THE HIGH COURT

2008 4333 P

BETWEEN

KOGER INC. AND KOGER (DUBLIN) LIMITED

PLAINTIFFS

AND

JAMES O'DONNELL, ROGER WOOLMAN, DAVID GROSS, HWM FINANCIAL SOLUTIONS LIMITED

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 8th day of October, 2010.

1. These proceedings were commenced by the two plaintiff companies by plenary summons dated the 28th May, 2008. The proceedings were brought against three individuals, James O'Donnell (also known as Seamus O'Donnell), Roger Woolman and David Gross named as first, second and third named defendants and the fourth named defendant was a company which had been set up by those three persons, namely, HWM Financial Solutions Limited, hereinafter known as HWM. In the proceedings the two plaintiffs claimed that the defendants had been in breach of copyright and breach of confidence. It was claimed that the defendants and each of them had infringed the copyright of the first named plaintiff in a computer software program known as NTAS and the related program known as E*TAS. The plaintiffs claimed that the defendants had infringed the plaintiffs' copyright and that the plaintiffs were entitled to injunctive relief restraining the defendants from infringing the plaintiffs' copyright in the plaintiffs' two software products. There was a claim for damages or, at the plaintiffs' option, an account of the profits of the defendants and each of them in respect of copyright infringement and the plaintiffs also claimed relief in respect of an allegation of breach of confidence and/or abuse of confidential information and/or trade secrets by the defendants and each of them. There was also a claim for damages for conspiracy, it being alleged that the defendants and each of them had conspired to breach confidence and/or abuse the confidential information of the plaintiffs and each of them. The plaintiffs also claimed aggravated or exemplary damages and damages against the first, second and third named defendants for breach of contract, breach of fiduciary duty and damages for breach of duties of loyalty and fidelity. There was a separate claim against the first named defendant for damages for inducing or procuring breach of contract and against the fourth named defendant for damages for wrongful interference with the economic interests of the plaintiffs or either of them together with a claim of damages for inducing or procuring breach of contract. The plaintiffs also claimed ancillary relief in the form of injunctive and declaratory relief as set out in the statement of claim.

2. The first named plaintiff was incorporated on the 6th April, 1995 in New Jersey, U.S.A. and has its head office at 12, Route 17, North Paramus, New Jersey. The second named plaintiff is the wholly owned subsidiary of the first named plaintiff and was incorporated in this jurisdiction on the 4th day of January, 2002.

3. The first named plaintiff herein after known as "Koger" was jointly founded by George Sipko in 1995. George Sipko remains the managing director of Koger and he is also a director and shareholder of the second named plaintiff Koger (Dublin) Limited herein after called "Koger (Dublin)". The chief operating officer of Koger is Rastislav Sipko herein after known as "Ras Sipko". He is also a director of the second named plaintiff.

4. George Sipko jointly founded, together with Paul Piringer the first named plaintiff. Those two persons developed and designed back office software for fund administrators, fund managers and fund advisers. The plaintiffs developed a proprietary software product called NTAS. NTAS was an acronym for New Transfer Agency System. The software product was developed for customers in the fund administration industry. The product was developed throughout 1996 and into 1997 and the product was launched in 1997. Thereafter the software product known as NTAS was continuously updated and revised. George Sipko claims that NTAS was developed using software he had designed in 1994 known as KIT or "Koger Inherited Technology". George Sipko claimed he had written KIT as an "empty cybernetical system" and that software had allowed Koger to build the information management system that became NTAS. In evidence, a number of witnesses, particularly James O'Donnell, questioned whether KIT ever existed and claimed that, notwithstanding he had worked with NTAS for a number of years, he had no knowledge of what KIT is. George Sipko gave evidence that KIT was still in use in NTAS and contained in the library KIC.pbl. The evidence to the Court was that Koger offer KIT for sale on its website. George Sipko stated that the offer was made in error and that KIT cannot be purchased and is available "in the development of NTAS". He stated that it is used in approximately 15% of NTAS functions and its algorithms are used over the entire NTAS. KIT was never produced to the Court and it appears that it is some form of framework. The NTAS software product provided back office software for fund administrators, fund managers and fund advisers and in particular the NTAS program provided an information technology system and software program to facilitate the processing, storing and categorisation of business data. The NTAS product was successful and Koger became the industry leader in the provision of back office software for fund administrators, fund managers and fund advisers. NTAS is used in the fund administration industry in a number of countries and had established itself as market leader to the extent that by 2006 it had over 50% market share in the relevant market.

5. In the pleadings the plaintiffs claim that the NTAS product is a work protected by copyright under the Copyright and Related Rights Act 2000 and it is pleaded that NTAS has a number of key features which include the following:

> (a) it facilitates the calculation of complex incentive fees;
>
> (b) it does not require a dedicated IT department to run, support or maintain the software;
>
> (c) it has multi-currency and multi-language capabilities; and

(d) it has flexible configurations to allow satisfaction of clients specific requirements.

The plaintiffs also developed another product in or around the year 2002. That product was E*TAS which was an acronym from Electronic Transfer Agency system. That product was a software product which complimented the NTAS product by enabling the ultimate customer to retrieve online information provided by fund administrators. The plaintiffs also claim that the E*TAS product is protected by copyright and is the property of the plaintiffs. The plaintiffs claimed that Koger created its E*TAS system in the twelve month period leading up to its launch in 2005. E*TAS is claimed to be a system which is designed as a three tier web application for investors, fund managers, fund advisers and other related parties promoting on-line communication, reporting and trading. The plaintiffs claim that the E*TAS system is unique due to the fact that it is fully integrated with the back office systems which permits of complete vertical transparency between the back office transfer agency system and the web front end.

6. To assist in the development and promotion of the NTAS product the first named plaintiff opened a Dublin office in 1998. That office was established to develop the market in Europe for NTAS and to service that market and to deal with issues which arose in Europe. Ultimately the first named plaintiff incorporated the second named plaintiff on the 4th January, 2002. The second named plaintiff is a wholly owned subsidiary of the first named plaintiff and the first named plaintiff holds 99% of the shares in the second named plaintiff, the remaining 1% being owned by George Sipko, the co-founder and managing director of the first named plaintiff.

7. During the process of developing NTAS in the period from the end of 1995 to June of 1997, one of the first clients of the first named plaintiff was Swiss Bank and Trust (Cayman Islands) Limited (now UBS (Cayman Islands) Limited) herein after called "Swiss Bank". In the period covering the years 1995 into 1998 the first named defendant, James O'Donnell, worked for Swiss Bank in the Cayman Islands and was directly involved with the first named plaintiff. James O'Donnell when working for Swiss Bank was directly involved in the procurement and testing of the NTAS system for his employer. In June of 1997 Swiss Bank procured, by agreement, the use of the NTAS system and became the first named plaintiff's then largest client. During that period James O'Donnell came into contact and worked with the two co-founders of Koger, George Sipko and Paul Piringer. At that stage Paul Piringer was a director of Koger and joint owner with George Sipko of that company. In 1999 Paul Piringer sold his 50% interest in the first named plaintiff to George Sipko.

8. James O'Donnell left his employment with Swiss Bank in Cayman Islands in 1998 and returned to Europe. By that stage Koger had opened an office in Dublin and James O'Donnell was engaged by Koger to act as a consultant. It was envisaged that James O'Donnell would endeavour to grow the Koger business in Europe and would identify the type of design features that clients would seek to have incorporated in the NTAS system and would provide support and service to customers in Europe and other locations. From 1998 up until the incorporation of the second named plaintiff, James O'Donnell worked as a consultant for Koger. Shortly after the incorporation of Koger (Dublin) at the start of 2002, James O'Donnell became an employee of Koger (Dublin). I will later deal in this judgment with the employment contracts of the first two named plaintiffs. James O'Donnell remained employed by Koger (Dublin) up until the 30th April, 2006 and was, in effect, during the years of his employment the senior person employed by the company and was responsible for the running of the Dublin office. I will deal with the circumstances and evidence relating to James O'Donnell's departure from Koger (Dublin) later in this judgment.

9. Roger Woolman, the second named defendant, had worked with James O'Donnell at Swiss Bank in the Cayman Islands. David Gross, the third named plaintiff, also worked in the Cayman Islands at that time but for a different bank. All three plaintiffs knew one and other. The first named plaintiff, James O'Donnell, is a chartered accountant as were the second and third named defendants. As the business of Koger grew the amount of work required to be done out of the Ireland office increased. In 1999 Roger Woolman had returned from the Cayman Islands and was approached by James O'Donnell to work as a consultant for Koger. Roger Woolman initially refused the offer to work as a consultant for Koger and commenced his own business as a professional photographer in 2000. To supplement his income from photography Roger Woolman provided services for Koger as and from February 2001. Those services were provided on a self-employed basis and Roger Woolman carried out part-time accountancy work for Koger. Roger Woolman's point of contact within Koger was James O'Donnell and Roger Woolman gave evidence that the principal task that he carried out during his consultancy was to help the plaintiffs' clients reconcile incentive fee calculations back to the NTAS product and to produce reports. At the time that the second named plaintiff was established in 2002, Roger Woolman was working as a part-time consultant providing accountancy work for Koger. The evidence was that the incorporation of the second named plaintiff Koger (Dublin) would be facilitated if there was an Irish resident director and Roger Woolman volunteered to become a director of that company. His evidence was that he volunteered on a temporary basis envisaging that he would be a director from January 2002 to the end of the year. At the start of 2003 James O'Donnell became a director and Roger Woolman resigned. After his resignation Roger Woolman continued to provide services for Koger (Dublin) until the middle of 2003. At that time there was a gap in Roger Woolman working for the company as he had moved from Dublin to Waterford. In the middle of 2004 Roger Woolman re-commenced providing consultancy services and continued to do so for Koger (Dublin) up until September 2006. The evidence was that Roger Woolman ceased to provide services on the 13th September, 2006 and offered his notice to the second named plaintiff which was declined. In the days following that refusal Roger Woolman handed over the company laptop that he used to the second named plaintiff.

10. The third named plaintiff moved to Ireland in 2000. By that stage Koger had expanded its business and had entered into contracts for the supply of its software to a number of significant companies operating in offshore funds. That business or industry was experiencing growth at that time. After he came to Ireland, David Gross was approached by James O'Donnell with a view to David Gross working for Koger due to his experience of offshore accounting and fund administration. That was at a time when plans were evolving for a full-time Irish base with an Irish company. David Gross joined the first named plaintiff in April 2001 working as a senior analyst and remained an employee until November 2004. His employment transferred from the first named plaintiff to the second named plaintiff after its incorporation. That transfer took place in November 2002. David Gross' evidence was that in late 2003 he was contacted by the head of Deutsche Bank's fund administration business who was setting up a new consultancy business and was looking for an experienced consultant. David Gross decided to avail of the opportunity and joined Carne Global Financial Services in March 2004. The plaintiffs suggest that David Gross remained working as a senior analyst up until November 2004 but that dispute is of no real relevance as it is undisputed that by the end of 2004 David Gross had ceased to work for either of the plaintiffs.

11. The Dublin office performed the role of expanding business and cultivating clients and providing services to such clients. The Dublin office not only sought new contracts but also developed and tested the functionality of the systems provided by the plaintiffs and offered support to the clients and facilitated them in having their requirements fulfilled. The Dublin office acted as the channel through which clients identified their business requirements and indicated additional or extra features that were required by them from the NTAS software system. Clients would indicate to the Dublin office their requirements and also any technical faults or glitches that had occurred. Having identified those matters, the Dublin office would then communicate such information to the plaintiffs' Slovakian office which had been set up in 2001.

