

Dataview 32 Ltd v Ensynergy International Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	20 March 2001
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Text

[2001] JRC 066

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff & Jurats Le Ruez & Bullen

Between
Dataview 32 Limited
Plaintiff
and
Ensynergy International Limited
Defendant

Advocate D. Gilbert for the Plaintiff

Advocate W. Grace for the Defendant**Authorities.**

American Cyanamid -v- Ethicon [1975] 1 All ER 501 .

Cerqueira -v- Bilbao International Bank (Jersey) Ltd and Anor [\(1981\) JJ 141](#) .

Application by the Plaintiff for interlocutory injunctions, following alleged breach of contractual agreement.

Bailiff

THE DEPUTY

- 1 This is an application by Dataview 32 Limited ("the Plaintiff") for interlocutory injunctions. The factual background as presented by the Plaintiff in its affidavit evidence is as follows.
- 2 On 28th February, 1998 the Plaintiff (under its then name of Solution 6 Financial Systems Limited) entered a distribution agreement ("the Distribution Agreement") with a company allegedly incorporated in the British Virgin Islands called Dataview Limited ("Dataview"). The agreement stated that Dataview's registered office was at Lincoln Chambers, 31 Broad Street, St. Helier.
- 3 By the Distribution Agreement Dataview, as principal, granted exclusive distribution rights to the Plaintiff, as distributor, in respect of Dataview's company and trust administration software package ("the Dataview Package") for Jersey, Guernsey, Sark, Alderney and the Isle of Man ("the Territory"). At the time Mr David Bennett was a principal beneficial owner of Dataview. He was also the beneficial owner of the Plaintiff.
- 4 Two key provisions of the Distribution Agreement were as follows:–

"C4 Responsibilities of Principal

The Principal shall: ...

4.5 Not engage directly or indirectly without the prior written consent of the Distributor in the manufacture, marketing, sale, lease or hire of any products which in the reasonable opinion of the Distributor compete with or are likely to compete with the Licensed Products or the Principal's Product Range in the Territory"

4.6 Not be interested, directly or indirectly, in any business, firm or company

which competes with the Distributor or is likely to compete with the Distributor”.

- 5 On 3rd April, 1998 CDP Sigma Limited (“Sigma”) purchased from Mr Bennett 51% of the Plaintiff and 51% of the Plaintiff’s sister company Solution 6 Offshore Systems Limited (“Solution Offshore”) leaving Mr Bennett with 49% of each company. It is asserted on behalf of the Plaintiff that the primary asset of the Plaintiff was its interest under the Distribution Agreement and that was why Sigma purchased the Plaintiff and why it paid a premium for the shares.
- 6 A number of agreements were entered into for the supply of the Dataview Package to various end users in the Territory. Although it was the Plaintiff which held the distribution rights, some of the agreements were apparently entered into by Solution Offshore. In particular an agreement with SG Hambros Trust Company (Guernsey) Limited (“Hambros”) was made by Solution Offshore although that agreement is dated 26th September, 1997 and therefore predated the Distribution Agreement and the acquisition by Sigma of the majority shareholding in the Plaintiff and Solution Offshore.
- 7 On 12th October 1998 Solution Offshore apparently entered a distributor agreement whereby it granted sub-distribution rights in respect of the Dataview Package for the Isle of Man to the Defendant. No signed copy of this agreement can be found but there is an unsigned document which has been dated 12th October. It is to be noted that it was Solution Offshore which purported to grant the sub-licence notwithstanding that the distribution rights to the Dataview Package were held by its sister company, the Plaintiff, pursuant to the Distribution Agreement.
- 8 In May 2000 negotiations took place between Sigma and Mr Bennett for the separation of their respective interests in the Plaintiff and Solution Offshore. It is not necessary to recite all the details. In brief:–
 - (a) Sigma transferred its 51% in Solution Offshore to Mr Bennett so that he thereafter owned 100%;
 - (b) Mr Bennett transferred his 49% interest in the Plaintiff to Sigma so that Sigma thereafter owned 100% of the Plaintiff;
 - (c) Mr Bennett received a consideration of £150,000 for the transaction in addition to the shares in Solution Offshore; and
 - (d) by a signed but undated agreement Solution Offshore assigned its rights under the distributor agreement dated 12th October 1998 in respect of the Isle of Man to the Plaintiff. However no notice of this assignment was apparently given to the Defendant, which was the sub-distributor under that agreement.
- 9 As part of this transaction, the Distribution Agreement was amended by an Instrument of

