

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**INTELLECTUAL PROPERTY ENTERPRISE COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 29/07/2014

**Before :**

**HIS HONOUR JUDGE HACON**

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**Between :**

**COLIN LINDRIDGE HARMAN**

**Claimant**

**- and -**

**HENRY JOHN BURGE**

**Defendant**

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**Jonathan Pennington Legh** (instructed by **Mayo Wynne Baxter**) for the **Claimant**  
**Marc Wilkinson** (instructed by **Tedstone, George & Tedstone**) for the **Defendant**

Hearing dates: 10-11 June 2014  
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**Judgment**

**Judge Hacon :**

**Introduction**

1. This is an inquiry as to damages following the Order by consent of HH Judge Birss QC dated 12 June 2012 in which judgment was given for the Claimant (“Mr Harman”) in respect of allegations of passing off and unlawful interference.

**History of the dispute**

2. The Defendant (“Mr Burge”) owns a holding of around 80 acres at Oare, near Lynton, Devon, known as ‘Cloud Farm’. It is in the Exmoor national park, a part of the country well known as a destination for holiday-makers, particularly those who enjoy camping, riding and trekking. In the years up to 2003 Mr Burge and his wife ran a holiday business from Cloud Farm known as ‘Doone Valley Holidays’ (“DVH”).
3. In July 2003 the DVH business was sold to Mr Harman and his wife along with a lease to Cloud Farm for a period of 7 years, expiring on 17 July 2010. One of the assets purchased was a website with the domain name

www.doonevalleyholidays.co.uk (“the Website”). Though given no attention at the time, Mr Burge remained registrant of the Website.

4. In their 7 years at Cloud Farm Mr Harman and his wife made considerable financial investment in the business which successfully developed. Part of the investment was devoted to the expansion and improved sophistication of the Website. This played an important role in the growth of the business. The work on the Website was done by David Cartwright who, although he was a university lecturer by profession, had experience of website design and had spent time as a holiday-maker at Cloud Farm.
5. As the date of expiry of the lease for Cloud Farm approached, Mr Harman took steps to inform his customers that the business would be leaving Cloud Farm. On 30 May 2010 a notice to that effect was put on the Website. Although the notice did not say so, Mr Harman and his wife had arranged to move the DVH business to Hallslake Farm in Brendon, about 7 miles away.
6. On 25 June 2010 Mr Harman began to receive phone calls from people who had tried and failed to access the Website. It emerged that Mr Burge had taken control of it so that none of the former content of the Website could be accessed. All that could be seen was a page headed

“Doone Valley Holidays. Announcement. Doone Valley Holidays at Cloud Farm Look forward to seeing you in 2010”.

The heading thus implied that the DVH business would continue at Cloud Farm. The announcement went on to say that Mr Harman and his wife would be moving to new premises which “will only have limited facilities and availability for this season from mid July 2010” and gave some details about their new holiday business and a contact number.

7. Mr Harman called in Mr Cartwright to help regain control of the Website. Mr Cartwright discovered that Mr Burge was still registrant of the Website and, without Mr Harman being aware of it, Mr Burge had had the authority to control the Website all along.
8. A Claim Form was issued on 7 July 2010 and on 8 July 2010 HH Judge Fysh QC heard an application by Mr Harman for an interim injunction. Mr Burge gave undertakings to arrange the transfer the Website to Mr Harman’s control, not to use the DVH name and not to pass himself off as the owner of or as being associated with the DVH business. On 9 July 2010 control of the Website was transferred to Mr Harman by Nominet.
9. On 17 July 2010 Mr Harman and his wife left Cloud Farm and resumed the DVH business at Hallslake Farm from 18 July 2010.
10. On about 28 October 2010 the Particulars of Claim were served. By a Defence dated 12 December 2010 Mr Burge admitted passing off and unlawful interference of trade by reason of his takeover of the Website.

11. A little under a year after having moved to Hallslake Farm, on 17 June 2011 Mr Harman and his wife moved the business again, this time to Caffyns Farm, Lynton, on the Exmoor coast, about 3 miles from Hallslake Farm.
12. In January 2013 Mr Harman changed the name of the business to ‘Exmoor Coast Holidays’. The Website remains operative but only to the extent that it displays a short message redirecting visitors to the Exmoor Coast Holidays website.