12. Both George Sipko and Paul Piringer were born and brought up in Slovakia and after NTAS had been developed they began to use technically expert persons in Slovakia to assist with technical and programming work. Marian Klco is an expert computer programmer

with a detailed knowledge and experience of how to create, develop, refine and correct software code such as NTAS. Marian Klco came to Koger in New Jersey in September 1998. Marian Klco's evidence is that when he worked for Koger from September 1999 to March 2006, he was the driving force behind the redesign of the NTAS code. He also claims that during that period a significant amount of the features in the NTAS code were developed by him working for Koger. In 1999 Marian Klco returned to Slovakia and resigned from Koger. There is a dispute in evidence as to what occurred at the time. Even though Marian Klco offered his resignation it is clear that he continued to work as a consultant for Koger after returning to Slovakia in 1999. Thereafter he continued to work on the development and adaptation of the NTAS code. From 2001 Koger operated an office in Kosice in Slovakia and employed a number of programmers in that office. After the departure of Paul Piringer, George Sipko directed and controlled Koger and he used his connections with Slovakia to identify experts who could provide technical services for the first named plaintiff. After the establishment of the separate Dublin office Koger operated on the basis that the Dublin office identified the requirements and support needed by the clients and provided the specifications which the clients required which then could be prepared by developers working for Koger. The developers in Kosice received those specifications and requests from the Dublin office but were under the direction of George Sipko who was in the USA. This led to a certain tension between Dublin and New Jersey as the Dublin office were dealing directly with the clients and identifying the modifications and specifications needed by the clients whilst the New Jersey office directed and controlled the developers in Kosice. The business model was identified in the evidence of David Gross where he stated that during the period after the Dublin office had been set up that it was for the business analysts in Dublin to specify the requirements to the developers in Slovakia. Those developers would then produce new scripts and PowerBuilder objects which ultimately would be sent to New Jersey where George Sipko would include them in a PowerBuilder library 'GTEST'. After those new scripts and PowerBuilder objects had been tested they would be included in the relevant application library. The evidence established that the input in relation to the design and development process came though Dublin and the actual development work was carried out in Slovakia. The developers in Slovakia were under the direction of George Sipko and this created a situation as identified by Marian Klco, who was an independent contractor, that problems arose as the requests and specifications were coming from the Dublin office but the developers were under the direction of George Sipko. That resulted in a situation where George Sipko who had little or no input into the design or the development process would often direct how the developers carried out their work or whether or not such items should be included in the PowerBuilder library 'GTEST'.

13. One of the senior personnel in the Kosice office was Jana Potocnakova. She commenced working for Koger in August 2001. She described in her evidence how the business operated. By the time she arrived in August 2001 NTAS was already in existence and a number of clients were using the NTAS software product. The persons in Kosice worked on enhancements and new functionalities. These were identified and requested by the clients and the specifications for new functionality came to Kosice from the Dublin office. She identified that the specifications which came to Slovakia from the Dublin office were always clear and after they had carried out the necessary work to comply with the specifications it was sent to George Sipko in New Jersey where he would direct how the proposed enhancements and/or additional functionalities were to be implemented. Jana Potocnakova in her evidence identified that George Sipko's directions were usually technical changes and that they sometimes made no sense and that his requests were erratic and in her view counter-productive. One of the unusual features in the manner in which the plaintiffs operated was that George Sipko communicated with the Slovakian office by means of what he described as "his daily notes". These daily notes were publicly available to all the employees and any personal comments made to or about a particular employee were seen by all. Given the contents of George Sipko's daily notes and the personal and offensive nature of some of the contents, this process had a serious effect on the morale and working environment in Slovakia.

14. Some of the other features of George Sipko's style of management will be dealt with later in this judgment and there will be a more detailed account of some of the contents of the daily notes.

15. Marian Klco continued to work as an independent contractor providing programming services to the plaintiffs until the 2nd March, 2006 which was the expiration date of his month's notice. Marian Klco's evidence was that at that time his wife had got an offer of a part-time job which was better paid than his full-time job and that from March 2006 he decided to take paternity leave for a number of months. In 2005 Jana Potocnakova was the person who was responsible in the Kosice office for co-ordinating NTAS programming work among the software developers. She gave evidence of occasions when George Sipko endeavoured to browbeat and bully her by asserting that she could be fired at any moment and that her contract could be terminated immediately. She gave evidence that the situation had become so intimidating that by October of 2005 she had decided to leave her employment with Koger and that she started to look for a new job. In the last months of 2005 she had a number of interviews and contacted recruitment agencies. She obtained a position in Siemens Plc in Kosice in Slovakia and sent an e-mail to George Sipko on the 9th February, 2006 indicating her resignation as and from the end of February and stating that she would stay until the end of the month and that she would be joining Siemens on the 1st March, 2006. On the following day George Sipko directed her to depart immediately. She commenced work with Siemens on the 1st March, 2006 and worked with them until she resigned in September 2006.

16. The first three defendants together with Marian Klco and Jana Potocnakova and other former employees of the plaintiffs were involved in the creation and establishment of the fourth named defendant, HWM. The plaintiffs have sued the defendants for breach of copyright and breach of confidence in relation to the transfer agency system developed and evolved by the defendants known as ManTra. The plaintiffs claim that they have expended considerable time, money and mental labour in developing their NTAS software over a number of years and that it has become a highly successful commercial product. Over and above the claim for breach of copyright and breach of confidence, the plaintiffs claim that the personal defendants are all former employees or consultants of the plaintiffs and that they left the plaintiffs at various dates during the course of 2006 and, within a remarkably short space of time released onto the market a software program known as ManTra which is a rival product to NTAS. In the outline submissions at the commencement of the hearing the plaintiffs stated:

> "It is the plaintiffs' case, in short, that the defendants did so (i.e. develop and release the rival ManTra product) as a result of breach of confidence and infringement of the copyright held by the plaintiffs in the NTAS program, in particular, in its source code and design materials".

As stated in the plaintiffs' outline closing written submissions, the plaintiffs' claim is:

> "At its heart a simple case. The plaintiffs built up a very successful and financially rewarding business over many years based on their NTAS transfer agency software. The plaintiffs expended considerable time, money and mental labour in developing their NTAS software over a long number of years. It is a very successful commercial product with a leading share of the market. The personal defendants are former senior employees or consultants of the plaintiffs. They left the plaintiffs at various dates during the course of 2006 and, within an unfeasibly short space of time, released onto the market their rival agency transfer system ManTra (though the fourth named defendant company 'HWM'). …. It is the plaintiffs' case that the defendants set about systematically 'taking out' the plaintiffs' key developer and business analyst personnel with a view to hijacking the plaintiffs' business and seeking to have ManTra replace NTAS as the leading software solution for transfer agencies in the fund administration market."

It is the plaintiffs' unambiguous case that from October 2005 or at the latest from December 2005 that the first three named defendants and other former employees and consultants of the plaintiffs conspired together to set up a rival and competing company and to use unlawful means including breach of contract, breach of confidence and breach of their duties to the plaintiffs to facilitate the establishment and development of a competing product. The plaintiffs claim that the defendants acted in a covert manner and put in place a business plan which was already devised and in place from no later than December 2005 and that all steps taken by the three defendants and their associates thereafter were taken with a view to furthering such conspiracy. The plaintiffs further claim that the narrative account given by the defendants and their associates of their post-December 2005 actions in their statements and oral evidence amounts to false and untruthful evidence and that each of the first three defendants and a number of other witnesses conspired to mislead the Court by giving false evidence. That claim is made over and above the claim for breach of copyright.

17. A key issue for the Court to address is the question of whether or not the three personal defendants and their associates were truthful in their evidence. Counsel for the plaintiffs recognised that it was central to the determination of this case as to whether or not the Court found the evidence of the first three defendants and their associates to be truthful or not. The credibility of those witnesses is central in deciding the plaintiffs' claim.

18. The Court has had the benefit of seeing and hearing each of the three personal defendants and also the evidence of the witnesses who assisted those three persons in the establishment of HWM and in developing the ManTra product and the source code contained within ManTra. Having had that opportunity and having considered the technical evidence adduced by parties, the Court is satisfied that each of the three named personal defendants and their associates, in particular Marian Klco and Jana Potocnakova, are truthful and reliable witnesses. The Court is satisfied that the accounts that each of those witnesses gave in relation to their actions concerning the development of ManTra was coherent, accurate and credible. Each account given by those witnesses as to the manner and mode of the development of ManTra and the establishment of HWM was not only credible but also was cogent and consistent. The evidence of those witnesses stands in sharp contrast with the evidence of George Sipko and Ras Sipko. Both those witnesses demonstrated a willingness to provide misleading and unreliable evidence. They were evasive and unreliable in their evidence. Where there is a conflict in evidence between the first three named defendants, Marian Klco and Jana Potocnakova's evidence on the one part and the evidence of George Sipko and Ras Sipko on the other part, the Court favours the accounts given by and on behalf of the defendants. I will return to this matter later in this judgment.

19. The plenary summons was issued on the 28th May, 2008 and the statement of claim was delivered on the 25th June, 2008. The central claim which the plaintiffs made was that the defendants had committed a breach of copyright and a breach of confidence in the plaintiffs' software programs NTAS and E*TAS. That plea was set out at paragraph 21 of the statement of claim which claimed that the defendants had used copyright material of the plaintiffs in the development and design of the fourth named defendant's ManTra product. Particulars were set out of 51 examples of the similarities in functionality between the plaintiffs' NTAS and E*TAS products and the fourth named defendant's ManTra product. Particulars were raised arising out of the statement of claim in a notice of particulars dated the 7th July, 2008 and that was replied to on the 15th July, 2008. At paragraph 15 of the notice the defendants sought particulars of the alleged infringement of copyright including particulars of the copyright material which it was alleged that the defendants had used. That request for particulars was responded to in paragraph 15 of the replies which stated that "the particulars requested are matters which are within the defendants' knowledge and matters in respect of which the plaintiffs will provide further particulars on completion of discovery and/or interrogatories". The plaintiffs went on to state:

> "Without prejudice to the foregoing, the plaintiffs' plea that the defendants have infringed the copyright in the E*TAS and NTAS products by copying and/or making available and/or adapting the said works contrary to s. 37 of the 2002 Act and, in relation to the database rights, by extracting and re-utilising a substantial part of the contents of the said databases contrary to s. 324 of the 2000 Act."

On the 29th July, 2008 the defendants put in their defence denying all claims made by the plaintiffs including an express denial that there had been any use of confidential information or copyright material and in paragraph 16 of the defence it was pleaded as follows:

> "(a) It is not disputed that the fourth defendant has launched a product, ManTra, which competes with NTAS and E*TAS, however it is denied that the NTAS and E*TAS products are the only rivals to ManTra, there being a range of other products competing with NTAS or E*TAS in part or whole in the market, and it is further denied that ManTra possesses all the features of NTAS or E*TAS (and vice versa) so as to be completely substitutable products;
>
> (b) It is denied that the ManTra product was launched in November 2006 and it is pleaded that the true position in respect of the development of this product is as follows:-
>
> (i) after the first defendant served the period of his notice and left the business of the second plaintiff on 30th April, 2006 the first defendant in the course of September and October 2006 engaged software programmers to carry out the development of the product, on behalf of the fourth defendant, which subsequently was named ManTra and such development commenced in October 2006;
>
> (ii) the product was independently developed without improper recourse to any other products in the relevant industry;
>
> (iii) the first commercial release of the object code for the ManTra product was in the course of April 2007 for use in local or wide area office networks only;
>
> (iv) the second commercial release of an enhanced version of the object code of ManTra was released in October 2007, which release was the first to include the internet browser version of ManTra."

By that paragraph in their defence the defendants set out what was to remain the core element of their defence. It was admitted that the fourth named defendant's product was in competition with the plaintiffs' products but it was contended on behalf of the defendants that their product was independently developed without improper recourse to any other products in the relevant industry.

