experts had accepted the correctness of that method and had merely differed over its application, there would be some force in Mr. Davenport's submission, but that was not the case.

33. The Master decided that the correct multiple to adopt when applying Mr. Land's method was 6, twice that put forward by Mr. Taub. It must borne in mind, however, that at that stage in his calculation Mr. Land was seeking to put a value on the business as a whole, whereas Mr. Taub was seeking to put a value on only one asset which had a limited commercial life. I do not think, therefore, that one can simply regard these as different points on the same scale; the choice of multiplier is likely to be affected by the nature of exercise in which it is being used. On the other hand, the Master's finding that 45% of TGS's sales in the first year were derived from its use of the index is one that does have a direct effect on Mr. Taub's calculation and would bring his figure up to £162,000, still a long way short of the value at which the Master arrived. If one were to use a multiplier of 6 rather than 3, his valuation for the index would increase to £324,000. That is much nearer the Master's figure, of course, but even so, one third of that amount (£108,000) is significantly less than the amount that the Master actually awarded. I do not think this is a case, therefore, in which it can be said that the outcome turned on the view the Master took of those two elements in the calculations that were common to both experts.

34. In these circumstances I have come to the conclusion that the Master's judgment must be set aside. Mr. Land's method of valuing the card index does not properly reflect the fact that its only value to Seeds Direct in the latter part of May 1993 was what it would fetch on the open market or the fact that any potential purchaser, including TGS, would have had to make the best assessment it could of its profit-earning potential in the light of the information then available. I have reached this decision with a certain amount of regret because the costs that have already been incurred in this litigation are significant in the context of the amount in issue and a further trial will only add to them, but I am persuaded that it would be unjust to the defendants to allow the existing judgment to stand. I would only add that this surely is a case in which the parties ought to make a serious attempt to settle their differences by mediation or some other alternative dispute resolution procedure.

35. Mr. Scott criticised the Master's judgment on a large number of other individual grounds, but in view of the conclusion to which I have come on the main ground of appeal it is unnecessary to consider them.

36. For these reasons I would allow the appeal, set aside the judgment below and direct that there should be a fresh inquiry as to damages before a judge of the Chancery Division.

Lady Justice Arden:

37. I am most grateful to Moore-Bick LJ for setting out the background to this case and the submissions. I have, however, come to a different conclusion from him.

The basis of the award

38. An important issue arises in this case as to whether the Master correctly directed himself as to the measure of damage. Thus it is necessary to establish at the outset the basis on which damages were to be assessed in this case. I deal with that question in paragraphs 39 to 42 of this judgment, and the question whether the Master correctly directed himself in para 7(iii) below.

39. The judge (Kevin Garnett QC) had found that the defendants had wrongfully interfered with confidential information belonging to Seeds Direct. In such a case, the usual measure of damages is that the defendant should compensate the claimant for the loss which he (the defendant) has caused him. So, if the claimant would have used the information himself to earn profits, the correct measure of damages is that the claimant should receive fair compensation for what he has lost (see for example ***Universal Thermosensors Ltd v Hibben*** [1992] 1 WLR 840). If, on the other hand, he would have licensed or sold the information to others, the correct measure of damages is the amount that he would have received if he had licensed or sold the information (***Dowson & Mason v Potter*** [1986] 1 WLR 1419).

40. In the present case the parties owed each other duties as former members of a partnership. The Master refers to neither of the reported cases referred to above. However, he speaks of the need to compensate Mrs Gorne for the loss she has suffered and the need to find the value of the partnership share without drawing any distinction between those two concepts (see for example para 4). He also refers to section 39 of the Partnership Act 1890, and points out that Kevin Garnett QC did likewise in his judgment at para 102.

41. Section 39 provides: *"On the dissolution of a partnership every partners is entitled, as against the other partner in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."*

42. Because Seeds Direct was a partnership and the partnership was dissolved on 17 May 1993, the effect of section 39 is that what Mrs Gorne lost by the wrongful acts of the other partners in taking the card index for themselves was the right to have that card index sold and the proceeds applied in accordance with that section. The court must proceed on the basis that if the wrongful interference had not occurred the other partners (if they wanted to continue using the index) would have had to purchase the share of Mrs Gorne at fair value and that if a sale to a third party had taken place this too would (unless the contrary had been shown) have been at fair value. In the instant case, the fair value would be the value as between a willing buyer and a willing seller. Although the point does not have to be decided, my provisional view is that there is no reason why the presence of TGS in the market would have to be left out of account.

