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EMPLOYEE INVESTIGATIONS – THE LIMITS TO ACCESSING EMPLOYEES' EMAILS AND PERSONAL DEVICES

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When investigating employees for misconduct, a company will often try to review its employees' emails and correspondence. More discerning employees, however, will not use their work devices if engaging in surreptitious activity. Instead, it is often the case that the incriminating evidence can only be found in the employees' personal devices, or in their personal email accounts which are not provided by the company.

What rights of access does a company have in relation to employees' personal devices or personal email accounts? This article seeks to explore the possible factors and permutations which affect the company's rights, with reference to recent decisions from the English courts.

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I. Introduction

1 What rights does a company have in relation to accessing and inspecting an employee's emails and devices for the purposes of the company's investigations and due inquiry[1] into possible employee misconduct?

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1 Section 14 of the Employment Act 1968 (2020 Rev Ed) provides that "[a]n employer may after due inquiry dismiss without notice an employee employed by the employer on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of the employee's service". See also *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 at [161]–[167].

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2 This article explores the possible answers to the above, with reference to the English decisions of *Fairstar Heavy Transport NV v Adkins*[2] ("*Fairstar v Adkins*"), *Phones 4U Ltd v EE Ltd*[3] ("*Phones 4U v EE*") and *Pipia v Bgeo Group Ltd*.[4]

II. Scope of the article

3 There are a myriad of considerations in determining the rights of a company to its employee's information, and the limits of such rights.

4 These include (a) the terms of the employment contract, (b) the scope of the employee's duties (including fiduciary duties, if any), (c) the contents of the implied duties of fidelity and mutual trust and confidence, (d) the proprietary nature of the information sought to be accessed (if any) and (e) data privacy considerations under the Personal Data Protection Act 2012[5] ("PDPA").

5 From the above, it is already clear that the contours and limits of the company's rights are necessarily context-dependent and fact specific.

6 This article does not seek to provide an in-depth analysis into considerations of employee monitoring under the PDPA.[6] For the purposes of this article, it is concerned only with the isolated instance of accessing the employee's data for the specific purpose of the company's investigations and due inquiry into possible misconduct, as opposed to general routine or day-to-day monitoring and surveillance of the employee's activities. To this end, it is assumed that the company has fulfilled the relevant

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2 [2013] EWCA Civ 886 (Court of Appeal); [2012] EWHC 2952 (TCC) (High Court).
3 [2021] EWCA Civ 116 (Court of Appeal); [2020] EWHC 1921 (Ch) (High Court).
4 [2021] EWHC 86 (Comm).
5 2020 Rev Ed. See, *eg*, *Advisory Guidelines on the Personal Data Protection Act for Selected Topics* (17 May 2022) at paras 6.1–6.32.
6 Which is itself deserving of a much fuller analysis. For a more detailed discussion, please refer to Alexander Yap Wei-Ming & Darrell Tan Chun Loong, "Employee Monitoring" *Thomson Reuters Practical Law* (25 September 2019).

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requirements under the PDPA, including notice obligations[7] and consent obligations[8].

III. Analysis of the relevant cases

A. Fairstar Heavy Transport NV v Adkins

7 The analysis begins with the case of *Fairstar v Adkins*.

(1) The facts

8 In that case, Fairstar was a Netherlands incorporated company that specialised in the sea transport of heavy and valuable cargo.[9]

9 Sometime in May 2011, Fairstar entered into an agreement with a shipyard to build a vessel. By May 2012, it was alleged that Fairstar had become liable to pay instalments totalling to around US$50 million to the shipyard.[10] Subsequently in July 2012, Fairstar was subject to a hostile takeover by the owners of a competitor. The immediate result was that the services of its chief executive officer, Adkins, was terminated forthwith.[11]

10 Fairstar, under the new owners, alleged that Adkins never revealed the alleged substantial instalment liability to the shipyard in the period leading up to the takeover.[12]

11 An interesting aspect of this matter is that Adkins was not directly employed by Fairstar, although he was its CEO. Adkins was employed by a company which he owned, known as Cadenza Management. Fairstar contracted with Cadenza for the services provided by Adkins.[13]

7 See s 20 of the Personal Data Protection Act 2012 (2020 Rev Ed).
8 See s 13 of the Personal Data Protection Act 2012 (2020 Rev Ed).
9 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [10].
10 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [15], [16].
11 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [12], [13].
12 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [19].
13 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [21].