20. On the 28th July, 2008 the Court directed the parties to exchange correspondence in relation to an expert analysis of the plaintiffs' and the fourth named defendant's software. On the 16th June, 2008, an order was made admitting the proceedings to the Commercial List pursuant to Order 63A, rule 4(2) of the Rules of the Superior Courts 1986 as amended. The order of the 28th July, 2008 has not been perfected but there is no issue but that there was a direction to the parties to exchange correspondence in relation to an expert analysis of the products and that is what occurred. Following the delivery of the defence the defendants raised a further notice of particulars dated the 5th September, 2008 and that was replied to on the 22nd September, 2008. In the meantime on the 8th September, 2008 the plaintiffs had delivered a reply to the defendants' defence and in paragraph 7 of that reply there was a response to the plea raised by the defendants in relation to the development of the ManTra product which was set out at

paragraph 16 of the defence. The plea in the defence was expressly denied. On the 3rd October, 2008 the plaintiffs' solicitors raised a notice for particulars and that was replied to on the 10th November, 2008. The plaintiffs sought in paragraph 7 of that notice full particulars arising out of paragraph 16(b) of the defence. In paragraph 7 of the reply the defendants' solicitors contended that such particulars were not appropriate and were a matter of evidence and could be dealt with at the trial of the action. The plaintiffs' solicitors sought further particulars relating to the plea at paragraph 16(b) of the defence by notice dated the 18th December, 2008 and that was replied to on the 17th April, 2009 and the reply stated, *inter alia*,:

> "For the sake of clarity, paragraph 16(b)(i) of the defence states that 'after the first defendant served the period of his notice and left the business of the second plaintiff on 30th April, 2006 the first defendant in the course of September and October 2006 engaged software programmers to carry out the development of the product, on behalf of the fourth defendant, which subsequently was named ManTra and such development commenced in October 2006'. Paragraphs 19(j) of the defence states the Slovakian individuals named in paragraph 23 of the statement of claim were not employees of the fourth defendant and, rather, were 'contractors providing consultancy services to a Slovakian company that supplies programming and other services to various non-parties and to the fourth defendant'. The latter paragraph 19(j) clarifies the position in relation to individuals which the plaintiffs claim, at paragraph 23 of the statement of claim, were employees or contractors of the second named plaintiff and which it is alleged the first named defendant 'set about soliciting … to join the fourth named defendant'.

> ManTra was developed by the fourth defendant, with additional programming services provided by that Slovakian contractor company. The Slovakian company engaged to provide additional contracted software programming services is KONTAKT, s.r.o. The identity of individual employees of the fourth defendant and the nature of their employment is not a matter for particulars."

21. Following the order of the Court made on the 28th July, 2008 correspondence was exchanged between the parties and the parties' experts met on the 6th January, 2009. Christopher Dickson and Darran Thomas attended the meeting on behalf of the defendants and Harry Goddard and Michael Turner attended on behalf of the plaintiffs. Following that meeting correspondence was exchanged between the solicitors which related to the extent of the documents to be disclosed and the terms of reference for an expert review by the experts for both parties. The terms of reference were agreed and incorporated in a confidentiality agreement signed by the parties and the experts. Attached to that confidentiality agreement were the terms of reference for the experts' review which set out three questions to be addressed by the experts and also set out on a further page the material which the experts should have access to for the purpose of the expert review. Those terms of reference and the details concerning the material to which the experts were to have access were agreed following the experts' meeting and the subsequent correspondence between the solicitors. Both parties proceeded on the basis that the terms of reference for the experts' review were as agreed and as set out in the appendix to the confidentiality agreement signed by all relevant persons.

22. The terms of reference for the expert review set out three questions to be addressed by the experts. Those three questions were, namely:

> "1. Does the defendants' ManTra product contain source code that appears to be copied from the plaintiffs' NTAS product and, if so, are these copied elements substantial in nature?

> 2. Do the change history records This is agreed to change history records for ManTra from October 2006 to October 2007 insofar as they exist. (including the speed and manner in which such changes were implemented by reference to the programming techniques employed and number of programmers engaged) support a conclusion that the defendants' ManTra product was substantially copied from the defendants' NTAS product?

> 3. Does the defendants' ManTra product copy in a substantial way any functional elements and/or look and feel specific to the plaintiffs' NTAS product that are capable of protection under the Copyright and Related Rights Act, 2000?"

Question 1 expressly required the experts to address whether the defendants' ManTra product contained source code that appeared to be copied from the plaintiffs' NTAS product and question 2 also required the experts to address whether or not a conclusion could be arrived at that the defendants' ManTra product was substantially copied from the defendants' NTAS product. As part of the process leading to that agreement the parties had made a pre-investigation presentation of their products to the experts on the 30th January, 2009, which presentation was attended by a representative from both of the solicitors' firms. The experts for each side then prepared their reports which were exchanged over the following months. On the 20th April, 2009 the Court had made an order that the parties exchange expert reports on the 1st May, 2009, that date having been agreed between the parties. After the exchange of expert reports the defendants' solicitors delivered an additional report from Darran Thomas dated the 15th May, 2009 which sought to reply or respond to the preliminary reports of the plaintiffs' experts, Harry Goddard and Michael Turner. On the 28th May, 2009 at a directions hearing before the Court the parties agreed and the Court directed that the experts for the parties should meet and reduce to writing areas of agreement and areas in dispute. Following that order, the experts met on the 12th June, 2009 and a joint memorandum of that meeting of the same date was prepared and signed by each of the four experts who attended the meeting. A few days before the joint meeting and the preparation of the joint memorandum, the plaintiffs had provided up-dated particulars of the plaintiffs' claim. The document is undated but it was served on the 8th June, 2009. In the second part of paragraph 1, it was stated:

> "The plaintiffs' solicitors have written to the defendants' solicitors today confirming that, subject to certain qualifications, the plaintiffs do not intend to pursue their claim in respect of E*TAS."

In fact, no claim was pursued in respect of E*TAS and that was acknowledged by counsel on behalf of the plaintiffs during the opening of the case. No explanation or reason for the abandonment of that claim was identified and it is clear that as and from the date of the updated particulars that the plaintiffs' only complaints related to the defendants' alleged misuse of the NTAS design, source code and data base. It was stated in paragraph 4 of those particulars that in developing NTAS the plaintiffs "also used free licensed code which is available in the public domain". The particulars went on to state that in many instances that public domain code was customised by the plaintiffs for use within NTAS and that such customised code is also proprietary to the plaintiffs. In paragraph 6 the particulars identified the fact that the plaintiffs' experts "have identified specific instances of literal source code copying of the NTAS product in the ManTra product" and further stated "that while some of the source code which was literally copied might originally have been in the public domain, it was not accepted that the defendants in fact sourced this code in the public domain". It was also pleaded in paragraph 6(e) that there was evidence that the defendants took steps to conceal the fact that they copied and used in an unauthorised manner the plaintiffs' NTAS product in developing their ManTra product. In paragraph 8 the plaintiffs claimed that it was their experts' opinion that the apparent pace of development of ManTra was quite extraordinary and is inconsistent with starting the product development from scratch without the benefit of access to the plaintiffs' proprietary source

code and data based structure. Paragraph 8 of the particulars went on to state:

> "The plaintiffs' experts are presently of the view that it is not credible that the defendants' product was produced in the timescale alleged without the benefit of unauthorised access to the plaintiffs' proprietary source code and database structure."

The plaintiffs continued to claim that there was literal copying of the NTAS source code within ManTra. This is apparent from the précis of evidence of the plaintiffs' expert, Harry Goddard, dated the 15th September, 2009 where he stated at paragraph 12 his conclusion in response to the three questions, addressed to the experts as set out in the terms of reference for the experts' review. They were as follows:

> "(a) Based on the review that I have undertaken, I am of the opinion that the defendants' ManTra product contains source code from the plaintiffs' NTAS product. There is also evidence to suggest that HMW had access to the NTAS database structure and source code during the development of ManTra. The copied elements are substantial in that there are code fragments that are specific to NTAS in ManTra, even if these code fragments are few in number. Further there is evidence of the systematic migration of the NTAS database structure to the ManTra database structure that is difficult to ignore."

That statement made by Harry Goddard was confirmed by him in his direct evidence where he adopted the contents of his précis of evidence as his evidence in chief. Michael Turner also gave evidence in relation to his conclusions concerning question 1 of the questions to be addressed to the experts. He did so at paragraph 10 of his précis of evidence where he stated as follows:

> "The defendants' ManTra product contains literal source code similarities that are so distinctive that they are consistent with copying, either from NTAS or from a common third party. In the circumstances of the case it appears likely that they have been copied from the plaintiffs' NTAS product. There is evidence that the defendants' ManTra development team had access to NTAS during the design and development of ManTra. There are relatively few literal source code similarities, but their nature is compelling. The pattern of evidence in this case is consistent with wholesale copying, at least of the NTAS database structure, if not all NTAS. In reality I believe it is easier to copy the development documentation of an entire software solution than to copy specific parts. On that basis, I believe that the copied elements are substantial."

23. In the outline submissions made on behalf of the plaintiffs made at the start of the case and as set out in writing in a document dated the 30th September, 2009, the plaintiffs continued to contend that the defendants' ManTra product contained source code that was copied from the plaintiffs' NTAS product and that the copied elements were substantial. At paragraphs 26 and 27 of the written outline submissions the plaintiffs reiterated Harry Goddard's expert view that the copied elements were substantial and that there was evidence of a systematic migration of the NTAS database structure to the ManTra database structure that was difficult to ignore and also relied on their other expert, Michael Turner, and his conclusion that the pattern of evidence in this case is consistent with wholesale copying, at least of the NTAS database structure, if not all of NTAS. Even though the claim in literal copying remained as of the opening of this case there was a different emphasis in the case as put forward in the plaintiffs' submission. In paragraph 19 of the submissions, the plaintiffs contended:

> "The facts of this case are a paradigm example of abuse of confidence/copyright infringement in relation to commercial secrets in a software business. It is the plaintiffs' case, in short, that the defendants developed the ManTra software by 'reverse engineering' the plaintiffs' NTAS software. It is the plaintiffs' case that the defendants have sought to 'springboard' into a very specialised market, service by technically complex software solutions, through the unauthorised copying and reliance upon the plaintiffs' software."

24. As the plaintiffs' case was presented to the Court it became apparent that the plaintiffs no longer sought to rely on a claim based upon literal copying notwithstanding having claimed that such copying was substantial.

25. On day 22 at the commencement of his cross-examination, Harry Goddard was asked about question 1 in the terms of reference for the experts' review. He was referred to his first report and to the statement he had made therein in relation to literal copying. In response, Harry Goddard stated: (Transcript 22 – answer to question 143).

> "... I didn't approach this exercise on the basis of literal copying. I never really held the view that there was a literal copying issue at the heart of this case. I did identify source code, some of which I suggested was also in the public domain. Some which I didn't identify as being in the public domain but on that being presented to me, I would agree is also available in the public domain. And some which I think we, when I say 'we', we the experts as a group of four agreed were fragments of code that were specific to NTAS that was not identified within ManTra."