### **Judgment on admissions**

13. By an Order dated 12 June 2012 Judge Birss gave judgment for the Claimant on admissions in relation to the principal allegations of passing off and interference with trade. He ordered this inquiry. There remained outstanding allegations of passing off, infringement of copyright and breach of an undertaking which had not been admitted by Mr Burge. At the start of this trial these were sensibly abandoned by Mr Harman.

### **Damages claimed by Mr Harman**

14. The damages claimed fall into three categories:
  - (1) Loss of profit, as a consequence of lost turnover caused by the disruption to the Website.
  - (2) The wasted cost of cancelled listings and subscriptions. These were promotions for the DVH business on other websites. The links to the Website had been rerouted to Mr Burge’s ‘Announcement’ page, so the listings and advertisements had to be cancelled, even though Mr Harman had paid for them.
  - (3) Mitigation costs. These were incurred by way of the cost of new links to directories and listing sites, the cost of a Google adwords campaign (sponsored advertising on Google) to recover the profile of the website and fees paid to Mr Cartwright to carry out this work.

### **The law**

15. In *SDL Hair Limited v Next Row Limited* [2014] EWHC 2084 (IPEC) I said this:

“[31] I derive the following principles from authorities in relation to an inquiry as to damages:

  - (1) A successful claimant is entitled, by way of compensation, to that sum of money which will put him in the same position he would have been in if he had not sustained the wrong, see *Livingstone v Rawyards Coal Co.* (1880) 5 App.Cas., 25 per Lord Blackburn at 39.
  - (2) The claimant has the burden of proving the loss, see *General Tire and Rubber Company v Firestone Tyre and Rubber Company Limited* [1976] RPC 197, at 212.

- (3) The defendant being a wrongdoer, damages should be liberally assessed but the object is to compensate the claimant, not punish the defendant, see *General Tire* at p.212.
  - (4) The claimant is entitled to recover loss that was (i) foreseeable, (ii) caused by the wrong and (iii) not excluded from recovery by public or social policy, see *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, at 452.
  - (5) In relation to causation, it is not enough for the claimant to show that the loss would not have occurred *but for* the tort. The tort must be, as a matter of common sense, a cause of the loss. It is not necessary for the tort to be the sole or dominant cause of the loss, see *Gerber* at p.452.
  - (6) An inquiry will generally require the court to make an assessment of what would have happened had the tort not been committed and to compare that with what actually happened. It may also require the court to make a comparison between, on the one hand, future events that would have been expected to occur had the tort not been committed and, on the other hand, events that are expected to occur, the tort having been committed. Not much in the way of accuracy is to be expected bearing in mind all the uncertainties of quantification. See *Gerber* at first instance [1995] RPC 383, per Jacob J, at 395-396.
  - (7) Where the claimant has to prove a causal link between an act done by the defendant and the loss sustained by the claimant, the court must determine such causation on the balance of probabilities. If on balance the act caused the loss, the claimant is entitled to be compensated in full for the loss. It is irrelevant whether the court thinks that the balance only just tips in favour of the claimant or that the causation claimed is overwhelmingly likely, see *Allied Maples Group v Simmons & Simmons* [1995] WLR 1602, at 1609-1610.
  - (8) Where quantification of the claimant's loss depends on future uncertain events, such questions are decided not on the balance of probability but on the court's assessment, often expressed in percentage terms, of the loss eventuating. This may depend in part on the hypothetical acts of a third party, see *Allied Maples* at 1610.
  - (9) Where the claim for past loss depends on the hypothetical act of a third party, i.e. the claimant's case is that if the tort had not been committed the third party would have acted to the benefit of the claimant (or would have prevented a loss) in some way, the claimant need only show that he had a substantial chance, rather than a speculative one, of enjoying the benefit conferred by the third party. Once past this hurdle, the likelihood that the benefit or opportunity would have occurred is relevant only to the quantification of damages. See *Allied Maples* at 1611-1614."
16. The type of loss considered in *Allied Maples* and referred to in subparagraphs (8) and (9) above does not arise in the present case, see also *Parabola Investments Ltd v*

*Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477; *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 and *Wellesley Partners LLP v Withers LLP* [2014] EWHC 556 (Ch). In relation to the claim for lost profits, this is the type of case in which it is necessary to consider a counterfactual history of events in which the Website was not disrupted by Mr Burge, assessing the net profits that the DVH business would have made, and then subtracting from that the net profits that were actually made in the same relevant period. The result is the damage sustained by way of loss of profits.