Key points

43. I now turn to examine some of the key points about this case:

i) This litigation started some 11 years ago. In it Mr Scales and Mr Taylor (whom I will call collectively the appellants) claimed that the index was not an asset of Seeds Direct while Mrs Gorne claimed that it belonged to her alone. In those circumstances the question of the ownership of the card index containing the names, addresses and other details of the customers of the partnership was not determined until November 2002, when the judgment of Kevin Garnett QC sitting as a deputy judge of the High Court of Justice, Chancery Division was handed down. In the meantime, the position was that the appellants had taken the card index and were using it in a new business, out of which they made substantial profits. They denied Mrs Gorne access to it and the market for purchasers of the index could not be tested by offering the index for sale in the usual way. The index was clearly of value since in about May 1993 the appellants had taken the trouble to send a flyer to all the customers whose names were in the index stating that they were starting a new business, TGS, to continue the business of the old partnership and giving their contact details. But by November 2002 the index had ceased to be an asset which could be sold on the open market.

ii) The significance of the card index was that it gave access to the customer base of the old partnership. It was more than a customer list. It ordinarily contained such matters as contact details, activity data, quantity of seed cleaned and price, customer's comments etc. It therefore was in substance the goodwill of the old partnership. It was this that the Master had to value.

iii) The Master appreciated that the exercise was one of ascertaining the damages which Mrs Gorne had suffered through the wrongful use by the appellants of the confidential information contained in the index. At paragraph 2 of his careful judgment he recites the terms of the inquiry ordered by the judge (Kevin Garnett QC) "as to the loss and damage, if any, suffered by Mrs Gorne by reason of the wrongful interference with ... [the index]..and … misuse … of confidential information contained in it." Thus investigation of the use, which was the same as misuse, of confidential information was an integral part of the Master's task. At para. 4, he

held: "Essentially, as I assess it, I must on this inquiry direct myself as to the extent of the use of confidential information … and against that assess any loss and damage suffered by Mrs Gorne." There is a passage to like effect in para 19 of his judgment. At para 87 of the judgment, he held:

> "Bearing in mind all the evidence it seems to me that on the estimated value of £457,024 for the Index the one third figure of £152,341 arrived at in appendix 1 to the joint statement is correct applying a multiple of 6 and a reduction of 30% for other factors. In my view that value is consistent with my general assessment of the value of the Index to TGS and its assistance in perpetuating the business of Seeds Direct for TGS. It also recognises that Mrs Gorne was prevented from herself selling the Index when it was at its most valuable. The defendants' actions ensured that a competitor could not use the Index. This amount constitutes Mrs Gorne's *damages*." (emphasis added)

In those circumstances, in my judgment the Master did not misdirect himself as to the basis on which he was to assess the damages to be awarded to Mrs Gorne.

iv) Mr Scales and Mr Taylor gave evidence before the Master. Their case was that the index was not substantially used by TGS and that its value had been exaggerated by Mrs Gorne. This case was effectively rejected. The Master was satisfied that (a) the index was of particular value to TGS (para 74), (b) TGS traded immediately following the dissolution of Seeds Direct and that it used the index (para 74); (c) the index had value as was evidenced by the ability to send out the flyer (para 75); (d) possession of the index was of real value (para. 76); (e) the appellants had made more than the limited use of the index which they claimed in their evidence (para.79); (f) Mr Taub's estimate of percentage use should be rejected (para. 80); (g) the appellants played down the use of the index "for obvious reasons" (para.80); and (g) the index was of value to TGS in perpetuating the business of Seeds Direct for TGS (para 87).

v) The two experts called to assist on valuation were Mr Taub for the appellants and Mr Land for Mrs Gorne. Mr Taub valued a one third share in the index at between £9,000 and £27,000 if the purchaser was a third party and between £18,000 and £54,000 if the purchaser was TGS. Mr Land valued a one-third share of the index at £208,715. The Master's valuation in effect gave Mrs Gorne about two-thirds of the amount she claimed.

vi) The Master rejected the assumption made by Mr Taub for the purpose of his valuation that a high percentage of sales could have been made by TGS without using the index (para 84). Mr Taub accepted in cross-examination that he had relied on what the appellants had told him about the content and value of the index without inspecting it himself. It was thus apparent that he had not obtained third party verification for what the appellants told him, despite their conflict of interest. Mr Taub's valuation was wholly dependent on his estimate of the sales attributable to use of the index.

vii) The equipment which was needed for the old partnership's business was installed on ten lorries owned by SPI. At about the time of the dissolution of Seeds Direct, these lorries were repossessed by the hire purchase company. The lorries were put up for sale by auction and the appellants were able to buy seven of them. Any other purchaser of the index could have done the same.

viii) The new partnership made about the same level of profits and had about the same turnover in its first year of trading as the old partnership had done with only seven lorries and thus the lack of the other three lorries did not have any adverse effect on the business. Thus it would appear that the appellants had made more effective use of the tangible assets of the old partnership. TGS took on a number of employees of SPI and Seeds Direct. Any purchaser of the index could have done the same.

ix) It was clear that Mr Land and Mr Taub both valued the index on the basis of what it would fetch if it had been offered for sale on the dissolution of the old partnership, as ought to have happened if the affairs of the old partnership had been properly wound up (see section 39 of the Partnership Act 1890 above). This can be seen for example from the experts' joint report. This contains nine agreed items and an unnumbered table of non-agreed items. Items 7 and 8 in the list of agreed items refer to potential purchasers of the index and (for example) the first, fourth and fifth of the non-agreed items also concern potential purchasers. The fact that the basis of valuation is a multiple of maintainable profit does not mean that the experts were confused into thinking that they were trying to calculate the profits which the appellants made. What they were calculating was the profit *potential* of the index as that, in their expert opinion, was an element of the way in which a purchaser would have valued the index if offered for sale in May 1993.