When expressly questioned by the Court as to whether or not Harry Goddard's initial view was that there was literal copying present, Harry Goddard responded by stating that he did not believe that there was literal copying to any extent. By day 22 Michael Turner had also given evidence on behalf of the plaintiff. He had stated in reply to a question in cross-examination (Transcript 16, question 351) in answering the question "Do you think it is still a possibility, in this case that there was wholesale copying of the NTAS source code?" he replied "I think unlikely". He was then questioned as to whether the common code found within NTAS and ManTra came from a third party source and he indicated that he did not know and that whilst the defendants' experts had identified a number of potential sources, he had not looked at those sources. Michael Turner had previously expressed the view that in the circumstances of the case it appeared that code was likely to have been copied by the defendants from the NTAS product and when questioned (Transcript 16, question 359) by the Court as to whether he would have used the word likely if he had known the information about the common code emanating from identifiable third party sources, he accepted that he would not have used the word likely. Due to the evolving nature of the plaintiffs' claim and the apparent abandonment of any claim based upon literal copying and also given the more limited and confined nature of the claims as outlined in the plaintiffs' evidence, the Court required the plaintiffs to deliver a clear and final statement in relation to the precise nature of the claims with which they were proceeding. A direction to that effect was given on day 25 so that the Court could clearly understand the extent of the case which was then being made by the plaintiffs. The Court directed that an amended and definitive statement of claim be delivered by the plaintiffs. That requirement was identified at the close of the plaintiffs' evidence. The plaintiffs duly delivered a document entitled "Plaintiffs' statement of case dated the 5th February, 2010". A copy of that document is annexed to this judgment. It is the claims contained in that statement of case which this Court must address. Other claims which were previously contended for by the plaintiffs were effectively abandoned by the service of that statement of case. The Court will deal with the manner in which the plaintiffs have pursued this claim later in this judgment, insofar as it is relevant, but for the purposes of determining the issues which remain outstanding between the parties it is agreed by all that the Court must address the matters raised in the plaintiffs' statement of case dated the 5th February, 2010.

26. The plaintiffs' statement of case of 5th February, 2010 can be broken down into four separate parts. In paragraph 1 the plaintiffs assert ownership of the copyright in the NTAS product including the source code database structure (including table names and column names and the relationship structure between them) and SQL creation scripts. The plaintiffs claim that their NTAS product is not only protected by copyright under statute but also that its constituent elements constitute confidential information. The second portion of the plaintiffs' case is to be found in paragraphs 2 – 5 of the statement of case which make the claim that the defendants took a copy of the NTAS product and used that unauthorised copy as a functional and/or design specification for the development of ManTra. The plaintiffs claim that but for such access ManTra could not have been developed as quickly as it was or to such a high quality. In paragraph 3 of the statement of case the plaintiffs identify in 22 lettered paragraphs from letter (a) to letter (v) particulars in support of the claim that the defendants took a copy of the NTAS product and used that unauthorised copy. Paragraphs 4 and 5 raise claims of breach of copyright and misuse of confidential information based upon the pleas contained at paragraphs 2 and 3 of the statement of case. The third portion of the plaintiffs' statement of case is found in paragraph 6 in which it is claimed that the first and second named defendants acted in breach of their contracts with the plaintiffs and in breach of their fiduciary duty to the plaintiffs. The fourth element of the plaintiffs' claim is contained in paragraph 7 which repeats a claim to the reliefs sought in the original statement of claim.

27. The Court will deal with each of the particulars identified in the lettered sub-paragraphs of paragraph 3 of the statement of case later in this judgment but prior to doing so it is appropriate to look at the manner in which the plaintiffs have conducted this case and in which their witnesses have given evidence and also at the claim made on behalf of the plaintiffs that the majority of the defendant witnesses conspired together to mislead the Court. In addressing these matters it is necessary for the Court to consider the evidence which was led in relation to the manner and circumstances in which the personal defendants and other former employees departed from the plaintiffs and also the evidence led concerning the development of ManTra.

28. The manner in which the plaintiffs have prosecuted their claims demonstrates a willingness to alter and vary such claims without explanation. They have proceeded to drop a significant element of their claim, in abandoning the claim based upon E*TAS, without any explanation. Similarly, they have been prepared to persist with claims, such as the claim of literal copying in a material respect notwithstanding that their experts either did not believe that there was such literal copying or had not made the effort or been requested to ascertain and confirm that the common source code identified in the two products emanated from common third party sources. It was not until the very end of the plaintiffs' case that there was an acknowledgement that the plaintiffs were not pursuing a claim for literal copying. A more troubling matter arose in evidence when it became apparent that the plaintiffs were prepared to plead and swear directly contradictory accounts in respect of the same set of facts in separate cases in different jurisdictions. That was indicative of an approach whereby the plaintiffs were prepared to use a set of facts in such a manner as to manipulate them for present advantage without regard to the real truth. The first named plaintiff, Koger, together with Ras Sipko and George Sipko were part of a number of defendants sued by Robert Sipko in proceedings in the U.S.A. Robert Sipko is the son of George Sipko and the brother of Ras Sipko and he brought proceedings in the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. BER-C-393-07. Copies of the documentation within those proceedings was available to the Court and in the trial brief submitted on behalf of Koger and Ras Sipko and George Sipko and the other defendants in that case dated the 11th December, 2008, it was claimed (in page 6) as follows:

> "Robert (Sipko) effectually orchestrated a mass exodus of more than fifteen employees of the Koger Entities, vis-à-vis, his disparagement of the corporate defendants and George's operation thereof, which undermined George's authority and made employees question Koger's management."

It was also claimed on page 26 of the same document that Robert Sipko's conduct precipitated the departure of James O'Donnell, the managing director of the Koger (Dublin) office and at least 15 other Koger employees to create HWM Financial Services. On page 27 of the same document it was claimed that but for Robert's disparagement of George and the Koger Entities and resulting breach of his fiduciary duty to the corporate defendants, O'Donnell and the others would not have left the employ of Koger. That claim is at complete variance with the claim pursued by the plaintiffs in this case. They claim that by October 2005 or December 2005 at the latest, James O'Donnell and the other personal defendants were conspiring together to set up HWM for their own benefit and purposes. Such claim is entirely at variance with the claim asserted in the U.S.A. proceedings that it was Robert's actions which precipitated James O'Donnell to depart and that but for Robert's actions neither James O'Donnell or the other personal defendants in these proceedings nor the other employees of Koger who departed would have left Koger. When George Sipko was cross-examined on this apparent inconsistency between the case made to the New Jersey Court and the claim made by him and as set out in his statement within the Irish proceedings, George Sipko stated that he did not have a good recollection of the relevant testimony in the U.S.A. proceedings. (Transcript 19, question 341). When further questioned on this matter (Transcript 21, question 63), George Sipko said in response to the suggestion that he had no honest belief of the truth of what had been claimed within the U.S.A. proceedings, he stated:

> "Robert, I believe, was not involved in the decision of the people who have parted from Koger."

George Sipko was then questioned as to the basis for the assertion in the American proceedings that Robert's lifestyle had caused the HWM people to leave Koger and that such claim was without truth and George Sipko responded: "I really do not have any answer to that". George Sipko sought to rely on a suggestion that the claim within the U.S.A. proceedings was made by his lawyers and that it was written by the lawyers and was not his style. The Court is satisfied that his claim to be unaware of the nature of the claim made within the U.S.A. proceedings is untrue. The evidence of George Sipko and other witnesses convincingly established to the Court that he operated Koger in such a manner as to be fully aware of day to day details of the company and to be involved in all significant decisions within the companies. The attempt by George Sipko to distance himself from the inconsistency between the case being made in the U.S.A., and the case being made in these proceedings, by seeking to rely on a claim that such inconsistency arose from the actions of the lawyers unbeknownst to him, is an explanation which this Court does not accept. The Court is satisfied that George Sipko knew that a different and inconsistent case was being made in two different jurisdictions in relation to the same set of facts. This is further demonstrated by the fact that within the brief submitted on behalf of George Sipko, Ras Sipko, Koger and the other defendants in the U.S.A. proceedings to the Superior Court of New Jersey Appellant Division in a document dated the 14th January, 2010, it was asserted that an e-mail sent by Robert to James O'Donnell "only served to undermine the operations of Koger, and indeed contributed to a mass exodus of Koger employees in late 2005/2006". (See page 27 of the brief to the appellant Court.) By January 2010 George Sipko had already given direct evidence and confirmed his précis of evidence and Ras Sipko had given extensive evidence concerning the departure of James O'Donnell and had completed his evidence. George Sipko was unable to provide any credible explanation as to why Koger had made a different case in U.S.A. proceedings and these proceedings. The Court is satisfied that in relation to this matter George Sipko and Koger demonstrated that they were prepared and willing to make entirely inconsistent cases in different jurisdictions. The inconsistent case that it was Robert Sipko's actions which participated the departure of employees from Koger was not only made within the original U.S. proceedings but was repeated in the brief submitted in the appeal in January 2010 when George Sipko was giving oral evidence to this Court. The Court is satisfied that the correct explanation for the inconsistency is not any error or oversight on the part of the American lawyers or a lack of awareness of such inconsistencies on the

part of George Sipko but rather that George Sipko was prepared and willing to put up entirely contradictory accounts in different jurisdictions in the hope of advancing his claims within each individual jurisdiction without regard to the truth.

29. In 2007 Koger Inc. brought proceedings in New Jersey against James O'Donnell and other persons. Those proceedings were ultimately dismissed on the basis of *forum non conveniens*. (Civil Action No. 07-3091 United States District Court District of New Jersey). Within those proceedings Ras Sipko on the 7th September, 2007 certified the truth of a written statement made and signed by him. Within those proceedings Koger had exhibited two contracts said to have been entered into by James O'Donnell with Koger Inc. Ras Sipko certified within those proceedings that the averments made by him were true and that if any of the foregoing statements made by him were wilfully false that he was subject to punishment and signed that certification dating it the 7th September, 2007. In paragraph 6 of that document Ras Sipko certified:

> "As of April 1, 2004 O'Donnell was working for Koger in accordance with the terms of a contract entered into between O'Donnell and Koger's wholly owned subsidiary, Koger (Dublin) Limited ("Koger Dublin") (the "O'Donnell employment agreement"). A true and correct copy of the O'Donnell employment agreement is attached hereto as "exhibit A".

Exhibit A contains an employment agreement dated the 1st April, 2004 between Koger (Dublin) Ltd. and James O'Donnell signed on page 5 by James O'Donnell and attached thereto is a document headed "Independent Contractor Intellectual Property Agreement between Koger Inc. and James O'Donnell", signed by James O'Donnell but undated. Those two documents were exhibited together as Exhibit A and it was apparent that it was being asserted that on the 1st April, 2004 James O'Donnell had signed the two documents which formed Exhibit A. The true position, which became apparent from the evidence to this Court, was that the document entitled "Independent Contractor Intellectual Property Agreement" had been agreed and signed a number of years prior to the 1st April, 2004 and that the date appearing on the original document in handwriting on the foot of page 3 of the 12-21-2000 had been removed in the document submitted to the U.S.A.. Court as had been the three single line fax heading contained on each of the three pages indicating a date of December 21, 2000, 5.44pm and 5.45pm together with the name of the party who sent the fax in Cayman together with a fax number. The fact that the American Court had been provided with a document where the dates had been removed had the clear potential to mislead the American Court. This matter was raised in cross-examination with Ras Sipko (Transcript 13, page 114 onwards) and he was handed the original of the two contracts including the contract headed "Independent Contractor Intellectual Property Agreement" with the date of the 21st December, 2000 and a second contract in the American format without the fax headings or a date and he was asked to explain why the document submitted to the American Court had been altered by the deletion of dates from the original. After requesting a break to study the documents Ras Sipko proffered an explanation to the Court that the disappearance of the dates might be explained by the fact that the contract might have been entered into in triplicate so that there could be three documents, one retained by the person who made the contract, and the other two retained by the company. Ras Sipko had accepted that the document which James O'Donnell had and the one which he found in the Koger offices in Dublin both had the date thereon. The Court did not receive any credible explanation for the apparent removal of the handwritten date or the fax headings including dates in the document submitted to the American Court. The purpose of submitting that document without dates together with the contract document of the 1st April, 2004 was acknowledged by Ras Sipko as being to suggest to the American Court that the two documents formed one agreement. Concerning this matter the Court is satisfied that the most likely explanation is that the document dated the 21st December, 2000 was deliberately altered for the purposes of assisting in creating the false impression that the two documents attached were made at the one time and therefore formed part of the one agreement. This was an illustration of the willingness of Koger and Ras Sipko to use information in a selective and misleading manner to support an argument being made to a court. The Court does not accept Ras Sipko's explanation that if he was intent on wrongdoing he would not have made available the original dated document in discovery. The fact is that within the U.S. proceedings and within these proceedings in support of the plaintiffs' application to enter this case into the Commercial List and within Ras Sipko's précis of evidence he relied on and exhibited the undated contract and it was only as a result of the deletions being identified and raised in cross-examination that the true position was established to the Court.