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12 As a result of this arrangement, all incoming emails that were addressed to Adkins at his Fairstar email address were automatically forwarded to Adkins' *Cadenza* email address. Fairstar alleged that it had no copies of the emails.[14]

13 Fairstar applied to court to retrieve and read the emails of Adkins received in his Cadenza email address. The question that the court faced was whether Fairstar had a right to do so. In this regard, Fairstar argued that it had a proprietary right to the content of those emails.[15]

(2) Decision of the English High Court

14 The English High Court reviewed authorities from England and Australia and held that "the preponderance of authority points strongly against there being any proprietary right in the content of information".[16]

15 The English High Court was particularly concerned with the characterisation of information in an email as property, with all its attendant rights. In this regard, the court came up with five possible ways in which proprietary rights may play a part in the contents of the email:[17]

> (1) that title to the content remains throughout with the creator (or his principal);
>
> (2) that, when an e-mail is sent, title to the content passes to the recipient (or his principal) – this being by analogy with the transfer of property in a letter when one person sends it to another;
>
> (3) as for (1), but that the recipient of the e-mail has a licence to use the content for any legitimate purpose consistent with the circumstances in which it was sent;
>
> (4) as for (2), but that the sender of the e-mail has a licence to retain the content and to use it for any legitimate purpose; and

14 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [22], [23].
15 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [10], [11].
16 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [58].
17 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [61].

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> (5) that title to the content of the message, once sent, is shared between the sender and the recipient and, as a logical consequence of this, is shared not only between them but also with all others to whom subsequently the message may be forwarded.

16 The English High Court observed significant difficulties in each of the methods above. For example, if characterisation (1) was adopted, it would be very "strange" and "far reaching" if the creator of an email could require a recipient to delete the email.[18] As for characterisation (2), it would be "hopelessly confus(ing)" to determine the question of title in an email sent to various recipients, some of whom forwarded it to others.[19] To sum up, the High Court deemed the various characterisations to be unrealistic.[20]

17 The High Court concluded that "(t)here are no compelling practical reasons that support the existence of a proprietary right – indeed, practical considerations militate against it".[21] Accordingly, Fairstar's application to inspect Adkins' emails was dismissed.[22]

(3) Decision of the English Court of Appeal

18 The English Court of Appeal took a radically different approach to the issue and overturned the decision of the English High Court.

19 The Court of Appeal held that the analysis as to Fairstar's rights to the emails ought not have been grounded on whether the information was *proprietary* to Fairstar. Instead, the issue ought to have been analysed in the context of an agency relationship, *ie*, whether Adkins was an agent of Fairstar, and whether Fairstar (as principal) therefore had a right to inspect the emails relating to its business which Adkins conducted for Fairstar (as agent).[23]

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18 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [64].
19 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [66].
20 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [62]–[69].
21 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [69].
22 *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) at [70].
23 *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [46].

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20 The Court of Appeal held that has a general rule, "it is a legal incident of [the relationship between principal and agent] that a principal is entitled to require production by the agent of documents relating to the affairs of the principal".[24] The emails sought to be inspected fell within the category of such documents.[25] This is so even if the agency had been terminated.[26]

21 It is important to note that whilst the Court of Appeal took a different approach from the High Court, it refrained from expressing any views on the correctness of the High Court's conclusion that there can be no proprietary right in the emails.[27] Subsequent decisions have affirmed the High Court's view that there is generally no proprietary right in the emails.[28]

B. Phones 4U Ltd v EE Ltd

22 In this case, Phones 4U (P4U) had commenced action, through its administrators under English law, against various mobile network operators in the UK for anti-competitive behaviour.[29]

23 P4U applied to court for searches to be conducted in relation to, amongst other things, "communications between individuals [including employees] at the Defendants [that] may have been made on their personal electronic devices, and not necessarily using their work email or mobile devices".[30]

24 The English High Court noted that it was "well-known that where companies do engage in unlawful, collusive behaviour, the

24 *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [53].
25 *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [53].
26 *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [56].
27 *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [46]–[48].
28 See *Capita plc v Darch* [2017] EWHC 1248 (Ch) at [71] and [72], citing *Your Response Ltd v Data Team Business Media Ltd* [2014] EWCA Civ 281, and *Environment Agency v Churngold Recycling Ltd* [2014] EWCA Civ 909. A fuller analysis of whether proprietary rights can ever arise in emails and intangible information, and when, is beyond the scope of this article.
29 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [6].
30 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [46].