### **The witnesses**

17. Mr Harman's expert witness was Thayne Forbes who is a chartered accountant and is director and co-founder of Intangible Business Limited which provides services in brand valuation and corporate strategy. I found Mr Forbes to be a witness doing his best to assist the court. His evidence was a mixture of careful detail and quite significant assumptions, but Mr Forbes freely acknowledged where he had made those assumptions.
18. David Black, also a chartered accountant, acted as expert for Mr Burge. He made some concessions during cross-examination about the calculations he had done, which suggested that he did not always focus on detail. Despite that, like Mr Forbes I am sure that Mr Black was trying to assist the court.
19. Mr Harman gave his evidence in a straightforward manner.
20. Mr Cartwright I have already mentioned. He is a retired university lecturer who did a lot of work on the Website up to June 2010 and also assisted Mr Harman after the Website had been taken over by Mr Burge, both in finding out what had happened and in restoring it after control was handed back to Mr Harman. Mr Cartwright was not in good health which meant that he sometimes appeared hesitant. Occasionally I had the impression that he felt he had a duty not to let down Mr Harman.
21. Mr Burge gave evidence on his own behalf and he was enthusiastic in maintaining his view of the case in every aspect.

### **Mr Harman's case on damage as calculated by Mr Forbes**

22. Mr Harman said that about 80% of the DVH business came through the Website. This was not disputed. Nor was the fact that for a period of about 2 weeks in high season potential holiday-makers had been unable to contact the business. However, this was a relatively minor cause of damage according to Mr Harman.
23. The main source of damage he relied on was the loss of business caused by the fall in the ranking of the Website on search engines and the loss of links to other websites. Up to June 2010 the visibility of the Website on the net had been optimised by building up its ranking with search engines, particularly Google. This is done largely by embedding key words in the text of the Website and in the metatags associated with the site. A search engine will recognise such words when they are entered by a potential holiday-maker, so their presence enhances the ranking of the Website. It was claimed that prior to the takeover of the Website in June 2010 a Google search for words such as 'Exmoor camping', 'Exmoor riding', or 'Exmoor walking' brought up the link to the Website on the first or second page of the search result. It was said

that searching for 'Doone valley' together with 'camping' would present the DVH business near the top of the first page.

24. Mr Harman argued that after the Website was restored to his control on 9 July 2010 its rankings had drastically declined. Google and the other search engines consigned the Website to a wilderness at the bottom of the pages of results.
25. By way of separate harm, Mr Harman relied on the loss of links with directories, listing agencies and advertisers. Mr Cartwright's evidence was that by June 2010 the Website had about 100 such links. The obvious advantage was that even if a potential holiday-maker searching the net did not find the Website directly, he or she might do so via a link in a more prominent website. ukcampsite.co.uk was mentioned by way of example. Mr Harman complained that after the disruption of the Website by Mr Burge these links were broken.
26. Mr Harman's case was that taken together, (a) the importance of the Website in bringing customers to the DVH business and (b) the long term effect on the rankings of the Website and its loss of link caused by Mr Burge's disruption to the Website, led to a loss in turnover in the business and thus a loss of profit. This loss of profit was said to extend over a three year period up to the summer of 2013.
27. The damage initially alleged by Mr Harman was modest compared to what it is now. In his first Schedule of Loss dated 28 October 2010 he estimated that the move to Hallslake Farm would have reduced the turnover of the business by 50%. He claimed that he had lost profit of about £20,000 in the 2010 season because of the Website disruption and expected to suffer further, though unstated, damage in the 2011 season. Mr Pennington Legh, who appeared for Mr Harman, submitted that in October 2010 it was difficult for Mr Harman to estimate the loss and he had not had the benefit of expert advice. The Schedule of Loss is signed by his solicitor, so he must have had legal advice. The advice he was apparently missing was that of Mr Forbes.
28. The considerably revised Updated Schedule of Loss dated 17 January 2013 claimed a total loss of profits of £174,309. Mr Forbes gave expert evidence to support the claim, but he recalculated the loss of profit to be £98,442 before interest. He made some assumptions which included the following:
  - (1) No lost sales were taken into account before the move to Hallslake Farm.
  - (2) Mr Forbes ignored accommodation and tea room income because these were not offered at Hallslake Farm. The loss of profits was calculated only in respect of the businesses in camping and trekking.
  - (3) He calculated losses in the financial reporting period of the DVH business, ending on 31 August. The first was therefore the period ending 31 August 2010.
  - (4) He assumed that the move from Cloud Farm to Hallslake Farm would have caused a loss of business in any event. He assumed that had there been no Website disruption the turnover in camping and trekking, after the move, would have been 60% of that achieved "for the prior period." I take that to be the equivalent period in the previous year.