30. The approach of Ras Sipko to litigation was further demonstrated during his cross-examination on Day 12. He was cross-examined in relation to a statement contained in paragraph 18 of his précis of evidence concerning what had occurred on the 6th September, 2004. On that date a senior Koger consultant, Marek Polak, and two other members of his team departed the company "within seconds of each other". Ras Sipko stated in his précis of evidence that we, that is Koger, immediately launched proceedings against them in the Superior Court of New Jersey and obtained injunctions against them and the trial of the action is still pending. In cross-examination on Day 12 Ras Sipko confirmed that the claims made in that case were breach of contract, breach of non-competition clauses and claims in respect of intellectual property and trade secrets. Having been cross-examined as to what evidence Koger had to support the claims, he responded (at question 337) that they (Koger) did not have any *prima facie* evidence that Mr. Polak or either of the other two defendants had committed any wrong. He justified bringing the proceedings, without any *prima facie* evidence, on the pattern of behaviour which was suggestive of wrongdoing and that he considered it proper to institute proceedings making such claims without any *prima facie* evidence. In re-examination (Transcript 14, page 116) Ras Sipko sought to resile from the position he had stated in cross-examination. He sought to rely on the fact that Koger had obtained advice from his U.S. lawyers to institute proceedings. What is clear from the evidence is that Ras Sipko and Koger were prepared to sue former employees on the basis of a suspicion and without any *prima facie* evidence. The evidence is that neither Ras Sipko nor Koger had any *prima facie* evidence and were relying on a suggested suspicious pattern of behaviour. Irrespective of such advice as might have been received from the U.S. lawyers the evidence on this matter demonstrates a willingness on the part of Ras Sipko and Koger to institute proceedings against former employees, based upon suspicions, and at a time when the company had no real hard factual evidence to support a claim. That approach was further demonstrated by the fact that as Ras Sipko stated in evidence, that Koger immediately sued the three former employees upon their departure without any actions being taken by those persons in furtherance of the alleged illegal acts. That approach had a real parallel and resemblance to many steps taken by Koger in these proceedings.

31. The approach to litigation and the methods which Koger and Ras Sipko are prepared to use in prosecuting civil proceedings was further demonstrated in the evidence which Ras Sipko gave on day 13. Under cross-examination Ras Sipko stated that Koger intended to sue three former employees of that company, namely Eric Ivancak, Peter Hisem and Peter Kralovansky on the basis that their three names appeared in an early version of the HWM business plan. He indicated that Koger had recently taken a decision to include those three persons within the U.S.A. proceedings. When asked by the Court did he think those three persons were part of HWM's efforts to set up their business and take it away from Koger, Ras Sipko replied (question 359) "Exactly. If it proves true, the discovery will be more extensive process. If it proves that it is not the case, then we have always the option to drop the proceedings against various people." That statement is illustrative of an overall approach which Koger demonstrated through George Sipko and Ras Sipko of a willingness to sue former employees with little or no known facts to support such proceedings and thereby place pressure on former employees and also to try and create a situation where such employees would have to establish that they were not involved in any illegal or unauthorised actions. The manner in which this case is being litigated is consistent with that approach whereby the plaintiffs have shown a willingness to make extensive and general assertions against the defendants and seek to have those parties disprove such matters. The plaintiffs have also demonstrated a desire to seek further discovery when the discovery which has been obtained does not establish the claim already made by Koger. In effect, the overall approach to litigation demonstrated by Koger is that in

relation to former employees the onus is on them to prove that they have done nothing wrong and that Koger can and will sue those parties to see whether or not discovery might produce the documentation necessary to prove Koger's case and if the original discovery does not achieve that end, then further and additional discovery will be sought.

32. The Court has already identified the fact that the claim based upon literal copying was persisted with by the plaintiffs after they should have been aware that there was no real basis for same. The plaintiffs made an application for further and better discovery before the Court in July 2009 leading to an order of the 31st July, 2009 and a judgment of that date of Mr. Justice Kelly. In that judgment Mr. Justice Kelly had regard to the fact that the plaintiffs' lawyers as part of the application had pointed to the fact that their experts had identified *prima facie* breach of confidence and copyright infringement and take the view that the technical documentation must be made known to the plaintiffs in order to enable them to complete their task and properly prepare for trial. If the full position had been disclosed to the Court, then the Court would have been aware of the fact that the main expert of the plaintiffs who was dealing with literal copying was of the view, as he stated on day 23, that this was never a case about literal copying. Yet the claim in literal copying was persisted with by the plaintiffs until Harry Goddard acknowledged the fact that the case had never been one about literal copying. After Day 23 that position was acknowledged for the first time in the amended statement of the case wherein no claim for literal copying was made. Such approach is again consistent with a willingness on the part of the plaintiffs to make claims without any firm or real basis or to persist with those claims until constrained to abandon them. In persisting with such claims, the plaintiffs can pursue applications for additional discovery with the hope of establishing some wrong by a defendant or defendants. The changing nature of the plaintiffs' claim outlined in the earlier paragraphs of this judgment is demonstrative of a plaintiff or plaintiffs willing to make wide and damaging allegations and to drop or alter those allegations if the necessary evidence does not turn up.

33. George Sipko and Ras Sipko were the two witnesses called for the plaintiffs who gave evidence in relation to factual matters. The other witnesses called by the plaintiffs were expert witnesses. There are a number of factual matters in dispute in the case, some of them central to the Court's determination. At the very centre of the factual dispute is whether or not the personal defendants together with others were involved in a conspiracy. That is described in the presentation of the case on behalf of the plaintiffs as the business conspiracy case. The plaintiffs claim that their case establishes facts that demonstrate clear and contemporaneous evidence of the conspiracy to take over the plaintiffs' business, solicit employees and clients and potential clients and to misuse the clients' information. The plaintiffs identify who they claim are the key players in the alleged conspiracy. Each of those persons gave evidence to the Court. The extent of the dispute between the parties on this issue is demonstrated in the closing submissions made on behalf of the defendants in response to the allegation of a so-called business conspiracy. In those submissions it is asserted that each of the persons involved in the design and production of the fourth named defendant's ManTra product categorically testified on oath that there was no access to, or use of, a copy of NTAS in the design of ManTra and each of those witnesses also gave evidence that they were not involved in any conspiracy. In considering this conflict and addressing the central issue as to whether or not there was a business conspiracy, the Court has had the benefit of hearing the evidence of George Sipko and Ras Sipko and the alleged conspirators and of observing those persons give evidence and considering their evidence in the light of the other evidence available to the Court including the expert evidence and contemporaneous documents. That has enabled this Court to arrive at a clear and unambiguous finding that the evidence called on behalf of the defendants is to be preferred. In arriving at this view the Court has considered the evidence of the various witnesses by reference to the testimony of the experts which is hereinafter dealt with and has also had regard to contemporaneous documentation with a view to considering whether the evidence given by the various witnesses, is consistent and accurate. In carrying out that process the Court has arrived at the conclusion that neither the evidence of George Sipko or Ras Sipko is scrupulous nor is it complete or credible.

34. In a number of areas of their evidence, George Sipko and Ras Sipko demonstrated that they were less than complete or reliable and they showed a willingness to be evasive and inaccurate to such an extent and with sufficient regularity as to vitiate their credibility. This was demonstrated in a number of areas of their evidence which are hereinafter set out.

35. These areas include the following:

(a) The already identified actions of George and Ras Sipko that allowed and permitted the use of mutually inconsistent arguments to be made to this Court and to the Court in the U.S.A. That willingness continued as late as January 2010 when a claim inconsistent with the case made on behalf of the plaintiffs in this jurisdiction was propounded in the appeal documentation submitted on behalf of the first named plaintiff and George Sipko and Ras Sipko in the U.S.A. appeal in the case brought by Robert Sipko. The Court is satisfied that this demonstrates a willingness on the part of the plaintiff company through George Sipko and Ras Sipko to manipulate facts with a view to seeking an advantage within litigation irrespective of the true factual position.

(b) The already identified issue of the use in evidence of a contract document entered into between the first named plaintiff and the first named defendant which had been altered or tampered to create a misleading impression. The Court is satisfied that Ras Sipko failed to provide any credible explanation as to how he came to use such a document. The knowing use of an altered or tampered document in Court proceedings illustrates not only a lack of candour but also a willingness to seek to mislead a Court.

(c) The manner in which George Sipko dealt with his knowledge of his son Robert's e-mail of the 8th February, 2006 to James O'Donnell, the first named defendant and how that e-mail was used within the U.S.A. proceedings was another area of evidence which was relevant in relation to frankness. The Court is satisfied that in relation to this matter George Sipko demonstrated an evasiveness and a lack of regard for the full truth.

(d) The manner in which Ras Sipko portrayed the departure of James O'Donnell, within the U.S.A. proceedings and the dealings between the company and James O'Donnell in the period from March to May 2006 was partial at best. In Ras Sipko's evidence (Transcript 13, pages 57 to 63) he failed to properly or adequately address this matter. The claim made to the U.S.A. Court that James O'Donnell acted in an unprofessional manner is inconsistent with the facts adduced to this Court and Ras Sipko provided no proper explanation. (See Transcript 13, pages 61 to 66).

(e) The Court is satisfied that George Sipko failed and refused to acknowledge his true position within the company in his attempt to suggest that decisions relating to the firing of employees, particularly in Slovakia, were decisions made and taken by the local management. The weight of evidence clearly demonstrated that George Sipko exercised effective and absolute control of the company in Slovakia. The evidence available to the Court concerning his actions made that clear. One area of the evidence which illustrated this is the manner in which Martin Madej was sacked by the first named plaintiff on the 18th October, 2005. The Court accepts Martin Madej's evidence that on that date he was at home when the manager telephoned him to say that he had been fired, after five years, without any reason being identified. George Sipko in his evidence sought to suggest that the sacking was decided upon by the then manager in Slovakia, Mr. Focko.

The Court did not find this evidence credible particularly given the contrived nature of the suggested reason for the sacking. The sacking took place in the middle of October and George Sipko swore in evidence that the reason was that Martin Madej had abused the protocols that the company had in place in relation to the use of the internet in that he had used it to watch tennis whilst at work on the company's computer. George Sipko in his evidence swore to the Court that when he was in Kosice in mid-October 2006 he received a call from the manager who informed him of this abuse of protocol by Martin Madej which led to the manager taking the decision to dismiss. The matters which are suggested to have been identified must have occurred over three months prior to that date as the suggested viewing was of the Wimbledon tennis tournament which takes place in June and early July. The suggestion made by George Sipko in his evidence that, when Mr. Focko told him about what Martin Madej had done, the only thing he could do was agree with him and that therefore it was Mr. Focko who decided to sack Martin Madej, is implausible and the Court finds this claim to be incredible. The Court is satisfied that Martin Madej was not informed as to why he was to be fired and the suggestion that the reason related to the misuse of the internet some three months previously lacks any credibility. The Court is satisfied that a proper consideration of the evidence on this matter demonstrates that the local manager was in effect acting on the directions and instructions of George Sipko and that George Sipko's attempt to persuade the Court otherwise is not to be believed. Marian Klco's evidence on the firing of employees and George Sipko's attempt to stand behind "Koger Management" as being the party who made such decisions and the failure of George Sipko to identify the persons in management who made such decisions when asked to do so (see précis evidence paragraph 39) further reinforces the Court in its belief that the real decision maker on issues of firing was George Sipko. The evidence to the Court demonstrated that the position of George Sipko, as the effective owner of Koger, and his domineering personality was such that decisions to fire were his and not those of Koger management. George Sipko acted in a manner which demonstrated that he believed he had the power to fire as he threatened both James O'Donnell and Jana Potocnakova that he would do so.