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individuals involved sometimes use their personal devices and may deliberately avoid using their work email or work devices".[31]

25 In relation to the rights of the defendants to inspect and access their employees' personal devices, the High Court made the following comments:[32]

> 52. The note at para 31.8.2 of the White Book states that the concept of 'right to possession' in the rule 'covers the situation where a party's documents are in the hands of a servant or agent.' *If and insofar as an employee of a company, however senior, sends or receives emails or SMS messages in relation to the business of the company, I think it is clear that they are doing so in the course of their employment. Accordingly, the employer (or in the case of an agent who is not an employee, the principal) has a right to require production by the employee of those 'documents', including after the termination of the employment or agency*: *Bowstead & Reynolds on Agency* (21st edn), para 6-093. Hence, in *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886, the Court of Appeal held that the appellant company was entitled to an order requiring its former CEO (the respondent), after termination of his appointment, to give it access to the content of emails relating to its business affairs which were stored on his personal computer. …
>
> …
>
> 54. *I emphasise that the principle here engaged does not depend upon there being any particular term in the contract of employment* (or in Mr Adkins' case, his contract of services) giving the employer or principal an express right of inspection or access to personal devices….
>
> [emphasis added]

26 In other words, while the English Court of Appeal in *Fairstar v Adkins* held that a principal has a general right to inspect an agent's emails in relation to the principal's business, *the High Court in* Phones 4U v EE *appears to have extended this right to employers, in relation to an employee's emails or messages on personal devices that had been sent or received in relation to the business of the employer company*.

31 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [49].
32 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [52]–[54], citing *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886.

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27 The High Court in *Phones 4U v EE* went on to hold that the defendant's employees should not be asked to provide their personal devices to the defendants for inspection by the defendants themselves. Instead, the employees should be asked to provide the devices to independent IT consultants engaged by the defendants, to conduct the relevant searches.[33] This direction appears to have been a safeguard motivated by, *inter alia*, the need to minimise interference with the employees' right to privacy under Art 8 of the European Convention on Human Rights.[34]

28 The defendants' appeal to the Court of Appeal was dismissed.[35] The Court of Appeal did not disturb the holdings of the High Court elaborated on above.

29 As an aside, the Court of Appeal noted that parties had proceeded on the common assumption that the employees' personal devices were not themselves in the control of the defendants. Notwithstanding, the Court of Appeal recognised that the question was a complex one. The court noted that there is a spectrum of circumstances which possibly affect the employers' extent of control over such devices. The situations may range from (a) a device owned by the employee but used mainly for work, to (b) a device "used almost exclusively for personal matters save for an isolated work email perhaps sent in error from the wrong device". The court also noted that many documents in the modern world may not be actually stored in the device at all, but in cloud storage.[36]

33 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [56], [57].

34 By contrast, there is no general right to privacy under Singapore law – see, *eg*, *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [44]–[49] (in relation to the Singapore Constitution.

35 The appeal was centred substantially on whether the English court had jurisdiction, under its discovery/disclosure procedures, to order the defendants to request third-party individuals to voluntarily produce their personal devices (which contain both personal and work emails) – see, *eg*, *Phones 4U Ltd v EE Ltd* [2021] EWCA Civ 116 at [19]–[30]. The underlying premise is that a company generally has no right to personal emails on personal devices.

36 *Phones 4U Ltd v EE Ltd* [2021] EWCA Civ 116 at [22].

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C. Pipia v Bgeo Group Ltd

30 In this case, the claimant (Pipia) claimed that he had been unlawfully deprived of a fertiliser plant worth hundreds of millions of dollars, through "a series of cunning transactions orchestrated by the Defendant ('BG UK')".[37]

31 The claimant applied to court for an order that the defendant produce relevant documents stored on the personal mobile phones of one Gilauri and one Namicheishvili.[38] Gilauri was at the material time the CEO of the defendant,[39] although at the time of the application, Gilauri had ceased to be employed by the defendant.[40] Namicheishvili was at the material time the group general counsel employed by a subsidiary of the defendant.[41]