Amendment dated 26th May, 2000 and made between the Plaintiff and the Defendant. This made a number of minor amendments but the key amendment for today's purposes was that Dataview was replaced as principal in relation to the Distribution Agreement by the Defendant. The recital to the Instrument of Amendment said that this was because Dataview had changed its name to Ensynergy International Limited. Certainly the Plaintiff asserts that Mr Bennett at all times represented to it that Dataview had simply changed its name to Ensynergy International Limited so that the parties to the Instrument of Amendment were thought to be the same parties as had executed the Distribution Agreement.

- 10 What has led to these proceedings is that on 6th December 2000 the Plaintiff was advised by Hambros that Hambros wished to terminate the existing agreement for the provision of the Dataview Package as it was going to enter into an agreement with the Defendant to utilise the Defendant's software package known as enVisual. The Plaintiff's evidence suggests this is a similar product to the Dataview Package and is one which is in competition with the Dataview Package. There is evidence of a similar approach by the Defendant to another potential customer of the Plaintiff. The Plaintiff therefore asserts that the Defendant is acting in breach of clause 4.5 of the Distribution Agreement and should be restrained from doing so further until trial. If matters rested there, the case would be reasonably straightforward.
- 11 However matters became more complicated when, following the contact by Hambros, the Plaintiff made some enquiries. It transpired that there had never been a company called Dataview incorporated in the BVI. There had been a company called Dataview International Limited but this had been struck off the register on 1st November, 1998. The Defendant had been incorporated in the BVI on 22nd September, 1997 under the name of Synergy Worldwide Limited and had changed its name to Ensynergy International Limited on 7th August, 1998. It followed that, contrary to what had been believed at the date of execution of the Instrument of Amendment in May 2000, it was not the Defendant which had been party to the Distribution Agreement, although it had signed the Instrument of Amendment.
- 12 Secondly, it was drawn to the Plaintiff's attention that the written agreement with Hambros for the supply of the Dataview Package was in fact between Solution Offshore and Hambros rather than between the Plaintiff and Hambros. Solution Offshore is of course now owned by Mr Bennett, not by Sigma and it is not a plaintiff in these proceedings. In passing we should note that Solution Offshore has apparently changed its name to Ensynergy Channel Islands Limited but we have not been informed when this took place and we will continue to refer to it by its former name in order to avoid confusion.
- 13 On 3rd January, 2001 the Plaintiff's advocate wrote to the Defendant alleging a breach of the non-competition clauses of the Distribution Agreement and seeking an assurance that there would be no further breach. On 15th January, 2001 Lincoln Trust Company (Jersey) Limited replied on behalf of the Defendant asserting that the Instrument of Amendment was void as the Defendant had not entered the Distribution Agreement originally and the Instrument of Amendment was entered into on the false premise that the Defendant was the

same company as Dataview. Secondly, Lincoln raised the point that the agreement with Hambros was with Solution Offshore, which was now owned by Mr Bennett.