(f) The Court is satisfied that the evidence given by Ras Sipko which criticised James O'Donnell for making inadequate arrangements prior to his departure from Koger (Dublin) and the way in which he portrayed that matter to the U.S. Court did not amount to a true or proper account of what actually occurred nor was it consistent with the full facts. The evidence established that prior to his departure James O'Donnell had expressly offered to assist in training someone else how to deal with the accounts, salaries and expenses and with the PAYE and VAT returns. The evidence established that this offer was made and that the plaintiffs chose not to take up such offer. (Transcript 13, page 74). Yet Ras Sipko sought to portray James O'Donnell as having made inadequate arrangements and having behaved in an unprofessional manner. The Court is satisfied that the evidence of Ras Sipko on this matter was partial and failed to have regard to the full and true facts.

(g) Evidence was led by Ras Sipko in an attempt to suggest that James O'Donnell had altered Roger Woolman's contract in March/April 2006 to facilitate his departure from his contractual obligations with the second named plaintiff. It was contended that Roger Woolman's contract had been altered as part of the conspiracy and to facilitate him working for the fourth named defendant at a later date. In giving that evidence Ras Sipko failed to identify or refer to express advice which the second named plaintiff had received from their auditors, KPMG. In cross-examination an e-mail from KPMG dated the 27th March, 2006 identified a coherent and logical explanation for the alteration in Roger Woolman's contract. The alterations in the contract which James O'Donnell supervised were as a direct result of the auditors' advice. The advices given by Sharon Byrne from KPMG were for the purpose of protecting the financial interests of the second named plaintiff and the implementation of those advices was for the benefit of the company. In relation to this matter, as with a number of other events, because of the coincidence of dates Ras Sipko sought to propound a theory of deliberate dishonesty notwithstanding that the contemporaneous documentation demonstrated the true reason for what had occurred. In the light of the contemporaneous documentation the Court is satisfied that the claim propounded by Ras Sipko that the alteration to Roger Woolman's contract was part of a conspiracy is without foundation and in putting forward that claim without reference to the contemporaneous documents Ras Sipko was providing evidence which had the clear capacity to mislead the Court.

(h) The accounts given in evidence by George Sipko and Ras Sipko concerning their dealings with James O'Donnell in the period from October 2005 to April 2006 which purported to support a claim that James O'Donnell was during that period already certain that he would depart from the second named plaintiff and was participating in a conspiracy to hide his true intentions is neither consistent with the overall evidence to the Court nor with the contemporaneous documentation. The evidence established that during that period James O'Donnell carried out a number of significant actions for the benefit of the second named plaintiff including the completion of a major contract with a third party company and staying on for a period so as to complete the accounts. James O'Donnell also sought proposals as to alterations in the second named plaintiff's organisation and his remuneration which might have led to him reconsidering his resignation. George Sipko and Ras Sipko's evidence in relation to their dealings with James O'Donnell was less than full. No proper or adequate explanation was given by either George Sipko or Ras Sipko as to why they failed to comply with their own proposal that a firm offer to James O'Donnell would be made by the 15th April, 2006 as stated in the e-mail of the 20th March, 2006. Also the evidence which they gave in relation to the identification of the terms of a potential offer to be made to James O'Donnell lacked credibility. The Court is satisfied that the manner in which the plaintiff companies, George Sipko and Ras Sipko dealt with James O'Donnell after he had been threatened with dismissal in mid-October 2005 up to the date of James O'Donnell's departure at the end of April 2006 provides the true explanation for James O'Donnell's departure rather than an alleged conspiracy. The evidence established that in October 2005 James O'Donnell was threatened with dismissal when a threat was made not only to fire him but also all senior staff in Slovakia. The date which was identified for the dismissal was the 15th December, 2005 which was the date upon which the annual bonus for employees was normally announced. The evidence also established that on the 7th February, 2006, James O'Donnell submitted his notice of resignation and that after that notice was submitted, George Sipko was in contact with James O'Donnell and requested him to continue to work out his notice and that George Sipko would try and find ways of resolving the matter. On that basis James O'Donnell agreed to work his resignation notice. Thereafter the evidence established that the initial response from George Sipko was not to address any of the matters raised by James O'Donnell in his detailed e-mail but rather to offer him a free holiday in Alaska or Hawaii. The evidence also established that by e-mail on the 20th March, 2006 George Sipko stated to James O'Donnell that as the issues which were being raised were complex, that the company would make a decision on the 15th April, 2006 and that by that date a decision one way or the other would be made. Immediately prior to that date, on the 13th April, 2006, George Sipko sent an e-mail to James O'Donnell indicating that all James O'Donnell's future business trips or visits had to be approved by the U.S.A. office in advance and that any amounts intended to be charged to the plaintiffs' clients had to be pre-approved by the U.S.A. office before they were quoted to a customer. It was suggested in evidence on behalf of the plaintiffs that this was a reiteration of existing practices but the Court did not find that evidence credible and the timing of the e-mail some two days before the date which the plaintiffs had identified for putting an offer to James O'Donnell undermined the credibility of that evidence. On the following day,

the 14th April, 2006, George Sipko sent an e-mail to James O'Donnell inviting him to a meeting to be held in New Jersey on the 8th May, 2006. There was no reference in that e-mail as to why the plaintiffs' own appointed deadline of the 15th April, 2006 was being ignored. The response to that e-mail by James O'Donnell of the 20th April, 2006 demonstrated his concern for the second named plaintiff company's interests given the uncertain position in which he had been placed and identified real matters of relevance which would have to be addressed if he were to depart. The Court is satisfied that having considered the contemporaneous documents and heard the evidence of the persons involved that the Court should accept James O'Donnell's evidence. That evidence establishes that on the 27th April, 2006 when James O'Donnell was in contact with George Sipko that it was evident that George Sipko had not given any time to considering James O'Donnell's proposals and it was against that background that James O'Donnell ceased his employment with the second named plaintiff on the 30th April, 2006. In accepting as true the evidence of James O'Donnell that the telephone call of the 27th April, 2006 between him and George Sipko made it clear that George Sipko had given no time to considering James O'Donnell's proposal, it follows that George Sipko's evidence to the contrary is not to be believed. Having considered the entire evidence in relation to the circumstances of the departure of James O'Donnell from the second named plaintiff, the Court is satisfied that the account given by James O'Donnell is credible and coherent and that the Court can rely on that account and that the claims put forward by George Sipko and Ras Sipko which suggested that James O'Donnell was lingering in the company to further a conspiracy are unfounded.

(i) The evidence led in relation to the first named plaintiff's manner and method of dealing with a former employee, Mikulas Klasovsky, indicated a willingness on the part of the first named plaintiff to adopt inappropriate and threatening behaviour towards former employees. Evidence was led that the service of proceedings on the former employee took place by means of documents addressed to the former employee's parents and in particular his mother, and those documents included a religious Easter greeting card wherein inappropriate abusive and threatening statements were made to the former employee's mother and father. Ras Sipko gave evidence that he was unaware of the method of service or of the Easter card. However given the other evidence available to the Court which demonstrated the manner in which employees were treated by the first named plaintiff in Slovakia, the Court does not find that evidence credible and is satisfied that the incident identified in evidence was a further illustration of an employer that was prepared to pressurise employees and former employees in a bullying and abusive manner.

(j) The evidence which was led to the Court which demonstrated that Ras Sipko was prepared to make an accusation in the U.S.A. proceedings against James O'Donnell that he was evading U.S.A. proceedings without having checked the true position. Evidence was led to this Court that the factual position was that papers were sent by attorneys acting for the plaintiffs to a so-called central authority in Ireland for service and that that authority returned the documents indicating that they were not the party to serve the proceedings. That occurred without James O'Donnell's knowledge and thereafter the proceedings were served though Irish solicitors in the normal manner and James O'Donnell in no way sought to evade the service of proceedings. This item of evidence demonstrated a willingness on the part of the plaintiffs to make a potentially damaging allegation against a former employee without checking or verifying the truth of the position.

(k) From an overall consideration of the evidence led in relation to George Sipko's earlier life, the Court is satisfied that George Sipko in evidence was less than complete or frank in his account relating to his military service. George Sipko endeavoured in his evidence to portray his military service as being an instance of him being sent to a labour camp when it was apparent on cross-examination that such categorisation was not consistent with the facts. Matters were raised in cross-examination concerning a suggestion that George Sipko had an involvement with the Czechoslovakian security service and a statement was made in the evidence of Paul Piringer in support of that allegation. However, given the nature of the documentation which was sought to be relied upon, and the fact that such involvement was denied and the fact that Paul Piringer did not give oral evidence, the Court is unable to form any view in relation to this matter and has disregarded all evidence concerning this allegation.

(l) George Sipko gave evidence that the NTAS design was achieved using KIT or otherwise "Koger Inherited Technology" which was a code or framework which George Sipko claimed to have designed and written in 1994. However, the evidence which was available to the Court in the testimony of Marian Klco was that even though George Sipko referred to his Koger Inherited Technology that when he was asked to present it or to explain it he was evasive. Marian Klco gave evidence that KIT never existed (see précis of evidence paragraph 55). He was not cross-examined on this belief, nor was KIT produced. The Court accepts Marian Klco's evidence that even though he worked for seven yeas on NTAS, that he never saw any use of KIT. That evidence of Marian Klco was supported by the evidence of Paul Piringer. Paul Piringer provided a précis of oral evidence and that précis was admitted in evidence by agreement and he was not subject to cross-examination. In his statement Paul Piringer stated that KIT never existed as described by George Sipko. The evidence also established that even though KIT was referred to on the first named plaintiff's website as being for sale, it was not in fact for sale. Nor was any credible or coherent evidence led as to what it contained. On balance the Court is satisfied that the reference in evidence by George Sipko to KIT and to the related technology, namely KIC "Koger Inherited Compiler", alleged to have been created in 1995, even if they did exist, exaggerated the importance of those technologies. The evidence established that any use of those technologies was historical and its very existence was far from obvious to developers working on NTAS at later dates.

(m) The plaintiffs' casual approach to their obligation of providing a Court with not only true information but also the full relevant information is demonstrated by the evidence that the Court heard in relation to the nomination of the company known as Capsicum as a proposed independent expert in the U.S.A. proceedings in New Jersey. The first named plaintiff's lawyers nominated to the U.S. Court as an independent expert on source code the firm of Capsicum. Ras Sipko acknowledged in evidence that the purpose of nominating Capsicum was for the purpose of conducting a source code review and at the time that Capsicum were nominated they had already been retained by Koger Inc., the first named plaintiff, to act as experts for the plaintiffs for the purpose of reviewing the laptops of James O'Donnell, Roger Woolman and Marian Klco. That fact was not disclosed to the U.S.A. Court and Ras Sipko in his evidence expressed the view that in nominating Capsicum as an independent agent when Capsicum were already assisting the first named plaintiff in relation to these proceedings did not represent a conflict of interest or an interest which should be disclosed. The Court does not accept that evidence and this item is a further illustration of the plaintiffs' and George Sipko's and Ras Sipko's willingness to view facts and to present facts in a partisan manner.