- (5) Likewise Mr Forbes made an assumption that the move from Hallslake Farm to Caffyns Farm on 17 June 2011 would have caused a further reduction in turnover. He assumed that the turnover for camping and trekking after the move would have been 70% of that achieved in the prior period.
  - (6) The financial periods ending in 31 August did not coincide with the moves of the business to Hallslake Farm on 18 July 2010 and to Caffyns Farm on 17 June 2011. So Mr Forbes made adjustments in relation to the weeks after those dates to the end of the accounting year, such that the 40% and 30% successive reductions in hypothetical turnover applied from the respective dates of the two moves. This was necessary because then Mr Forbes could give hypothetical figures for turnover in each of the relevant financial years, ending on 31 August, which could be compared with the actual figures for turnover in the relevant financial years.
  - (7) In this calculation of hypothetical turnover of the DVH business (absent any disruption to the Website) Mr Forbes assumed a staged recovery from the effect of the successive moves to Hallslake Farm and Caffyns Farm after June 2011, such that by late July 2013 turnover would have been back to level of the equivalent period in 2009.
  - (8) All the foregoing was done separately in relation to the hypothetical turnover in the DVH business in (i) camping and (ii) trekking. Mr Forbes then subtracted the actual figures for turnover in each of those two parts of the business in the relevant successive financial years to give the losses of turnover for each financial year caused by the disruption to the Website.
  - (9) Mr Forbes assumed that the gross profit margin for both parts of the business was 85% in all of the financial years he had to consider. That gave him the figures for lost profits.
  - (10) He assumed that the effect of the disruption to the website had continued until the year ending 31 August 2013, i.e. for a period of 3 years. He also assumed that the effect diminished with time. He therefore introduced a discount of 20% on the calculated lost profits for 2010/11, 40% for 2011/12 and 60% for 2012/13. There was no discount thereafter, i.e. from September 2013 onwards the actual and hypothetical profits from the DVH business were treated as having re-converged.
29. Applying these discounts to his figures for loss of profits in the three years ending 31 August 2010 to 2013, Mr Forbes calculated that the total loss of profit caused by the Website disruption was £98,442.
30. In a table presented by Mr Forbes which summarised his calculations and which I reproduce as Table (1) below, Mr Forbes added what he called 'additional costs'. I take these to be the further claims for (a) cancelled listings and subscriptions and (b) mitigation costs (see above) using figures given to Mr Forbes, although they seem not quite to coincide with the figures in Mr Harman's Updated Schedule of Losses dated 17 January 2013. He added these 'additional costs' to the losses for 2009/10 and 2010/11.

31. Mr Forbes then calculated the sum of the losses, applied interest and came to a total figure for Mr Harman's damages of £122,562, shown in Table (1) below.

**TABLE (1)**

<b>Summary of lost profits</b>					
<b>Year to 31 August</b>	<b><u>2009/2010</u></b>	<b><u>2010/2011</u></b>	<b><u>2011/2012</u></b>	<b><u>2012/2013</u></b>	<b><u>Total</u></b>
Camping - turnover after lease expiry but for Website and Other Issues	58,997	38,092	43,610	73,165	
Camping - actual turnover	39,398	4,556	7,860	36,831	
Camping - lost turnover	19,599	33,535	35,750	36,334	
Trekking - turnover after lease expiry but for Website and Other Issues	24,742	15,585	17,902	29,833	
Trekking - actual turnover	16,416	1,683	2,512	18,033	
Trekking - lost turnover	8,327	13,903	15,391	11,800	
Gross profit margin	85%	85%	85%	85%	
Lost profits	23,737	40,322	43,470	40,913	148,442
Discount for time elapsed after Website and Other Issues %	0%	20%	40%	60%	
Discount for time elapsed after Website and Other Issues £	0	(8,064)	(17,388)	(24,548)	(50,000)
Discounted lost profits	23,737	32,258	26,082	16,365	98,442
Additional costs	11,343	950			12,293
Losses before interest	35,080	33,208	26,082	16,365	110,735
Interest	6,300	4,874	2,593	180	13,948
Corresponding discount to interest as for lost profits	0	(975)	(1,037)	(108)	(2,120)
<b>Total</b>					<b>122,562</b>