- 14 The Plaintiff now seeks an interim injunction to restrain the Defendant from acting in breach of clauses 4.5 and 4.6 of the Distribution Agreement and restraining it from entering into an agreement with Hambros on the grounds that the Defendant adopted the Distribution Agreement by executing the Instrument of Amendment and is therefore bound by the non-competition provisions contained in the Distribution Agreement.
- 15 Mr Grace, on behalf of the Defendant, raises a number of matters in response. We will begin however with a general observation. The Plaintiff has made a number of assertions in its evidence concerning beneficial ownership of various of the companies at different times by Mr Bennett. As Mr Grace explained, the Defendant wishes to “keep its powder dry” in relation to its defence. Accordingly, save in one respect to which we will refer shortly, Mr Bennett's affidavit sworn on behalf of the Defendant does not contradict the assertions as to ownership of the companies, although Mr Grace stated in his submissions that they were not necessarily accepted. Nevertheless, for the purposes of this hearing, the Plaintiff's evidence on this aspect is uncontroverted.
- 16 The exception referred to above relates to ownership of the Defendant. In his affidavit sworn on behalf of the Plaintiff, Mr George Royle, a director of the Plaintiff, asserted that Mr Bennett was a director and shareholder of the Defendant and that the Defendant was within Mr Bennett's control. In his affidavit sworn on behalf of the Defendant, Mr Bennett asserted on oath in paragraph 6 of the affidavit that he is neither a director nor a shareholder of the Defendant. When the Court pressed Mr Grace with the fact that Mr Bennett was the 100% owner of Solution Offshore which was now called Ensynergy Channel Islands Limited and that it was stretching the Court's credibility to ask it to accept that Mr Bennett did not have any interest in Ensynergy International Limited, Mr Grace took instructions from Mr Bennett, who was present in Court on behalf of the Defendant, and then confirmed that Mr Bennett did indeed have an interest in the Defendant although he was not a director or registered shareholder. We were not told the nature or extent of this interest. We have to say that, in this respect, we found paragraph 6 of Mr Bennett's affidavit somewhat disingenuous. We further noted that, throughout the proceedings, Mr Grace took instructions from Mr Bennett on behalf of the Defendant.
- 17 In essence, Mr Grace's case was that the various agreements were such a shambles that the Court could not be satisfied that the Plaintiff owned the rights to the Dataview Package for the Territory or that the Defendant was subject to the non-competition terms of the Distribution Agreement. The Court should therefore not grant an interim injunction. He considered the various agreements in turn.
- 18 In relation to the Distribution Agreement itself he submitted that no one had yet identified the company that had signed the agreement as Dataview; that there appeared to be no ‘cause’ in favour of Dataview in that no consideration was stated to be payable to Dataview

by the Plaintiff for the distribution rights; that the Defendant might be alleging that the Plaintiff had not complied with its obligations under the Distribution Agreement so that the other party could terminate that agreement; and that because it was uncertain what had happened to Dataview, it might be that the agreement had been terminated under the provisions of clause 5.1.2 which dealt with the liquidation, winding up etc. of one of the parties. In summary, he submitted that the Defendant might well wish to allege that the Distribution Agreement was invalid or no longer in force.

19 He turned next to the Instrument of Amendment and made the following points:—

In summary, he asserted that the Defendant would wish to challenge the validity of the Instrument of Amendment and assert that it was not a valid agreement binding upon the Defendant.

(i) The Defendant was not the same legal entity as Dataview, contrary to what was said in the recital to the instrument. As Dataview had not been a party to the Instrument of Amendment, that document could not be valid as a variation of the Distribution Agreement.

(ii) Although the instrument purported to be executed under the seal of the Defendant, how was one to know that it was signed by directors or otherwise authorised signatories?

(iii) There was no governing law clause so that it was not known at this stage under what system of law the Court should consider the validity of the Instrument of Amendment. When it was put to him by the Court that the fact that one of the parties was a Jersey company, the other expressed as having an office in Jersey and the instrument was expressed to be supplementary to the Distribution Agreement which was expressly governed by Jersey law and that this suggested that the instrument was probably governed by Jersey law, Mr Grace accepted the force of the point but nevertheless maintained his submission that the position was not clear at this stage and that this lack of certainty should be added to the various other points he was making in order to consider the overall level of doubt in relation to the Instrument of Amendment.

(iv) The date of the alleged change of name of Dataview set out in the recital had never been completed by the lawyers as had been intended.

(v) The seal of the Plaintiff did not appear on the document against the signatures of the directors.

20 He turned next to the distributor agreement dated 12th October, 1998 (although no signed version has yet been found). This document was inconsistent with the distribution rights to the Dataview Package resting with the Plaintiff because it was Solution Offshore, not the Plaintiff, which had purported to grant the sub-licence in respect of the Isle of Man. He accepted that there was in existence an Assignment which purported subsequently to

transfer the benefit of this distributor agreement from Solution Offshore to the Plaintiff but there was no date on the Assignment, Mr Royle and Mr Bennett appeared to have signed on behalf of each other's company and the document was signed on behalf of each company whereas the attestation provision suggested that the Assignment should be executed under seal. Finally the Defendant should have been party to the Assignment. All of this cast further doubt on the position.