(n) There was a factual dispute in evidence as to whether or not George Sipko had made a death threat to Marian Klco. Marian Klco gave evidence that when he sought to resign in 1999 George Sipko had threatened to kill him and the whole of his family if he did not continue to work for him. Marian Klco gave evidence that George Sipko stated that he had contacts in the East, which Marian Klco took to mean the Eastern Bloc underworld, and that it would cost George Sipko just a few thousand dollars to order the assassination of Marian Klco and his family in Slovakia. Marian Klco also stated

that George Sipko went on to state that it was a good investment to kill him and that if he did not work for him, he would not let him work for the competition. This was denied in evidence by George Sipko. Having had the opportunity of hearing the evidence of those two witnesses and seeing them give their evidence, the Court is satisfied that Marian Klco is to be believed in relation to this threat. When this matter was raised in cross-examination (Transcript 19, page 35) and when George Sipko was asked why did he think that Marian Klco was making such a serious allegation against him, he responded by stating "It would be very good if Mr. Klco would answer this question because this is absolute … …. In other countries for such a false allegation he might be losing his head". That answer is of assistance to the Court in arriving at its conclusion that Marian Klco's version as to the death threat is to be believed but is by no means the decisive factor in arriving at such a conclusion. What is decisive is that the Court has had the opportunity of seeing the witnesses and considering their evidence which has enabled the Court to conclude that Marian Klco's evidence is to be preferred as being credible. The Court is further supported in its finding on this matter by the conduct and behaviour of George Sipko in the manner he controlled Koger and treated its employees.

36. The approach of the plaintiffs and of George Sipko and Ras Sipko to the requirement to provide the Court with a full and truthful account of what occurred and not to mislead or misrepresent matters to the Court is illustrated by the examples given in the above paragraphs. They are not the entirety of the matters upon which the Court has relied but are illustrative of the matters which the Court has taken into account. The Court also had regard to the matter, which has been dealt with above, that is the persistence with a claim of breach of copyright based upon literal copying at a stage when that claim was no longer capable of being propounded and when the Court should have been straightforwardly told that such claim was abandoned. In paragraph 25 of the plaintiffs' outline legal submissions dated the 30th September, 2009, it was stated in relation to question 3 of the questions addressed to the joint experts that "Given the strength of the plaintiffs' case in literal copying/adaptation, this element of the case is no longer as central to the issues for determination". The claim in literal copying continued to be propounded throughout the presentation of the plaintiffs' evidence and it was only on Day 22 that Harry Goddard stated to the Court in response to the question (Transcript 22, question 144) "What exactly was your initial position in relation to literal copying?" to which the answer was given "I did not believe that there was literal copying to any extent". That position should have been disclosed to the Court and for it to be withheld until an acknowledgement was obtained in cross-examination on Day 22 is demonstrative of a failure to be fully frank with the Court. The continued use of an allegation of literal copying to support further applications of discovery is also illustrative of the plaintiffs being less than straightforward with the Court. For the avoidance of any doubt the Court should say that it is apparent that the acknowledgement by Harry Goddard on Day 22 arose only when he was cross-examined on that matter and that there is no indication that there was any knowledge on the part of the plaintiffs' solicitors or counsel as to Harry Goddard's lack of belief in literal copying up until he acknowledged same in Court. Immediately following that acknowledgement an amended statement of claim was delivered which abandoned the claim in literal copying. It has been argued on behalf of the plaintiffs that such admission could only be made at a late stage due to continued investigations and the timetable that was in place. However, it is clear from Harry Goddard's answer that his belief that there was no literal copying to any extent was his initial position which would have dated from the time of his first report and certainly should have been manifest to him from the date upon which he became aware of the contents of the defendants' experts' reports which identified that any common code to be found in NTAS and ManTra had its origin in openly available third party sources.

37. Central to the plaintiffs' claim that there was the so-called business conspiracy is that key parties conspired together in the period from October 2005 and thereafter to take over or hijack the plaintiffs' business. The plaintiffs identify the persons who they claim were the key players in the conspiracy and it is claimed on behalf of the plaintiffs that the reason that they left their employment with the plaintiffs was to progress the conspiracy. It is therefore appropriate as an initial step in considering this matter to identify the circumstances in which those alleged key players departed from their employment and/or contracts with the first and/or second named plaintiffs.

38. From 1999 the first named plaintiff was effectively operated and run by George Sipko. The manner in which he conducted the business is relevant to the consideration of how and why employees and contractors ceased to work for Koger. The evidence establishes that the manner in which the business was conducted derived from George Sipko's character. It is the plaintiffs' contention, in their closing submissions, that "it is undoubtedly the case that a fair reading of the evidence is that George Sipko had shortcomings as a manager and was not a good personal communicator for reasons which might fairly be attributed to personality, language and cultural issues. … It is respectfully submitted that there is no doubting George Sipko's integrity". On the evidence that categorisation of George Sipko's actions as a manager and as a personal communicator is benign. There was direct and persuasive evidence before the Court that George Sipko conducted the plaintiffs' business in an abusive and dictatorial manner designed to humiliate, bully and threaten employees and contractors. The Court does not accept that the manner in which George Sipko carried out the business can be explained on the basis of language or cultural differences. Indeed, some of the actions of George Sipko and the procedures which he put in place appear to have the very intention of intimidating persons who worked for him. The Court heard a number of witnesses from Slovakia and has also considered their précis of evidence. There was a common and convincing theme, throughout such evidence which was to the effect that employees and contractors were subject to personal abuse, arbitrary action and a feeling of insecurity in relation to their continued employment. The Court heard those witnesses and is satisfied that their evidence is truthful and accurate. The nature of that evidence can be summed up in the words of Marian Klco when he stated:

> "The most abused were Kosice employees and employees in the N.J. office (New Jersey). They were permanently held in insecurity and it was simply impossible to mask how extremely stressed they were. The most abused person was Jana Potocnakova who was the most hardworking person in the Kosice office."

As part of the management procedures which George Sipko put in place, he arranged to communicate with the employees and contractors in Slovakia by means of daily written instructions or notes. Those instructions were not directed to individual persons but were received and seen by all employees and contractors in Slovakia. That continued to be the position until 2007. Even though on many occasions what was being communicated by George Sipko was of a personal nature, it was communicated in the daily notes and was seen by all. This resulted in the contents being known by everybody and any instance of admonishment, abuse or threat directed to one person would be seen by everybody. This process must inevitably have had the capacity to seriously undermine the morale of the persons working in Slovakia and the evidence given to the Court to that effect was both credible and compelling. The capacity of such a system to bully and intimidate employees and contractors can be seen by reference to a small number of examples taken from those available. The content and tone contained in such daily notes can be gleaned from such examples. The daily notes included the following:

> (i) "Peter, (to Peter Focko the Manager) find out who did it and deduct 50% from the November salary as a fine for the above destroyable code."

> (ii) "Programming discipline can't be accomplish without having idea about the business. Less programmer understand the business more subqueries is generating to accomplish his infinite ideas which are ending here in States to asking to create

such a SERVER … doesn't exist. I agree only that this 'garbage syntax' should be capture during a compilation."

(iii) "… If I find 'destroy' in source code by tomorrow night – last day with KOGER."

(iv) "The person who did it has no idea what he is doing."

(v) "Jana, I told you million times what we need and will not repeat any more to you – this is last time."

(vi) "The code is so purely (poorly) done, that doesn't satisfy even minimum requirements so I need your input and input of technology officer. For now, I am putting on a pending position any type of payment towards Mr. Martin Madej. I mentioned to him personally the above several times years ago. … Until he will not show ability to produce professional job no task could be assigned to him. It is only a matter of time that such code will destroy all KOGER business."

(vii) "Jana, put on hold Nov. salary for an employee who did it well/ we can't pay for it."

When cross-examined in relation to the daily notes, George Sipko indicated that when he had stated in the notes that if he "found destroy in the source code by tomorrow night – last day in Koger", that he was not threatening anyone and that he had a right to make a decision and to issue instructions. The clear evidence of the employees and contractors of Koger was that the daily notes when issued in such a public manner had the effect of intimidating the persons who worked for the plaintiffs. When dealing with a text in the daily notes which read "Peter, find out who did it and deduct 50% from November salary as a fine", George Sipko in evidence tried to justify such a statement by stating that it was an instruction for management and the manager decides. (See Transcript 20, page 46). This is a further illustration of George Sipko endeavouring to distance himself from his own actions when it was apparent from the overall evidence that George Sipko was the person who had the absolute power to fire employees and contractors and to dictate terms of employment. When George Sipko was cross-examined in relation to the daily note where he stated that he was putting on pending any type of payment towards Martin Madej, he dealt with it in the following manner: (Transcript 20, page 80),

"Question: "It was just a threat on the daily notes that all employees could see at the time, is that right? Do you think it is humiliating for an employee to see that kind of threat made to them in writing in front of their fellow employees?"

Answer: "It is a reality for him."

The Court is satisfied that the manner in which George Sipko used the daily notes created an atmosphere which led to the employees and contractors feeling insecure and bullied. The difficult and volatile personality of George Sipko is further revealed in the evidence of Paul Piringer (paragraphs 8 and 9 of his précis) who is a witness who worked closely with George Sipko and who is not involved with the defendants.

39. The Court has already outlined the evidence which it heard in relation to the sacking of Martin Madej. The Court is satisfied that the evidence establishes that the reality of the situation was that George Sipko summarily fired Martin Madej after five years service without giving him any reason. That sacking was a further illustration of the stratagem that George Sipko adopted to pressurise his Slovakian employees and contractors. In the years prior to 2005 the employees' earnings stagnated and effectively reduced because the salary was designated in U.S. Dollars and the alteration in the exchange rate with the Slovak currency resulted in a fall in real terms. The evidence which the Court heard was that a salary increase was brought in under a particular scheme. That scheme required the employees to repay a substantial portion of such increase if they left their employment with Koger within a period of five years. George Sipko endeavoured to describe this as a savings plan but the reality is that the money was not invested in savings but was paid directly, in effect as part of the salary or wage packet to the employees. Then if an employee left he or she would be obliged to repay the so-called employer contribution to Koger. This resulted in Martin Madej having to repay US$2,400 to Koger when he was summarily dismissed. George Sipko endeavoured to categorise this payment as a savings plan but the reality was that it created a situation where if employees departed within five years they were obliged to repay Koger part of what they had received in their wage packet. (See Transcript 14, pages 92 – 100). Not only did employees have to repay sums to Koger but the evidence also established that if employees failed to make such repayment, they were sued in Slovakia in the Civil Courts. The approach taken by Koger to salary increases whereby they were introduced in a manner which would result in employees being placed in a position that they would be obliged to repay a substantial portion of such increases if they left within a five year period and the willingness of the company to sue to enforce such arrangements provided this Court with further evidence as to the management style and working environment of the plaintiff companies as operated by George Sipko.

40. The impact of George Sipko's management style on the employees and contractors was significantly reduced during the twelve month period up to the autumn of 2005. This was as a result of George Sipko being absent due to his wife's illness. The evidence was that during this absence the relations between the Dublin office and the Slovakian office were excellent and that none of the difficulties which arose from George Sipko's management style were present. When George Sipko returned to a full-time involvement in the plaintiff companies in the autumn of 2005, there was almost an immediate series of events leading to the destabilisation and the undermining of the plaintiff companies. In mid-October 2005 George Sipko threatened to dismiss James O'Donnell. James O'Donnell was a key and well paid employee of the company central to the company's relationship with its clients. On the day following George Sipko's threat to dismiss James O'Donnell, he went to Slovakia and summarily dismissed Martin Madej. The Court also heard evidence that towards the end of 2005, Jana Potocnakova, who was the person responsible for co-ordinating the NTAS programming work amongst software developers in Slovakia, received a series of phone calls from George Sipko blaming her for certain problems. In her evidence she stated that at the end of 2005 George Sipko during his phone calls "started to blame me, that I had learned nothing during my work for the first named plaintiff and that I was damaging them". He repeated many times that I could be fired any moment and that my contract could be terminated immediately. She went on to state "In October 2005 when I had come to work during the night George Sipko called from Dublin and he screamed the whole time". He screamed "I'm king, I have power, I have money, I don't need Seamus, I don't need Marian, I don't need you". I had to stay in the office the whole night and I prepared something that was never used. When that evidence was put to George Sipko in cross-examination (Transcript 20, page 64) he said that he did not recall it. The Court is satisfied that Jana Potocnakova's evidence of what occurred in mid-October 2005 is an accurate account and consistent with other evidence available to the Court. Jana Potocnakova gave evidence that the incident in mid-October 2005 was the moment when she decided to leave Koger and start to look for a new job and the Court is satisfied that that evidence is truthful.