***Ex turpi causa***

32. On 22 May 2014 an application notice was issued on behalf of Mr Burge seeking permission to amend the Defence. At a very late stage he wished to rely on an argument that Mr Harman was not entitled to any damages for loss of profits in relation to the DVH business carried out at either Hallslake Farm or Caffyns Farm on grounds of public policy, relying on the principle of *ex turpi causa non oritur actio*. In brief summary, Mr Wilkinson, who appeared for Mr Burge, argued that the business had been conducted unlawfully at those two sites in breach of s.269 of the Public Health Act 1936 and s.1 of the Caravan Sites and Control of Development Act 1960. I heard the application at the start of the trial and refused permission to amend the Defence.

**Discussion of loss of profits**

33. The Defence formally admitted that Mr Harman had suffered some damage due to the disruption of the Website. In his oral submissions Mr Wilkinson argued that Mr Burge's primary case was that Mr Harman was entitled to no damages at all. Even taking alone what is pleaded in the Defence, I do not accept that. I must consider Mr Forbes's calculations and either accept them or, in effect, revise Table (1) above, but not down to zero.
34. The following objections were raised by Mr Wilkinson to the way in which Mr Forbes had calculated Mr Harman's loss:



- (1) The calculations are based wholly on surmise. There was no evidence that the alleged cause of the loss, the reduction in the Website's Google profile and the removal of links, had any effect at all. There were alternative explanations for the reduction in profits since the DVH business moved to Hallslake Farm and then Caffyns Farm, which had been disregarded.
- (2) The figures adopted by Mr Forbes to take into account the inevitable reduction in turnover caused by the business moving first to Hallslake Farm and then to Caffyns Farm. The assumed successive reductions to 60% and then 70% of the preceding year's turnover were based on a false analogy with other businesses owned by Mr Harman.
- (3) Both Hallslake Farm and Caffyns Farm were less attractive sites than Cloud Farm. This by itself would give rise to a significant reduction in turnover.
- (4) Other factors would also have caused a reduction in turnover when the business moved to Hallslake Farm, also ignored by Mr Forbes. These were:
  - (a) the move in July 2010 was at the peak of the holiday season;
  - (b) there was an unreliable phone system at Hallslake Farm;
  - (c) online and print directory listings continued to show that DVH was at Cloud Farm for some time after it had moved; this was through no fault of Mr Burge's;
  - (d) records of the meteorological office showed that the weather in the summer of 2010 was dull, cold and wet;
  - (e) the UK was experiencing a recession;
  - (f) there had been a disinclination on Mr Harman's part to pay for much marketing and advertising in the period leading up to the move from Cloud Farm.
- (5) Further factors were ignored by Mr Forbes which would have led to a reduction in turnover when the business moved to Caffyns Farm in June 2011 were:
  - (a) the relocation was in mid-season;
  - (b) weather conditions in the summer of 2011 were cool, dull and wet; the summer of 2012 was particularly bad;
  - (c) there was an error on Google maps which continued to DVH as being located at Cloud Farm until March 2012;
  - (d) there was a recession;
  - (e) the name of the business was changed in January 2013 to 'Exmoor Coast Holidays', which would have affected re-bookings.