- 21 He next relied upon the fact that the agreement with Hambros was made by Solution Offshore, not the Plaintiff. This, he said, was all part of the very confused picture which should have been picked up by the advocates acting at the time of the May 2000 transactions.
- 22 He also referred to a distributor agreement dated 14th September, 1999 whereby the Defendant granted distribution rights in the Channel Islands to the Plaintiff in respect of a computer software package relating to a "practice management, accounting and e-commerce". He sought to argue that this was inconsistent with the Plaintiff's assertion of a right to prevent competition with the Dataview Package. However we do not find this agreement to be of assistance. The package does not on its face relate to company and trust administration and there is nothing before the Court to suggest that it was in competition with the Dataview Package which was confined to a company and trust administration package.
- 23 Finally, he relied upon a sale agreement dated 5th August 1996 which was produced as an exhibit to the affidavit of Mr. Bennett. By that agreement, a company called DataAccess International Limited ("DataAccess") purported to sell the ownership of the rights of a trust and company, accounting and administration package known as Dataview to Solution Offshore. We have not been told anything about DataAccess but we note that the signatory to this agreement on behalf of that company appears to have been Mr Bennett. We think therefore that, in the absence of any explanation to the contrary, we are entitled to assume for present purposes that Mr Bennett had some interest in DataAccess. Mr Grace's point was that the existence of this agreement cast considerable doubt on whether Dataview had the right to grant distribution rights in the Dataview Package to the Plaintiff by means of the Distribution Agreement, as it postdated the sale agreement in 1996.
- 24 From this convoluted story, the following general picture emerges. In August 1996 DataAccess, a company in which Mr Bennett appears to have had an interest, purported to sell ownership of the Dataview Package to Solution Offshore, a company which appears to have been 100% owned by Mr Bennett at the time. In 1997, Solution Offshore supplied the Dataview Package to Hambros. Despite this, in February 1998, Dataview, a company in which Mr Bennett also had an interest, purported to grant exclusive distribution rights to the Dataview Package in the Channel Islands and the Isle of Man to the Plaintiff, then known as Solution Financial and also owned 100% by Mr Bennett. In April, 1998 Mr Bennett sold 51% of the Plaintiff and 51% of Solution Offshore to Sigma. The Plaintiff asserts that Sigma made this acquisition because of the right to the Dataview Package apparently conferred on the Plaintiff by the Distribution Agreement.

- 25 In October 1998, to Mr Bennett's knowledge, Solution Offshore (in which Mr Bennett then had a 49% interest) purported to grant sub-distribution rights to the Defendant (in which Mr Bennett had an interest) in the Dataview Package for the Isle of Man despite the fact that, also to Mr Bennett's knowledge, the Distribution Agreement purported to grant sole distribution rights to the Plaintiff.
- 26 In May 2000 it was agreed that Sigma should acquire 100% of the Plaintiff and Mr Bennett should acquire 100% of Solution Offshore. There was a consideration of some £150,000 paid to Mr Bennett by Sigma. We are satisfied for today's purposes that the parties proceeded on the basis that the Plaintiff had the Dataview Package distribution rights. That was the only asset of the Plaintiff. Why else would Sigma pay £150,000 and transfer the shares in Offshore to Mr Bennett in exchange for Mr. Bennett's 49% shareholding in the Plaintiff? The Instrument of Amendment was part of that transaction. The Defendant, a company in which Mr Bennett has an interest, agreed to become bound by the Distribution Agreement in place of Dataview, a company in which Mr Bennett also had an interest.
- 27 The Defendant, through Mr Bennett, now asserts that it was a mistake that the Defendant was party to the Instrument of Amendment. He thinks that it should have been Solution Offshore instead. The Defendant therefore asserts that the Plaintiff should not be entitled to an interim injunction because the contractual position is so uncertain for the various reasons which we have summarised above.
- 28 Before turning to the legal position, we cannot refrain from observing that the Defendant's position is not a particularly attractive one. On the footing that the distribution rights to the Dataview Package do indeed belong to the Plaintiff pursuant to the Distribution Agreement, the Plaintiff cannot, on the Defendant's case, enforce the non-competition provisions of that agreement against either of the companies which have signed up to that agreement. It cannot enforce the agreement against Dataview because that company appears no longer to exist and there is doubt over its original identity; neither can it enforce it against the Defendant because the Defendant was wrongly inserted as a party to the Instrument of Amendment as it is not the same legal entity as Dataview; and all this despite the fact that Mr Bennett appears to have been the controlling or a substantial influence in both Dataview and the Defendant, both of which companies purported to agree to the non-competition provisions of the Distribution Agreement.
- 29 Alternatively, the Defendant argues that the distribution rights in relation to the Dataview Package were never validly acquired by the Plaintiff because ownership of the Dataview Package had been conferred on Solution Offshore in 1996 and therefore was not Dataview's to dispose of in 1998; and this, despite the fact that Mr Bennett appears to have been a controlling or substantial influence in DataAccess and Solution Offshore, the parties to the 1996 agreement as well as Dataview, the company which purported to confer the rights on the Plaintiff in 1998. Furthermore, in April, 1998, Mr Bennett sold 51% of the Plaintiff and Solution Offshore to Sigma for a consideration which took into account the