x) For the purpose of assessing what a purchaser would pay, the experts were entitled and bound to proceed on the basis that the purchaser was reasonably well-informed. He would have had the accounts of Seeds Direct which had by then been prepared. He would have also asked the partners what profits they were expecting to make in the future. No purchaser would buy the index without asking this. Mr Taub states in his report:

> "It is my experience that purchasers of business assets generally undertake such investments with a view to earning a commercial return." (report, para 3.5)

xi) As the market was not tested, there was no actual purchaser and therefore there is no evidence as to what he would have been told if he had existed and made the enquiries mentioned in the last paragraph. For the reasons given below the valuers must in my judgment look for the best evidence of what the purchaser would have been told if he had been given honest answers to his enquiries (as they must assume he would have

been). It is part of the background that the appellants are defaulting fiduciaries since they had taken for themselves an asset belonging to all the partners and by analogy the appellants relied on the principle that if there is doubt as to the position, the respondents should not be given the benefit of that doubt (on this, see for example, *Murad v Al-Saraj* [2005] EWCA Civ. 959). However, that proposition is not directly applicable because the action is for damages for misappropriation of confidential information not for breach of fiduciary duty.

xii) The Master made allowance for the contribution of the partners to the new business and the uncertainties for which the purchaser would have expected a discount by applying the substantial discount of 30% referred to in para. 87 of his judgment and set out above.

Best evidence of the profit potential of the index

44. It is a striking fact that both experts, Mr Taub and Mr Land looked to see what profits TGS had in fact made by using the index. In my judgment they were entitled so to do. Even though that information would not be available to a (notional) purchaser in May 1993, it is clear for the reason that I have given that the purchaser would have wanted to know what profits were projected from use of the index . Purchasers of ongoing businesses do not buy businesses except on the basis that they are going to make profits for them. In this case, in the absence of evidence to the contrary, the best evidence of what profits would have been projected as at May 1993 is the evidence of the profits which TGS in fact in fact made after that date. The only evidence to the contrary was that TGS' success was to some extent due to other factors, apart from the index, and the Master made allowance for that factor, and in addition the allowance for uncertainties that a purchaser would demand (see para 7(vii) above and para 12 below). If, however, subject to those adjustments the profits of TGS were not used in the valuation process, an unduly optimistic or pessimistic view of the index's profit potential might be formed.

45. The approach of using TGS profits in this way is consistent with the general principle as to use of subsequent events adopted in valuation matters. It is a general principle that, where the court is charged with determining the value of an income-earning asset at a particular date and the valuation falls to be made at a time when it is known what income it in fact earned, the court should take into account the information as to the profits actually earned. As Lord Macnaughten, with whom Lords Shand, Robertson and Lindley agreed, held in ***Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co*** [1903] AC 426, 431: *"If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"*

46. The ***Bwllfa*** principle was applied, though not by name, by the House of Lords in the more recent case of ***Phillips v Brewin Dolphin Bell Lawrie*** [2001] 1WLR 143. That case concerned the issue of valuation of an asset for the purpose of determining whether a transaction was at an undervalue within section 238 of the Insolvency Act 1986. One of the questions in that case was how to value a covenant to pay rent which after the date the covenant was given (10 November 1989) the covenantor failed to perform. In addition other events had happened to make the covenant worthless. The covenant had to be valued as at 10 November 1989. Could the events after the date of the covenant be taken into account? Lord Scott, with whom the remainder of the House agreed, held that they should be taken into account:

> *"25. PCG's covenant, which had been precarious at the outset, had become worthless by 23 February 1990 at the latest. To complete the point, AJB went into compulsory winding up in April 1990 and an administrative received was appointed in May. These events would inevitably have led the head lessors to terminate the head leases and recover their equipment, if they had not done so previously, thereby bringing the sublease to an end.*
>
> *26. Mr Mitchell submitted that these ex post facto events ought not to be taken into account in valuing PCG's sublease covenant as at 10 November 1989. I do not agree. In valuing the covenant as at that date, the critical uncertainty is whether the sublease would survive for the four years necessary to enable all the four £312,500 payments to fall due, or would survive long enough to enable some of them to fall due, or would come to an end before any had fallen due. Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of section 238(4) however, and the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation. I would hold, taking account of the events that took place in the early months of 1990, that the value of PCG's covenant in the sublease of 10 November 1989 was nil. After all, if, following the signing of the sublease, AJB had taken the sublease to a bank or finance house and tried to raise money on the security of the covenant, I do not believe that the bank or finance house, with knowledge about the circumstances, surrounding the sublease, would have attributed any value at all to the sublease covenant."*

47. The same principle is applied in the valuation of contingent liabilities in the event of insolvency. Thus, if a person held a policy of insurance against fire issued by a company which goes into liquidation, the court is not bound to value the contingency of a claim occurring within the year in isolation from the fact (if it be the fact) that a fire

occurred during the period of the insurance after the commencement of the winding up: see *Law Car and General Insurance Co Ltd* [1913] 2 Ch 103, 122-3.