- (6) The gross profit margin of 85% adopted by Mr Forbes was overstated.
  - (7) The discounts for the reduction in the effect of the disruption to the Website over time were arbitrary and irrational.
35. I think there is really a single issue at the centre of these objections to Mr Forbes's approach. There was no attempt made by Mr Harman to produce evidence that the disruption to the Website had any long term effect. It was common ground that Mr Burge's control of the Website for two weeks must have caused some short-term harm. But the claim to harm stretching over three years depends on the acceptance of two related matters: first, that the diminishment in search engine profile and/or the effect of broken links stretched on for three years, albeit recovering by stages; secondly that this had had an effect on the DVH business to the extent estimated by Mr Forbes.
  36. It is always difficult to provide comprehensive evidence in circumstances such as these and I would not expect Mr Harman to have done that. But it seems to me that records of Google searches could have been provided to show how the ranking and profile of the DVH business altered over time during the relevant period. Historical analyses of websites are possible and if it were the case that this was impractical for some reason, I would have expected evidence from a witness familiar with Google, or the internet more generally, to explain why. Better still, such a witness might have been able to show what did happen to the Website profile and its links in the relevant years and might have been able to explain why it took three years to repair the damage, if it did.
  37. It was submitted by Mr Pennington Legh that the statistics for the Website before its 'hi-jack' (Mr Harman's expression) had been lost when Mr Burge moved the Website from one server to another. Assuming that is right, it is not an answer to the lack of direct evidence about the website's profile after control was restored to Mr Harman.
  38. In fact, the main piece of evidence on which Mr Pennington Legh relied came from Mr Forbes. It was in Mr Forbes's second report, in which he responded to doubts expressed by Mr Black that the effect of the disruption to the website lasted until the summer of 2013. This was not a matter about which either expert had the relevant expertise to give evidence, but Mr Forbes apparently felt he had to respond. He referred to Mr Cartwright's evidence that it took seven years to build the online presence of the DVH business and added that in his view this sort of time frame was normal. I do not think this adds anything. Mr Cartwright was talking about the time it had taken him to build up the Website, which is not the same thing as the time it would take to restore the rankings of the Website, assuming maximum urgency and effort deployed. Mr Cartwright said nothing directly about that.
  39. Mr Cartwright was the only witness with any familiarity with the workings of the internet although he did not, on his own confession, have the knowledge and expertise of a professional. He said that he was able to restore the Website fairly quickly after control of it was handed back to Mr Harman but because the Website had been dormant for two weeks, its rankings had dropped dramatically.
  40. In cross-examination Mr Cartwright explained that Mr Burge had moved the index page of the Website from one server to another, causing a 're-crawl' by search

engines. Mr Burge's announcement page had no metatags. Mr Cartwright said that this had the effect of putting the Website into what he called a 'Google sandbox', i.e. the Website was identified as having no relationship with any particular subject-matter. He said this was the main cause of damage to the value of the Website as a source of business. The loss of links to other sites had a relatively limited effect.

41. Mr Cartwright also said in cross-examination that the Google adwords campaign, which he arranged to restore the Website to something like its former place in the Google rankings, was not continued after October 2010 because it was "a very expensive thing to do". I find that surprising. In his Updated Schedule of Loss Mr Harman claims a precise cost of the campaign: £2,444.60. It was apparently conducted only up to 23 September 2010. £2,444.60 may even overstate what he paid, but that sum is still small beer compared to the loss which is now identified as having been caused by poor rankings. I find it hard to believe that the adwords campaign was halted at the end of September 2010 because of its cost. I infer, and find, that by that date Mr Harman felt there was no further need of an adwords campaign.
42. Mr Cartwright's work on the Website did not stop at this point. It seems he carried out some work between September 2010 and September 2012. I will return to this in the context of the claim by Mr Harman to recoup the fees due to Mr Cartwright.
43. Mr Cartwright also said that in March 2013 he started the long process of search engine optimisation for the Exmoor Coast Holidays website and that this would have been quicker and more effective if Mr Burge had not intervened in the operation of the Website. Mr Cartwright did not state whether this caused any significant loss to Mr Harman.
44. None of this evidence provided any direct picture of the effect of the Website disruption on its search engine rankings and on its links. In cross-examination Mr Cartwright said that he had created print-outs of searches on the web for the DVH business shortly after Mr Burge's intervention and handed them to Mr Harman's solicitor. That at least would have shown the effect of Mr Burge's acts in the immediate aftermath of them, but those print-outs did not make it into the evidence. I must assume that no attempt was made to show the rankings of the Website over the succeeding months and years.
45. It was also not clear whether the damage done by Mr Burge could have been rectified more quickly by the employment of a person with greater and more professional experience of maintaining websites than Mr Cartwright – not implying any criticism of Mr Cartwright. If Mr Forbes's figures for the damage suffered are to be taken at face value, it would have been money very well spent.
46. Thus, rather than approaching the evidence of damage caused to the Website in a relatively direct way, Mr Harman sought (via Mr Forbes) to assess loss of profit by inference. The logic is that the turnover of the business fell after 2008/9, so a large proportion of that fall must be ascribed to Mr Burge's intervention. Some part of it has to be discounted as being due to the business having moved twice, so the figures of 60% and 70% were adopted (see above). Likewise, it was accepted that the effect of the disruption must have declined over time, so successive discounts of 20%, 40% and 60% are introduced.