value of the distribution rights in May 2000. He sold the remaining 49% of the shares in the Plaintiff to Sigma for a consideration which again was clearly based on the assumption that the distribution rights lay with the Plaintiff. Yet he now asserts on behalf of the Defendant that the distribution rights may all along have belonged to Solution Offshore (now renamed Ensynergy Channel Islands Limited) of which he presumably retains 100% ownership.

- 30 We emphasise that we make no definitive findings on this aspect as we have not heard detailed evidence from the parties and the Defendant has expressly asserted that it is keeping its power dry. Nevertheless the consequence of this is that the picture as to ownership painted by the Plaintiff is not controverted for the purposes of this hearing.
- 31 We turn now to consider the legal position. The principles to be applied when considering the grant of an interlocutory injunction were authoritatively stated in *American Cyanamid -v- Ethicon* [1975] 1 All ER 501. The first matter which we must consider is whether there is a serious question to be tried as to whether the Plaintiff has the right to enforce the provisions of the Distribution Agreement (and clauses 4.5 and 4.6 in particular) against the Defendant and as to whether the Defendant has breached either of those provisions.
- 32 We are satisfied that there is a serious question to be tried on the first of these issues. We note Mr Grace's detailed objections to both the Distribution Agreement and the Instrument of Amendment. However the fact remains that the Plaintiff has a written agreement whereby it purportedly acquired the exclusive distribution rights for the Dataview Package in relation to the Territory. Whilst it seems clear that the recital in the Instrument of Amendment (which states that the Defendant is the same legal entity as Dataview because it has simply changed its name) is incorrect, the fact remains that the Defendant duly executed the Instrument of Amendment and, by doing so, purported to adopt the provisions of the Distribution Agreement, stepping into the shoes of Dataview. We note the points raised by Mr Grace and they will have to be considered at trial. Nevertheless we are quite satisfied that, as between the Plaintiff and the Defendant, there is undoubtedly a serious issue to be tried as to whether the Defendant is bound by the Distribution Agreement.
- 33 Secondly, is there a serious question to be tried as to whether the Defendant has acted in breach of the non-competition provisions of the Distribution Agreement by marketing a product that competes or is likely to compete with the Dataview Package? Mr Royle's affidavit asserts that the enVisual product is very similar. Mr Hall's affidavit filed on behalf of the Defendant suggests that it is not a similar product. We are not in a position to resolve the issue as to whether the enVisual product is technically of a similar nature to the Dataview Package. However we do not need to do this. Clause 4.5 does not relate to similar products but to products which compete with the Dataview Package. The fact remains that Hambros has decided to replace the Dataview Package with the enVisual product. That is strong prima facie evidence that the products are in competition. Initially the Defendant suggested that the enVisual product was a much wider product only part of which could possibly be said to be in competition with the Dataview Package and that therefore the wider product could not be said to be in competition. However, on looking at the extracts from the enSynergy web site which were exhibited to the affidavit of Mr Hall, the

chief executive for the Defendant, it became clear that the enVisual product is a modular system so that it can be supplied in parts or as a whole and certain modules could more easily be argued to be in competition with the Dataview Package.