48. In this case the critical question is what profits the index would enable the purchaser to make in the period following his purchase. As at the date of the negotiations for purchase that profit could only be an estimated profit so what the purchaser would want to know is what profits were projected for the future. No projection is available and so the court has to do the best it can to ascertain what that estimate would have been. To look at what actually happened is not to use the wisdom of hindsight but to use the best evidence available as a starting point for determining what the projection of future profits – subject to adjustment for contributions from other sources - would have been. The first period following acquisition is the period for which the purchaser would have expected to have an estimate. However the experts have access to more than a mere projection. They have the actual figures for the first year's trading. (If any further information had been available the valuers might have taken the view that, in case the actual figures for the first year following (notional) acquisition are exceptional, they should as a matter of prudence look at the year following that as well, in order to obtain confirmation as to the reliability (or, as they put it, its maintainability) of the figure of the first year's profit.)

49. I ask myself what alternative to taking the actual results for the first period of post-acquisition trading the valuer or the court would have, where there is no contemporaneous estimate of the projected profits for that period. One option would be to ignore that element altogether. In my judgment that course would be open to objection as unrealistic and artificial. It is artificial because no reasonably well-informed purchaser would have proceeded without information as to projected profits. The appellants did not suggest that no estimate could have been made, or that they had no business plan. Moreover, the court should not assume that the purchaser was not reasonably well-informed because, as Lord Scott held in a later passage (para 30) in the ***Brewin Dolphin*** case: "*The value of an asset that is being offered for sale is, prima facie, not less than the amount which a reasonably well-informed purchaser is prepared, in arms' length negotiations to pay.*"

50. For completeness sake this is not a case where the prima facie rule set out by Lord Scott is excluded.

51. The effect of Mr Land's evidence accepted by the Master was that the purchaser would gauge the price by reference to a multiple of profits. Once the purchaser knew the historic profits of Seeds Direct (and turnover), and the estimated profit (and turnover) for the next trading period, he would be able to work out gross profit margins and more importantly decide what multiple of profits was appropriate. He would make his offer to buy the index accordingly.

52. The *Bwllfa* principle is a well-known principle, and as Lord Scott states it is applied in many contexts. It is the underlying rationale of the principle that is important in this case. Where a valuation falls to be made by reference to an event (viz the making of post-acquisition profits), which is past, the court can and should use the information as to what actually happened to assist in the valuation process.

53. As Mr Davenport put it in the course of his oral submissions; "In the circumstances of deliberation by the experts eight years later as to the value of the index, the expert had to look to see what the business did in fact achieve. The expert was looking at the ability of the index in order to establish its true value. The profits made in 1994 self-describe that value."

54. The reason for taking into account what actually happened is not just to avoid speculation, important though that is. In accountancy matters it is common sense to use independent verification for figures where it exists. In this case there was independent verification for any estimate of profits that the purchaser would have been given in the form of the profits that TGS actually made. The Master found that TGS' profits were attributable to use of the index to a significant extent. He did not do so blindly. He recognised that there was a risk of overvaluation that might result from the use of TGS's figures without qualification, and made a 30% discount accordingly.

55. In summary on this point, the use of post-acquisition profits to determine the value that a purchaser would have paid for the index is neither hindsight nor the confusion of an inquiry as to damages with an account of profits. It is an integral part of the ascertainment of the price that a purchaser would pay.

Valuation of the index by valuing Seeds Direct as a whole

56. This court can only interfere with the Master's determination of the damages in this case if he erred in law or his decision was against the weight of the evidence. This court cannot interfere simply because it would itself have come to some other result itself. What is said by the appellants is that there was an error of law, in that the Master misdirected himself as to what he had to value. It is said that he wrongly took the value of the business rather than the value of the card index. Moore-Bick LJ has concluded that there was such an error. He has concluded that the valuation made by Mr Land did not properly reflect the fact that its only value to Seeds Direct in the latter part of May 1993 was what it would fetch on the open market or the fact that any potential purchaser including TGS would have had to make the best assessment it could of the profit earning potential in the light of the information then available (judgment, para 34). In respectful disagreement, I consider that, for the reasons given above and the further reasons given below, the Master was entitled to come to the conclusion that he did.

57. It is said that the method of valuation adopted by Mr Land was inappropriate because he sought to value the card index as part of the business of the partnership rather than as a separate asset. Again, in my judgment, the Master was not thereby prevented from accepting the method of valuation adopted by Mr Land and that method was a legitimate way of finding the value of the card index. What Mr Land did to establish the value of the card

index was to value the business as a whole and then deduct the value of the other assets. He regarded that card index as equivalent to the value of the goodwill of the business. Mr Land's reason for doing this was simple and sensible. There was no available evidence of what such card indices would fetch in the market but there was of course evidence as to what business with similar profit potential would sell for. Thus Mr Land chose to reach his valuation by taking the value of the index as part of a business.