47. These last figures of 20-60% seem to me to be particularly arbitrary and they include the assumption that the damage lasted for three years. There was no evidence to support that assumption. I do not criticise Mr Forbes; he was given a task to perform with the information he had. He said these figures were conservative. But it is not really meaningful to characterise something close to a stab in the dark as being either liberal or conservative.
48. I therefore treat Mr Forbes's calculations with caution. The burden for proving loss rests on Mr Harman. I think there could have been evidence about the rankings and links of the Website which would have made Mr Forbes's task less speculative.
49. I turn to the detailed criticisms made by Mr Wilkinson of Mr Forbes's approach to calculating Mr Harman's losses.

*Percentage reduction in turnover caused by relocation*

50. The figures of 60% and 70% used by Mr Forbes apparently came from what he had been told by Mr Harman. Aside from DVH, Mr Harman is the proprietor of a garden centre business and a web-based flower wholesaling business. These had at some time each been relocated and the reductions in turnover caused by the relocation had been used by Mr Forbes. Mr Wilkinson submitted that a holiday business is not analogous to a garden centre or flower wholesaling business, being much more sensitive to location. I agree, but I am not sure that I can conclude much as a consequence.
51. Mr Wilkinson also advanced a number of reasons why the move to Hallslake Farm would have caused a reduction in turnover, independently of the Website disruption. I have set them out above.
52. I have not been able to form a view as to how much effect any these factors would have had on the turnover of the business in the relevant parts of 2009/10 and 2010/11. True, Mr Forbes did not take them into account, but on the other hand his figures of 40% reduction in turnover caused by the move to Hallslake Farm and 30% reduction caused by the move to Caffyn's Farm were on any view broad brush figures and so they could, in fact, encompass the effect of the details identified by Mr Wilkinson. And the impact of some of those details is impossible to assess. For instance, some time was spent in argument and cross-examination on the respective merits of Cloud Farm, Hallslake Farm and Caffyns Farm as destinations for the discerning holiday-maker. I was able to form no clear picture of those relative merits. I can draw no inferences as to whether campers would have found either Hallslake Farm or Caffyns Farm a less attractive location for a campsite when compared to Cloud Farm.
53. I think Mr Forbes was entitled to take a broad brush view, but I think the figures of 60% and 70% are too high. Mr Harman's own estimate, which he did not repudiate in cross-examination, was that he expected to retain only half the business after the move to Hallslake Farm. I find that is the correct figure for the hypothetical change in turnover of the DVH business – a reduction of 50% – caused by the move alone. The same figure of a 50% further reduction in turnover is to be ascribed to the move to Caffyn's Farm.

*Gross profit margin for the camping and trekking businesses*

54. Mr Forbes estimated the gross profit margin for both businesses to be 85%. Mr Black accepted this figure for the camping business but thought that the trekking business ran at a loss. Mr Harman's own earlier assessment was that both businesses made a profit of 70%. I will accept Mr Harman's figure for the gross profitability of the camping business: 70%. I think the trekking business was less profitable and find that the gross profit margin was 50%. In each case this was for the whole of the relevant period.
55. Mr Forbes did not deduct any costs from the gross profit margins to provide a figure for net profits. Mr Black raised the question of costs, but provided no detailed figures. I am forced to assume that whatever deductible costs there were are not sufficiently significant to take into account. I find that the net profits are the same as the gross profits.

*Discount for reduction in the effect of Mr Burge's intervention over time*

56. I do not accept that there was any sound basis for Mr Forbes to assume that the damage caused by Mr Burge's takeover of the Website lasted three years. In my view it is significant that there was no adwords campaign with Google beyond 23 September 2010 and I do not accept that was because of cost restraints. On the other hand I take the view that on balance damage from a reduced profile of the Website probably continued after September 2010.
57. I find that the appropriate discount on lost profits for the passage of time is 50% for the year 2010/11. I find that there were no lost profits after the financial year 2010/11.

*Conclusion on lost profits*

58. Since there were no significant challenges to Mr Forbes's calculations in his Table (1) other than those I have dealt with above, Table (1) can be revised, adopting the findings I have made.

**Losses from cancelled listing and advertising**

59. The estimate for the loss under this head is £1,500. There are no invoices to support this figure. Since the burden to prove the loss rests on Mr Harman, I do not award any damage under this head.