34 This is borne out by enSynergy's web site itself. We will refer to the page numbers of the web site as exhibited to Mr. Bennett's affidavit. Thus page 4 says as follows:—

“enVisual™ is a modular based system including;

- **Central Contact / prospect data** — including task scheduling / document management*
- **Company / trust accounting & administration / accounts production***
- **Time recording / practice management & billing***
- **Portfolio management / brokering***
- **Document custody management***

All enVisual™ modules support true multi-currency transactions. Modules can be purchased together or in isolation as your requirements dictate”.

35 Pages 6 and 7 contain the following:—

“The enVisual suite current core professional modules include;

- **enCentral** — Central contact / marketing module — (standard to the system)*
- **enSecretary** — Corporate / trust secretarial and statutory database*
- **enAccount** — Client / trust account / accounts production*
- **enPractice** — Practice management / time and billing*
- **enPortfolio** — Portfolio account*
- **enCustody** — Document custody”.*

Considering each of these in turn, the introduction to “enSecretary” at page 10 of the web site says as follows:—

“What is enSecretary?

*The enVisual™ company secretarial system **enSecretary SQL** makes the process of recording and tracking statutory information for **Onshore and Offshore** Companies / Trusts a breeze, freeing you and your staff up to spend more time on real business. **enSecretary** performs all of the essential and time*

consuming tasks associated with corporate management including the production of resolution documents, while at the same provides **speedy data entry** and simple access to your precious data. **enSecretary** has been designed to support a **multitude of jurisdictions and optionally links to our other enVisual modules such as client / trust accounting, billing and time recording systems**".

Similarly on page 13 the introduction to "enAccount" says as follows:—

"What is enAccount?"

enVisual's Client and Trust Account module enAccount SQL is our *thoroughbred tool for the automatic production of client / company / trust and statutory accounts*. **enAccount** is the result of a marriage between the best in offshore technology and premium onshore expertise. **enAccount** delivers the integration productivity and multi-currency functionality typically found in offshore products — combined with an understanding of onshore issues such as sales / capital gains tax, consolidations and ... global after sales support."

- 36 In our judgment, therefore, there is evidence to support the Plaintiff's assertion that certain aspects of the enVisual product are in competition with the Dataview Package. On the information presently before us these appear to be the enSecretary and enAccount modules. We conclude that there is certainly a serious question to be tried as to whether the Defendant is in breach of Clause 4.5 of the Distribution Agreement as amended by the Instrument of Amendment by marketing these two modules of the enVisual product in the Territory.
- 37 We next have to consider whether, if the Plaintiff were to succeed at trial, damages would be an adequate remedy. If so, an interlocutory injunction should not be granted. In our view damages would not be an adequate remedy. The Plaintiff's sole business is the provision of the Dataview Package within the Territory. If it were found at trial that the Defendant had been in breach of the Distribution Agreement, it would be extremely difficult to assess what business had been lost by the Plaintiff in the meantime. How would it show that, in the absence of competition from the Defendant, it would have won particular business? Furthermore the presence of the unlawful (as it would have been found to be) competition could well cause irreparable damage to the Plaintiff because its sole business relates to this product within the Territory. There is a limited amount of business within the Territory and once potential customers had signed up to the enVisual system, they would be unlikely, save in exceptional circumstances, to change back to the Dataview Product. The Plaintiff's business might well never recover. Conversely, would an undertaking in damages compensate the Defendant in the event of it being successful at trial? Some of the problems of assessment referred to above would apply in equal measure to the Defendant but the Defendant has a worldwide business, of which the Territory is only part. Furthermore, an injunction would merely delay the commencement of the Defendant's ability to sell its product within the Territory. We would therefore only be preventing the Defendant doing what it has not (until very recently) done hitherto.