32 The claimant argued, *inter alia*, that (a) the terms of Gilauri's service agreement as CEO of the defendant allowed the defendant to inspect everything on Gilauri's mobile phone, even personal messages, at any time and even after termination,[42] and (b) both Gilauri and Namicheishvili owed fiduciary duties to the defendant so as to justify the defendant having direct rights to access their devices.[43]

33 For argument (a), the exact clauses relied on were as follows:[44]

> 2.9 … [Mr Gilauri] hereby authorises [BG UK], and any agent instructed by [BG UK], *to access any program or data held on any computer used by [Mr Gilauri] in the course of performing his duties of employment (and regardless of whether the program or data is related to the executive duties of employment)*.
>
> 15.1 On termination or at any time on request [Mr Gilauri] will:

37 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [2].
38 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [23].
39 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [16].
40 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [17].
41 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [16].
42 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [29]–[32]
43 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [36]–[38]
44 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [68].

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> (a) immediately return to the Company in accordance with its instructions any or all property belonging to [BG UK] which is in [Mr Gilauri's] possession or control including but not limited to documents or other records containing Confidential Information …
>
> (b) permanently destroy …. all Confidential Information … in documents or other records ….which do not belong to [BG UK] or any Associated Company …
>
> (d) if requested disclose to [BG UK] all passwords created or controlled by him in respect of documents or records belonging to the Company.
>
> [emphasis added]

34 In relation to Gilauri's mobile phone and personal messages, the English High Court agreed that the terms of the service agreement provided the defendant with access to Gilauri's phone such that the phone can be considered to be within the control of the defendant.[45]

35 Conversely, in relation to Namicheishvili, the court noted that Namicheishvili had no direct contract with the defendant. The court further rejected the argument that Namicheishvili was a fiduciary of the defendant, and held that Namicheishvi's phone was not in the control of the defendant.[46]

IV. Summary of principles and practical implications

36 It is important to note that the above cases of *Fairstar v Adkins*, *Phones 4U v EE* and *Pipia v Bgeo* concern discovery/disclosure of documents under the English discovery regimes. This article assumes that, where discovery/disclosure has been ordered as against the employee in favour of the company in the above cases, it is necessarily implied that the company had rights[47] to obtain the relevant documents. The question is, when and how do such rights arise?

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45 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [67]–[87].
46 *Pipia v Bgeo Group Ltd* [2021] EWHC 86 at [88]–[90].
47 Or power to obtain the documents.

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37 The following principles may be distilled from the above cases.

38 First, the company is unlikely to have proprietary rights to the contents of the employee's emails even if they are work-related emails, per the High Court's holdings in *Fairstar v Adkins*.[48]

39 This does not mean that the company has no right whatsoever to the work-related emails. It merely means that such right, if at all, is not proprietary in nature. It may well be possible that the company retains rights in other forms, such as a contractual right to the return or destruction of the emails to the extent that such emails contain confidential information of the company.

40 Second, to the extent that the employee is an agent of the company, the company has a right to the employee's work-related emails, even if such emails are stored on the employee's personal devices, per the Court of Appeal's decision in *Fairstar v Adkins*.

41 Of course, not all employees can be considered agents.[49] An employment relationship can be established without any agency relationship, and *vice versa* (*ie*, an individual may provide services to the company as an agent of the company).

42 Third, notwithstanding the above, it is at least arguable that the company has a right to the employee's work-related emails even if the employee is not an agent, per *Phones 4U v EE*.[50]

43 However, such a right (of a company in its capacity as employer) to inspect the employee's work-related emails) does not appear to be as strong or well established as the right of

48 It is arguable that the High Court's holdings in *Fairstar Heavy Transport NV v Adkins* [2012] EWHC 2952 (TCC) continue to represent the state of English law in relation to proprietary information in the emails. The substantive reasoning was not criticised by the Court of Appeal, which undertook a different analysis to reach its conclusion – see paras 19–22 above.

49 *Bowstead and Reynolds on Agency* (Peter G Watts & F M B Reynolds ed) (Sweet and Maxwell, 22nd Ed, 2021) at para 1-034.

50 See paras 26 and 27 above.

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a company (in its capacity as principal) to inspect an agent's work-related emails.