58. Analogies can be dangerous, but with a warning that an analogy is often imperfect, I would take the example of a valuation of part of an asset that is not normally sold separately. I take the example of a display cabinet built specially to accommodate an antique Toby jug, which is unique. Suppose that it is necessary for some purpose to value the Toby jug separately from the cabinet. (That need might arise if it was stolen and the owner wanted to make a claim for its value from insurers.) One way of valuing the Toby jug would be to ask what a purchaser would pay for the jug and the display cabinet together, and then ask what a purchaser would pay for such a cabinet on its own, and then to deduct the value of the cabinet on its own from the value of the Toby jug and the cabinet together. The resultant sum would be the required valuation. The right asset has been valued, namely the Toby jug. The valuation is indirect but in the case of some assets that may be the more reliable way of ascertaining their value.

59. There is then no objection in law to Mr Land finding the value of the index by finding the value of Seeds Direct as a whole and then deducting the value of the assets other than the index. As to whether this is a proper method is a question of valuation methodology. The experts in this case were disagreed as to the right approach as a matter of valuation. In the table of non-agreed items forming part of the expert's joint report, Mr Land said:

" The detailed information in the Index could not be wholly reconstructed as suggested by Mr Taub. The measure of its value is a part of the intangible assets of Seeds Direct.

That part of the intangible assets of Seeds Direct which is represented by the Index is a matter of judgment."

60. Mr Taub on the other hand said: *"Even if there were sufficient information for a reliable valuation of Seeds Direct, it is not possible to estimate with any reasonable degree of reliability the proportion of intangible assets which the Index represents. Mr Land's assumption that the Index represents 70% of the total value of the intangible assets is unsupported."*

61. The Master clearly preferred Mr Land's view on this point as he was entitled to do. His preference for Mr Land's approach amounted to an acceptance of Mr Land's reasons for his approach and thus sufficient reasons for his preference can be discerned. As this preference involved no error of law, the only basis for disturbing his conclusion to prefer Mr Land's evidence on this point would be perversity. In my judgment there is no ground for holding that the Master's decision on this point was perverse.

SPI

62. It is further said that the approach of Mr Land is flawed because he did not take into account the fact that SPI, the business partner of the former partnership, had failed and two of the partners were unwilling to make any further investment in the former partnership business. These factors are not relevant to the question of the value of the card index since one must assume that if a person would be prepared to take over the index he would be willing and able to invest in it. Moreover, if TGS was in fact able to develop its own contacts without using the information taken from the card index, that would have reduced the damages payable but the burden of showing that the business was not derived from such information would have fallen on it (see the *Universal Thermosensors* case cited above). That is the sort of matter encompassed by the Master's discount of 30%, which led to a valuation substantially below that of Mr Land.

Further points

63. Moore-Bick LJ makes the point that a purchaser would have had only limited information about the profit potential of the business. He would have had only the previous year's trading accounts. I have dealt with that point above. A purchaser of the index would ask for the business plan or projected future profit of the business. Mr Land adjusted the figures for the first full year's trading by TGS to take account of the fact that the new business had fewer machines than the old business. He then took the average of 1992 and 1994 trading to find the maintainable profits. Of course, a purchaser would not have had access to these profits in 1994 since the transaction in question would notionally have taken place in May or June 1993. However, the purchaser would as I have explained have wanted to have a figure for projected net profit. If the defendants did not produce a figure as to what they projected as the net profits for 1994 in the course of the trial before the Master, it was open to the court to make a reasonable inference about those profits. In my judgment, it was appropriate to infer that the amount of the profit actually made in 1994 was an appropriate starting point on which to base an estimate of those profits.

64. Moore-Bick LJ also makes the point that the information in the card index had only a limited life. I agree of course that a valuation must take account of all relevant matters but the Master accepted Mr Land's evidence as to the appropriate multiple. As to the 30% discount for other contributions to the making of profits, the Master was entitled to accept the evidence of Mr Land on this since he found that the evidence of Mr Taub was not sufficiently objective. I do not accept the argument that the Master did not give a reason for the 30% deduction. The amount of the valuation less that deduction represented the contribution which the index had made to TGS's success: see para 87 of his judgment above. I agree that the Master could have amplified that sentence, but it is in my judgment sufficiently explained when his findings are read as a whole.

65. As to the multiple to be applied to the profits of the business to reach a value of the business, as I understand it, the objection made by Moore-Bick LJ in paragraph 33 of his judgment would not apply if he had otherwise accepted the methodology of Mr Land. In my judgment, the Master was entitled to accept Mr Land's evidence as to the correct multiple. Mr Land was satisfied that the methodology which he adopted was an appropriate way of establishing the value of the index. Once he had established that a reasonable way of valuing the business was to apply a multiple to the maintainable profits, then he took away from the result and valuation the value of the other assets. The valuation was clearly on the assumption that the purchaser would also buy the lorries and machinery necessary to conduct the old partnership's business but as indicated above that was, in my judgment, a reasonable assumption to make Mr Land also performed a cross-check as to affordability. I further consider that the Master was entitled to accept the multiple of six. A lower multiple of four would have been adopted if there was a purchaser other than TGS but the Master was entitled to take the view that TGS was the most likely purchaser. He found that the index had a particular value to it (see above).