**Costs of mitigation**

60. Before turning to the four categories of loss claimed under this head, I must address an argument raised by Mr Wilkinson. Mr Cartwright confirmed that he has not yet been paid for the work he had to do investigating what had happened to the Website and conducting the adwords campaign. He said that he told Mr Harman that he could be paid when the litigation is over, by way of a generous gesture, but that when the litigation was done he would insist on payment.
61. Mr Wilkinson submitted that at the time of the trial no loss in that regard had crystallised and so it could not be claimed. I reject that. Where an expense incurred

by a claimant has not yet been paid but the claimant is under a liability in law to pay in due course, the relevant sum may be claimed by way of damages, see *Randall v Raper* (1858) EB & E 84, applied in *Total Liban SA v Vitol Energy SA* [2001] QB 643.

*Fees paid to Mr Cartwright for work done 25 June to 12 July 2010*

62. Mr Cartwright invoiced Mr Harman in the sum of £3,440 and I find that Mr Harman is entitled to claim that sum.

*Cost of new links to directories and listing sites and Mr Cartwright's time*

63. Mr Wilkinson submitted that a significant part of the sum claimed as the cost of creating new links was in respect of links created before 2010. That appears to be correct. I award £100 for this cost. There was no invoice for Mr Cartwright's time spent on this, so I make no award in respect of it.

*Cost of Google adwords campaign*

64. Mr Harman's credit card statements indicate that he spent £2,444.60 on Google services. Mr Wilkinson submitted that documents taken from the Google website showed that not all of this was spent on the DVH business. That may be right though Mr Wilkinson was not able to say with precision how much was spent on what. I will award Mr Harman £1,200 under this head.

*Fees paid to Mr Cartwright for work done 13 July to 30 September 2010*

65. Mr Cartwright invoiced Mr Harman in the sum of £1,450 and I award that sum to Mr Harman.

*Fees paid to Mr Cartwright for work done September 2010 to September 2012*

66. Very shortly before the trial a supplementary bundle of documents was served on behalf Mr Harman. The list included two invoices from Mr Cartwright to Mr Harman, dated 30 September 2011 and 30 September 2012, for work done in the period September 2010 to September 2012. A total of £3,300 is charged for the work done. Curiously, both identify the work done by Mr Cartwright as including "Management of Google adwords campaigns to re-establish website presence and ranking of DVH pages", yet Mr Cartwright said that the adword campaigns stopped in September 2010. This was not explored in cross-examination and I can take it no further. I am not convinced that Mr Cartwright did much of significance after September 2010 to improve the ranking of the Website, whether on Google or any other search engine. The invoices also both attribute to Mr Cartwright work done on re-establishing broken links. It is not clear to me why it would take until September 2012 to do this. However, absent any clear challenge to these invoices I will award the sum of £3,300 to Mr Harman.

**Conclusion**

67. I asked the parties, having seen this judgment in draft, to agree a revised table: Table (2). That has been done and it is as follows:

**TABLE (2)**

<b>Summary of lost profits and interest</b>					
<b>Year to 31 August</b>	<b><u>2009/2010</u></b>	<b><u>2010/2011</u></b>	<b><u>2011/2012</u></b>	<b><u>2012/2013</u></b>	<b><u>Total</u></b>
Camping - turnover after lease expiry but for Website and Other Issues	55,392	27,279	34,007	73,165	
Camping - actual turnover	39,398	4,556	7,860	36,831	
Camping - lost turnover	15,994	22,722	26,147	36,334	
Trekking - turnover after lease expiry but for Website and Other Issues	23,256	11,103	13,956	29,833	
Trekking - actual turnover	16,416	1,683	2,512	18,033	
Trekking - lost turnover	6,841	9,420	11,444	11,800	
Gross profit margin - camping	70%	70%	70%	70%	
Gross profit margin - trekking	50%	50%	50%	50%	
Lost profits	14,616	20,616	24,025	31,333	90,590
Discount for time elapsed after Website and Other Issues %	0%	50%	100%	100%	
Discount for time elapsed after Website and Other Issues £	0	(10,308)	(24,025)	(31,333)	(65,666)
Discounted lost profits	14,616	10,308	-	-	24,924
Costs of mitigation	8,540	950			9,490
Lost profits before interest	23,156	11,258	-	-	34,414
Interest - calculated on lost profits only	3,377	3,440	2,543	1,511	10,871
Corresponding discount to interest as for lost profits	0	(1,720)	(2,543)	(1,511)	(5,774)
Interest calculated on £100 and £1,200 costs of mitigation	190	-	-	-	190
<b>Total lost profits, costs of mitigation and interest to 18 July 2014</b>					<b>39,701</b>

68. Mr Burge must pay Mr Harman a total sum of £39,701 in damages and interest.