44 For one, the High Court in *Phones 4U v EE* (which ruled that a company in its capacity as employer had the right to inspect its employees' work-related emails) expressly relied on *Fairstar v Adkins* as authority, even though the analysis in *Fairstar v Adkins* was directly based on an agency relationship and not an employment relationship.[51] For another, the court in *Phones 4U v EE* did not appear to substantiate or elaborate on its reasoning as to why the company should have the same right of access to its employees' work-related emails in the same way as the company had a right to inspect its agents' work-related emails.[52]

45 Fourth, what about the right of a company to access the employee's personal devices themselves (which may contain both work-related emails and personal emails)?

46 As in the case of *Pipia v Bgeo*, if the employment contract expressly provides that the company may inspect the employee's emails in his work device (even if these emails are personal), then it is arguable that the company has such a right grounded in contract.[53]

47 However, it must be borne in mind that the employee in question was the CEO, no less. In terms of employment duties, the CEO is arguably held to a higher standard than an ordinary employee.

48 Further, the implications of a clause providing such a wide-ranging right of access by the company may be uncertain. This could, for example, contravene data protection laws.[54]

51 See paras 21, 26 and 27 above.
52 *Phones 4U Ltd v EE Ltd* [2020] EWHC 1921 (Ch) at [52]–[54]. Contrast *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [19], [35] and [36] where the analysis was undertaken with reference to well-established authorities on agency.
53 See paras 34 and 35 above.
54 See para 6 above.

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49 It may also be that the circumstances under which the company can invoke such a clause are circumscribed. It is arguable that such a clause may only be invoked in narrow circumstances so as not to conflict with the duty of mutual trust and confidence.[55] One such situation may be where the employee unilaterally asserts that he no longer retains any work-related emails in his personal devices, but the company reasonably suspects that the employee is not being truthful, and needs to inspect the personal device itself to ascertain.

50 In any event, absent such an express clause, there does not appear to be any settled legal basis for the company to compel the employee to turn over his personal device for inspection.

51 Fifth, as a related question, what is the extent of the company's rights regarding access to the employee's work devices (as opposed to personal devices)? This question is especially pertinent in relation to employees who store or send personal emails on the work devices.

52 There are often express contractual provisions governing the employees' use of work devices. Such contractual provisions often provide that the work devices are the property of the company. However, is it an incident of the company's proprietary rights that the company has the right to inspect and access the contents of the work devices (including personal emails), or are the company's rights limited only to the possession of the hardware device itself and do not extend to the email contents stored in the hardware devices? Questions also arise in relation to whether the company would have committed a breach of confidence by accessing and using the personal emails, notwithstanding that such emails were stored in the work devices[56].

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55 In *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] 1 SLR 1318 at [82], the Appellate Division of the Singapore High Court remarked that the status of the implied term of mutual trust and confidence has not been clearly settled in Singapore, and this remains an open question for the Singapore Court of Appeal to resolve.

56 In *Brake v Guy* [2022] EWCA Civ 235 at [53]–[81], the English Court of Appeal upheld the trial judge's findings that, on the facts, there was no reasonable expectation of privacy and confidentiality as against the company, in relation

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53 There is likely no easy answer to the above. As stated at paras 5 and 6 above, the company's rights are likely fact-specific and context-dependent[57].

V. Conclusions

54 The cases examined above appear to lend themselves to the following conclusions:

Type of Email	Company has a right to inspect?
Work emails on work devices	Likely
Work emails on personal devices	Likely[58]
Personal emails on work devices	Possibly
Personal emails on personal devices	Possibly

55 Notwithstanding the apparent simplicity of the above, they should not be viewed as invariable, immutable legal conclusions. Various fact-specific factors, including but not limited to the exact terms agreed between the employer and employee, will ultimately play a role in determining the contents and limits of the company's rights.

to personal emails sent from a business account. See also *Simpkin v Berkeley Group Holdings plc* [2017] EWHC 1472 (QB).

57 Such factors may include whether the personal emails were labelled "confidential", and whether other employees (such as the employee's personal assistant) can access the personal emails contained in the work device.

58 But if inspection of the whole personal device (and not just the work emails) is necessary (*eg*, in a situation where the company has legitimate grounds to suspect that an employee has not fully deleted confidential work information from his personal device), the company may wish to consider using independent third-party consultants to conduct the relevant searches as a safeguard to balance the employee's countervailing right to protect his confidential or private data – see, *eg*, *Phones 4U v EE* [2020] EWHC 1921 at [57].

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