- 38 In our judgment, the balance of conveniences comes down clearly in favour of granting an interim injunction at this stage. The status quo, insofar as there is one, is that the Defendant has not, until the events complained of, been selling the product which competes with the Plaintiff. If an injunction were granted, the Defendant would be free to continue to sell a competing product anywhere in the world except the Territory. It would also be able to sell any part of the enVisual product within the Territory which does not compete with the Dataview Package. Conversely, the Plaintiff has only one product, namely the Dataview Package and sells it solely within the Territory. For the reasons mentioned earlier we think that there is a real risk of irreparable damage to its business being suffered by the Plaintiff in the event of the Defendant being allowed (wrongly if the Plaintiff is successful at trial) to compete by selling a rival product without restriction pending trial.
- 39 Turning to the terms of the injunction, Miss Gilbert was forced to accept under questioning from the Court that she could not maintain her request for an injunction restraining the Defendant from supplying its product to Hambros because Hambros had already terminated its contract with the Plaintiff and had, so far as could be ascertained, entered into a contract with the Defendant for the provision of its product. An injunction would therefore run the risk of damaging the business of Hambros, a third party to the proceedings. In any event, the damage suffered by the Plaintiff from the termination of this particular contract would be ascertainable and could be compensated for by an award of damages in the event of ultimate success by the Plaintiff at trial.
- 40 Subject to the Plaintiff giving the usual undertaking in damages supplemented as described below, we propose to grant an injunction. We are willing to hear submissions on the detailed terms but we are minded at this stage to grant one along the following lines:—

“The Defendant shall be restrained by itself, its servants or agents or otherwise howsoever from:—

(i) engaging directly or indirectly in the marketing, sale, lease or hire in any of Jersey, Guernsey, Sark, Alderney or the Isle of Man of the enSecretary or the enAccount modules of the enVisual software package or any other product which competes with or is likely to compete with the Dataview Package; and

(ii) from being interested, directly or indirectly, in any business, firm or company which competes with the Plaintiff in the Territory or is likely to compete with the Plaintiff in respect of the Plaintiff's rights under the Distribution Agreement.

PROVIDED THAT, by way of exception, the said injunctions shall not prevent the Defendant from supplying the enSecretary and enAccount modules to SG Hambros Trust Company (Guernsey) Limited pursuant to discussions commenced prior to the date hereof.”

41 The Plaintiff's undertaking in damages must be fortified by paying £100,000 into Court or by the Plaintiff's parent company CDP Sigma Holdings Limited joining in the undertaking jointly and severally. The money must be produced or the written undertaking of the Plaintiff and CDP Sigma Holdings Limited lodged with the Judicial Greffe within seven days of today's date, failing which the injunctions will lapse.

42 Finally we should add that following the hearing, we noted that page 28 of the enSynergy web site contains the following passage:—

This passage was not drawn to our attention by either counsel nor by Mr Bennett and we emphasise that we have not heard any submissions on it. Nevertheless, on the assumption that the Dataview SQL product referred to is the same as the Dataview Package, it would not appear to assist Mr Bennett's assertion that there was no reason for the Defendant to be party to the Instrument of Amendment and that it must have been done by mistake. On the contrary, if the Defendant had by then become the owner of the Dataview Package as stated in the web site, it would have made perfect sense for it to be party to any amendment of the Distribution Agreement as the current proprietor of the Dataview Package. We note this because we think it may be of some relevance but we emphasise that it has not influenced our conclusion because we had reached a decision to grant the interlocutory injunction before noticing this additional point.

[Counsel addressed the Court on the exact terms of the proposed injunction]

- *“enSynergy International Limited was incorporated in 1997 in order to purchase Dataview SQL product and related technology.*
- *Annual global sales revenue for DataView SQL and related services — GBP 2 Million.”*

43 Miss Gilbert and Mr Grace have both requested the Court to vary the terms of paragraph (1) of the proposed injunctions to that set out below. We therefore grant an injunction as follows:—

“The Defendant shall be restrained by itself, its servants or agents or otherwise howsoever from:—

- (i) engaging directly or indirectly in the marketing, sale, lease or hire in any of Jersey, Guernsey, Sark, Alderney or the Isle of Man of the enVisual product, or any module thereunder or any other product which competes with or is likely to compete with the Dataview Package; and*
- (ii) from being interested, directly or indirectly, in any business, firm or company which competes with the Plaintiff in the Territory or is likely to compete with the Plaintiff in respect of the Plaintiff's rights under the Distribution Agreement.*

PROVIDED THAT, by way of exception, the said injunctions shall not prevent

the Defendant from supplying the enVisual product to SG Hambros Trust Company (Guernsey) Limited pursuant to discussions commenced prior to the date hereof.”