66. The remainder of the grounds taken by the appellants relate solely to the weight which the Master gave to the expert evidence. This is not a basis on which this Court should allow the appeal.

67. There is one further matter on which I should comment. At para 88 of his judgment the Master states: *"This figure appears to me broadly in line with Mr Taub's approach if the assumed percentages of TGS's sales achieved due to the Index is increased to an overall more realistic 40%-45%. The index valuation on his methodology is then broadly similar."*

68. It is not clear how the Master reached this conclusion. Moore-Bick LJ has suggested one approach in para 33 of his judgment. It will be recalled that Mr Taub's valuation was of the index and that it was based on the estimate percentage of sales attributable to the index being between 5% and 15% and the appropriate multiple being 3. The Master may, therefore, have taken Mr Taub's valuation of £27,000 multiplied it by four to adjust it for the increased percentage of sales and then doubled it to reflect the doubling of the multiple, and then applied a discount of 30%. The resulting figure (£151,200) would then be close to his own. I doubt whether this was the appropriate way to adjust Mr Taub's valuation. But, however that may be, para 88 was a postscript to the Master's conclusions. He does not suggest that his valuation of £152,341 was dependent on it.

Disposition

69. Accordingly the Master did not misdirect himself as a matter of law. For this and the other reasons given above, I would dismiss this appeal.

Postscript

70. Since writing this judgment, I have had the privilege of reading the judgment of Ward LJ as well as that of Moore-Bick LJ. Ward LJ and I are agreed as to the measure of damage but, in disagreement with me, Ward LJ has concluded (a) that the Master did not apply this measure, and (b) that in any event the Master was not entitled to ascertain the value of the index by valuing the business of Seeds Direct as a whole. I have considered the judgment of Ward LJ and that of Moore-Bick LJ with great care. I have found them extremely helpful, but respectfully remain unpersuaded. There is nothing I need to add on issue (b). On issue (a), if the Master was not in his judgment ascertaining the loss and damage suffered by Mrs Gorne but rather the share of profits to which she would have been entitled if she had elected to pursue an account of profits, he would have adopted a different route. He would have ascertained the profits of TGS actually received by Mr Scales and Mr Taylor less the amount of expenses they could properly deduct, and applied thereto a percentage, being the percentage of the profits of TGS which he found to be attributable to the use of the index. This is not the course he took. He found the value of the index, the asset of the partnership of which Mrs Gorne had been deprived. He valued the index on an earnings basis having accepted on the expert evidence that that was the appropriate method. I accept that, where an asset is valued on an earnings basis, there is some resemblance to an account of profits. However, to value an asset on an earning basis does not convert an inquiry as to the damage suffered through deprivation of that asset into an account of profits. If that were not so, the court could never adopt an earnings basis as a method of valuing an asset on an inquiry as to damages. That would be anomalous and, in my judgment, it is not the law.

71. I agree that, as a result of the conclusions of Ward and Moore-Bick LJJ the judgment of the Master must be set aside and a new inquiry ordered. I share Ward LJ's hope that the parties should settle this matter without a further trial. However, I envisage that, in the light of the majority's rejection of Mr Land's approach to valuation, she may need to obtain further expert evidence first.

Lord Justice Ward:

72. I have had the great advantage of reading the judgments in draft of Moore-Bick L.J. and Arden L.J. My views coincide with those of Moore-Bick L.J. and I would allow the appeal for the reasons he has given. Since my Lord and my Lady have disagreed and because we are setting aside the Master's order, it is appropriate that I should express my own main conclusions, albeit quite shortly.

73. The first thing that struck me on reading the Master's judgment was that whereas he had, on the one hand, taken great care to record much of the evidence, written and oral, he had, on the other hand, sadly but importantly, failed to direct a clear focus on the issue he had to resolve and on the proper approach to its solution. His task was to conduct: *"an inquiry … as to the loss and damage, if any, suffered by the claimant by reason of the misuse*

by the first and second defendants of the confidential information contained in the Seeds Direct card index and/or held on the Seeds Direct computer which the defendants ought to pay."

74. It was, therefore, an assessment of damages not an account of the profits wrongfully made by the defendants through their misuse of the confidential information. The claimant could have claimed the latter relief but chose not to do so. This is important because there is a distinction between the two remedies and the focus here should have been on the damage suffered by the claimant as at May 1993, not on the profits made thereafter. The correct measure of damages in a case like this is the market value of the confidential information on a sale between a willing seller and a willing buyer: see ***Seager v Copydex (No. 2)*** [1969] 1 W.L.R. 809, 813 per Lord Denning M.R.

75. I regret to say that in my judgment the Master failed to heed this distinction and so he misdirected himself. He held in paragraph 4 of his judgment, with emphasis added by me: *"Essentially, as I assess it, I must on this inquiry direct myself as to the extent of the use of the confidential information (the index and the computer) and the consequence of the interference with the physical property in the index and against that assess any loss and damage suffered by Mrs Gorne."*

This was wrong. The inquiry was not into the extent of the use of the information but as to what price that information would have realised if offered for sale in May 1993.

76. The second observation about the judgment is that, in the light of the way the Master directed himself, it is no surprise that he accepted the claimant's case which was presented to him on a similarly flawed basis as he recorded in paragraph 15 of his judgment, again with the emphasis added by me: *"In summary Mrs Gorne's principal case is that she is entitled to £280715.00, being a third share of the value of the index including her share of the profits of TGS generated by use of it; this is based in part on the submitted analogous proposition of law that where a fiduciary obtains a benefit in breach of duty he is liable to account, even if the beneficiary could not himself have benefited."*

77. Paragraph 19 of his judgment demonstrates this confusion again. He said: *"As I have already indicated on this enquiry I need to consider in particular the extent and value of the defendants' use of the index, and what damages, if any, are payable by reason of the fact that Mrs Gorne was deprived of the use of the index and, on her case, of an opportunity to realise its value by sale to the third party,"* once more with my emphasis added.

78. I would allow the appeal for the simple reason that the Master did not properly identify the measure of damage he had to assess.

79. Without that focus, he was ill-equipped to judge which expert provided the best evidence for him. Mr Land for the claimant took the view that, as he said in paragraph 3.07 of his report: "Essentially, the index represents the good will of the business." His approach was, therefore, to value *the business*, extract the value of the assets, establish the goodwill and then assess what value the confidential information had as a part of that goodwill. He acknowledged in paragraph 3.33 that the court would need to consider what I would think is a huge imponderable: *"What proportion of the goodwill is vested in the personalities involved i.e. the index on its own will not generate income; it requires the 'right' people to turn confidential information into profitable contract; a further discount might be appropriate."*

80. Mr Land then proceeded to set out his preferred methodology for valuing the goodwill based not simply on the goodwill of Seeds Direct but the goodwill of TGS.

81. By contrast Mr Taub, for the defendants, did attempt to do that which he was, in my judgment, correctly instructed to do, namely to ascertain *"the price that a willing buyer might pay a willing seller for the Seeds Direct card index (as constituted at 17th May 1993) in an arms-length transaction in May 1993 …"*. The Master described his approach as follows in paragraph 58 of his judgment:

> *"He described principles, as generally applied, at arriving at valuation of business assets. In particular he says that the valuation of a business asset may be expressed as maintainable positive cash flows that the asset would be expected to generate expressed times a multiple. …*
>
> *59. In paragraph 4 Mr Taub deals with his estimates of the value of the index. … [he] says it is necessary to forecast the cash flow which the index would be expected to generate."*

82. I am bound to say that from that simplified summary of their approaches, the defendants were attempting to grapple with the problem correctly by trying to value *the asset*, not *the business*. Why then did the Master not accept Mr Taub's approach? Sadly I do not know the answer to that question. The Master sets out a great deal of evidence but his conclusion is sparsely expressed. He says:

> *"72. In my view, having considered both the reports, the valuation method suggested by Mr Land and the multiples broadly indicated by the PCPI (BDO Stoy Hayward) but with a discount is a correct approach towards valuation of the index. On balance I prefer that to the approach suggested by Mr Taub. I also felt that Mr Land on balance had more hands-on experience of valuation of small businesses."*

No adequate reasons are given for that conclusion. Since Mr Taub was at least asking himself the right question, it behoved the Master to have explained why the defendants' case was unsound. To be dissatisfied with certain aspects of Mr Taub's evidence is one thing: to reject his approach to valuation when it was the correct approach is another. The defendants are entitled to say they do not understand why they have lost.

83. I am sorry to say that I also find the judgment deficient because no real attempt was made to analyse what realistic prospect there was that the card index had value in the open market at the time of the dissolution of the Seeds Direct partnership. The first and obvious problem is that there was no market. One obvious purchaser would be TGS. As to their interest the Master found in paragraph 74:

"I find that possession of the index as an available library was of particular value to the new TGS, it traded immediately and successfully and it wanted customers and use was made of the index. … I also find that the defendants knew, because of their various past employments and connections, the identity of the agents with whom they did business at TGS and a number of farmers. I am also prepared to accept that there was some concentration by TGS on agents in the first two years of its business and that an approach on this inquiry merely based on overlap of names of customers of Seeds Direct with those of TGS is over-simplistic subject to what I say below."

84. The index undeniably had a value to TGS and the imponderable is what price they would have been prepared to pay for it. They would assess the value to them by comparing the extent of the information they possessed in their own minds of customers with whom they had been dealing with over the years and which they were free to exploit and the likely further business to be obtained from those customers whose details they could not recall but which was to be found on the index. They would also assess the risk of competition if the card index came into the hands of someone able to trade in competition with them. Mrs Gorne was not in a position to compete, with or without help from Mr Stollery. TGS was in a position to go into the market, and did go into the market, to capture that year's trading. They knew enough of the customers; they had acquired the vehicles to perform their contracts and they knew that, farmers being conservative by nature, if they secured the business at the end of the 1993 harvest they had a good chance of keeping those customers. The Master found:

"Mr Taylor's evidence rang true when he was speaking about the conservative approach of farmers and their desire to have their seed cleaning done by people they knew."

85. There seems to be no evidence to which I can recall our attention being drawn of anyone else actually in the market, actually ready, willing and able to seek the business and more importantly to perform the business. The Master rejected the evidence of a Mr Serruys of his interest in the index saying that *"to describe his approach as an offer is to exaggerate."* Those facts would give TGS considerable bargaining power. Even if there were competitors in this specialised field, they had to assess their chances of winning contracts from farmers who were accustomed to dealing with Messrs Taylor, Gill and Scales. The Master said: *"In my view the value of the index was substantially greater value to TGS than it would be likely to be to another party who had not had previous contact with the farmers or agents on the cards."*

86. There was moreover but a narrow window of opportunity for use of the index. It was of greatest value to secure work after the 1993 harvest. After the 1993 harvest, customers would have been likely to have made alternative arrangements. In judging what a proper market price was, some regard has to be had to the ability of TGS to drive a hard bargain.

87. Even if I am wrong in that view, I agree with Moore-Bick L.J. that Mr Land's methodology was flawed by his taking account of the TGS business in order to arrive at a valuation of the Seeds Direct business. Seeds Direct had virtually collapsed as at May 1993 and it seems to me therefore quite arbitrary to have regard to previous years of trading of Seeds Direct and future years trading of TGS. They were not the same business. A potential purchaser would not have enjoyed the advantage of knowing the future profitability of TGS: the potential purchaser would have looked at the debacle of the collapsed Seeds Direct and attempted to do what essentially Mr Taub was doing, project the stream of income the confidential information could produce. The goodwill of Seeds Direct at that time was practically nil and it would have been a wholly inadequate guide to the value of the confidential information.

88. I respectfully disagree with Arden L.J.'s view that the subsequent events are capable of assisting in this case in establishing the value that could be placed upon this index at the time of the dissolution of the partnership. The claimant was not seeking an account of the profits made from the misuse of her confidential information. The future profits of TGS would not have been known to a prospective purchaser who had to judge the matter at the time and on the basis of the information available at the time. My Lady refers to ***Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Company*** [1903] A.C. 426. That was a wholly different kind of case. The waterworks company had to make compensation to the coal mining company for not working the mine after a relevant date. Reading only from the head note: *"… the inquiry was not what was the value of the coal at the date of the counter notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it."*

Our case is about the value of the index/coal at the date of the dissolution of partnership/counter notice. Our case is not the equivalent to what TGS/the mine owners would have earned if they had been free to use the index/go on mining. That being the nature of that inquiry, I can of course readily understand why the court should have regard to the price of coal after the date of the relevant counter notice and why it should not be confined to the price of coal before the counter notice took effect. In ***Phillips v Brewin Dolphin Bell Lawrie*** [2001] 1 W.L.R. 143 there were complicated arrangements for the payment of the price of the business. The cunning scheme was to provide that the seller sublet computer equipment at a rent payable over four years equal to the balance of the purchase price. The computer equipment, which had been leased, was repossessed and the "purchaser" of the business claimed it was then discharged from further performance of the sublease. On the insolvency of the

vendor a question arose as to whether the share sale agreement was a transaction at an undervalue. The court held that in assessing the value in money or money's worth of the sublease agreement the court was entitled to give precedence to reality over speculation. I can, of course, readily understand why on the facts of that case but I do draw comfort from the fact that Lord Scott did remark in paragraph 26 of his speech, with the emphasis added by me: *"Where events, or some of them, on which the uncertainties depend have actually happened, it seems me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises."*

89. The unknown in this appeal is how much someone would have paid for this card index. How TGS traded does not illuminate that which was then unknown so as to permit its accounts to be used to give proper assistance to the value of an asset of the former partnership.

90. I have reached the clear conclusion that the Master was wrong. I reach that conclusion with regret. My regret is that this case has already cost a very great deal of money and the thought of more money being wasted in legal costs to achieve what I suspect will be a small reward for the claimant at the end of the day fills me with gloom and dismay. I agree with Moore-Bick L.J. that the appeal must be allowed and the matter remitted for a fresh inquiry into damages before a judge of the Chancery Division. Before that takes place I urge these parties to engage in mediation before another fortune is spent on the lawyers and experts. If the hearing does go ahead, I hope and expect that the assigned judge will hold an early case management conference at which consideration will first be given to the correct measure of damage so as to define the task for the experts. Having determined that, it may be, though it will be a matter for the judge to decide, that consideration should be given to what kind of expert or experts would best assist in the resolution of that problem. Perhaps an agricultural expert with knowledge of the market and the way farmers operate could act jointly and in collaboration with an accountant. Perhaps the court should appoint that expert or those experts. But I repeat, if the parties have any sense at all they will now settle their differences.

Mr Charles Scott (instructed by Baker Gotelee) for the appellants
Mr Simon Davenport (instructed by Rogers & Norton) for the respondent