41. The Court also heard evidence from Ivan Mesarc who was a former employee of Koger. He stated that George Sipko fired people for no apparent reason and that for that reason staff felt threatened. He also gave evidence that he had seen on a number of occasions Jana Potocnkakova cry as a result of the content of a phone conversations between her and George Sipko. Martin Mesarc gave evidence that in June 2006 he arranged for a two week family holiday in Egypt and that he sent a message to the office informing them that he was taking a vacation. His evidence was that he was told he had to stay at work or otherwise he would be fired and that he decided to leave on his vacation and when he returned to work he was told that he had been fired. Martin Mesarc

gave evidence in which he confirmed his précis of evidence and he was not cross-examined on those matters. George Sipko in evidence endeavoured to suggest that that decision to fire Martin Mesarc was taken by local management and once again the Court does not accept that evidence as it is inconsistent with the overall thrust of the evidence which demonstrates that George Sipko was in complete command and was the person who decided who would be fired. A further illustration of George Sipko's approach to the firing of employees and contractors is what happened to Mr. Focko who was a manager in Slovakia. He had commenced in July 2005 and was fired on the 14th February, 2006. The evidence from George Sipko was that the reason he was fired was that he would not undergo a course of education. In this instance George Sipko accepted that he was responsible for the decision to fire Mr. Focko, as he was a manager. However, the Court is satisfied that the true position is that Mr. Focko's dismissal was just another illustration of George Sipko's control over who was or was not fired. The evidence given by George Sipko in relation to the reason to fire Mr. Focko (Transcript 19, page 86) being based upon Mr. Focko's failure to undergo a course of education was lacking in credibility and the evidence before the Court was to the effect that Mr. Focko's sacking was another example of George Sipko acting in an arbitrary and dictatorial manner in relation to the firing of employees and contractors.

42. It is in the light of the evidence relating to the employment and business methods of the plaintiff companies and, in particular, of George Sipko that the Court must consider the circumstances of and reasons for the departure of various employees and, in particular, those persons identified by the plaintiffs as key participants in the alleged business conspiracy. There was evidence before the Court that a number of employees and contractors entirely unrelated to the defendants or any of them departed from their employment with the first named plaintiff or ceased to be contractors for the first named plaintiff either as a result of being sacked or resigning. The evidence established that the prevailing atmosphere and morale within Koger was such that there was an inevitable turnover in staff and contractors and that employees and contractors were afraid that they would be fired and operated in circumstances where they were uncertain as to their future with Koger.

43. The plaintiffs claim that the evidence establishes that the defendants conspired to take over the plaintiffs' business. As part of that conspiracy it is alleged that the personal defendants or some person acting on their behalf, took a copy of the NTAS product and then used that product as a functional and/or design specification for developing ManTra. The plaintiffs allege that from October, or at the very latest December 2005, a decision had already been taken by the main participants in the conspiracy to leave their employment with the plaintiffs and that part of that conspiracy was a plan "to take out" the key Koger staff and to use those persons in developing ManTra. Koger claims that there was a sudden departure of key employees from the start of 2006 and that such departures were as a result of the defendants' conspiracy. The principal parties to that alleged conspiracy gave evidence to the Court and each and every one of them denied that there was such a conspiracy and provided an account as to the circumstances and reasons as to why they left their employment with the plaintiffs or ceased to work for them as a contractor. It is therefore necessary for the Court to consider the evidence relating to the departure of the persons who are suggested as the key participants in the conspiracy. In considering the evidence relating to this matter, the Court must have regard to the evidence hereinbefore set out concerning the business approach of George Sipko and the working environment within the Koger companies. The Court has already indicated that it is satisfied that these were such as to create considerable uncertainty and apprehension among employees and contractors as to their future or continued employment. That is a factor which the Court must take into account in considering the explanations provided and the reasons given by persons who departed from Koger and Koger(Dublin).

44. In their submissions the plaintiffs claim that the chronology in relation to the steps taken in furtherance of the business conspiracy commenced in October 2005. The chronology starts with a claim by the plaintiffs that James O'Donnell resolved, in October 2005, following, what is described in the plaintiffs' submissions, as his row with George Sipko to leave Koger and to set up a rival business. There is conflicting evidence as to what occurred in October 2005 when George Sipko and James O'Donnell met in the Dublin office of Koger (Dublin). George Sipko stated in evidence that several problems had arisen in relation to the operation of the Koger businesses and that one of the problems was that James O'Donnell was not following George Sipko's "decisions and instructions", in particular, relating to equalisation algorithms and methods. George Sipko's evidence in relation to that meeting is that he informed James O'Donnell that he had two options, the first being that James O'Donnell follow George Sipko's instructions and his decisions and that if he did not agree to do that, the second option was that he could leave the firm immediately. George Sipko went on to give evidence that in response to those two options James O'Donnell promised to follow George Sipko's instructions and decisions and that they parted on good terms. George Sipko also gave evidence that at that meeting he did not give any intimation of any intention or desire to fire all the senior staff from the Kosice office including Marian Klco. (see George Sipko's evidence in chief, (Transcript 19 pages 25 – 28). James O'Donnell gave evidence that at the meeting in October 2005, that took place on or about the 13th of that month, George Sipko commenced the meeting by stating that he was going to fire James O'Donnell and all the senior staff from the Kosice office including Marian Klco on the 15th December, 2005 and that it would be his decision and that he would tell James O'Donnell of the results of his decision at that time. There is a conflict in evidence between the two persons who were present at the October meeting and the Court favours the account given by James O'Donnell. The Court found James O'Donnell to be a more credible witness and his account that George Sipko threatened dismissal as and from the 15th December, 2005 is consistent with the evidence available to the Court concerning the management style and approach of George Sipko. In any event, it is clear, even on George Sipko's own account of that meeting that James O'Donnell was at risk of losing his employment with the second named plaintiff if he did not follow the instructions and decisions of George Sipko. There can be little doubt but that as and from the meeting of October 2005 James O'Donnell must have been apprehensive as to his continued employment with Koger (Dublin). The Court accepts James O'Donnell's evidence that following that meeting he was left in a position that he might be without a job and that even if he did not lose his job in December, he might do so at some future date and would, therefore, have to think about what he would do if he left Koger (Dublin). The claim made by the plaintiffs that the business conspiracy by the defendants to take over the plaintiffs' business commenced in October 2005 disregards the fact that following the meeting in October 2005, James O'Donnell had been placed in a position, by George Sipko, that he was uncertain as to his continued employment by Koger (Dublin). It is against that background that any preliminary or tentative steps taken by James O'Donnell towards setting up his own business must be viewed. James O'Donnell's apprehension as to his future prospects must also be viewed in the light of the fact that on the following day Martin Madej was summarily dismissed after five years employment. The Court has already found that the evidence supports Martin Madej having been dismissed for no stated reason and that such dismissal was effectively directed and controlled by George Sipko. The Court is satisfied that a true understanding of the steps taken by James O'Donnell subsequent to October 2005, which ultimately led to the formation of the fourth named defendant, is that they were as a consequence of George Sipko's threat to James O'Donnell's future employment rather than as a result of putting in place a conspiracy.

45. The evidence establishes that in December 2005 James O'Donnell and Roger Woolman registered the domain name www.hmwps.com and www.hwmsolutions.com. Whilst the plaintiffs seek to rely on the registration by Roger Woolman as being evidence of part of conspiracy, the Court is satisfied that, in fact, it merely illustrates that very tentative and provisional steps were being taken in the event that at some future date a decision was taken by James O'Donnell and Roger Woolman to set up their own business. The other steps identified in the chronology, prepared by the plaintiffs, as evidence of the "furtherance of conspiracy", in December 2005 are that Jana Potocnakova informed James O'Donnell and Dylan O'Brien that she was leaving Koger and that Marian Klco was using a PB10 folder and PowerDesigner 11. I will return later to the circumstances giving rise to Jana Potocnakova's decision to depart from her employment with the first named plaintiff but the evidence makes it is clear that her departure was not as a result

of any agreement or pre-existing conspiracy but rather directly as a result of George Sipko's own actions. The Court accepts Jana Potocnakova's evidence as to what caused her to leave and seek alternative employment. The Court also accepts her evidence when she stated that such decision was not based upon any pre-existing conspiracy. The fact that she informed colleagues that she intended to depart is of no particular relevance and given the manner in which she had been treated by George Sipko, it is in no way surprising that she would seek to share her future plans with members of the company whom she trusted. The claim that the use by Marian Klco of a PB folder and PowerDesigner 11 as of December 2005 is evidence of pre-existing business conspiracy has no basis. That finding is reinforced by the evidence which was available to the Court as to how ManTra was, in fact, developed and the evidence of the date and circumstances in which decisions were taken concerning what approach would be used in developing ManTra (this will be dealt with later in this judgment). The Court accepts the evidence given by James O'Donnell that the registration of the domain names in December 2005 arose in circumstances where during a conversation between himself and Roger Woolman, he had informed him of the difficulties that he was experiencing in Koger and that it was agreed that if the situation in Koger should deteriorate and James O'Donnell was obliged to leave, that the two of them might consider working together to create another business. The Court accepts James O'Donnell's evidence that in registering the domain names and coming up with the word ManTra that they were taking tentative or preliminary steps which would assist in the creation of a separate business in the event that a decision was taken at some future date to set up such a business. Given that the Court is satisfied that James O'Donnell's account as to the circumstances in which the domain names were registered and the name ManTra identified is truthful it follows that those steps were not part of a pre-existing conspiracy but were rather tentative and preliminary steps to put in place a contingency in the event that a future decision was taken to set up a separate business. Such steps as the plaintiffs identify as part of the conspiracy as of December 2005 are inconsistent with a pre-existing decision to set up a competing business but are rather consistent with James O'Donnell's account of tentative and preliminary steps being taken to enable a business to be set up at some future date if a decision to do so was made. James O'Donnell gave evidence that by the end of 2005 no decision had been taken by him to go out on his own or to create a competing product or business and the Court accepts the truth of that evidence.

46. The plaintiffs claim that one of the steps taken in furtherance of the business conspiracy in January 2006 was the discussion between Roger Woolman and James O'Donnell leading to a legal opinion being sought on the 18th January, 2006 from solicitors, Baker & McKenzie, as to the enforceability of non-solicitation clauses in contracts of employment by the first named plaintiffs' employees and contractors. That step is indicative of the fact that James O'Donnell and Roger Woolman continued to put in place certain preliminary or embryonic steps in the event that a decision was taken to set up a separate company or competing product at some future date. The Court is satisfied that the evidence establishes that by the end of January 2006 certain embryonic or preparatory steps had been taken which would assist in the setting up of a separate company or a competing business but that such steps were of a preliminary nature taken in circumstances where a future decision might be taken to set up such a business or to create such a product. The fact that such steps were preliminary and tentative rather than part of a conspiracy is shown by the fact that the legal opinion was not sought on any urgent basis and was not, in fact, obtained until 31st March, 2006. Such steps as were taken were done in circumstances where there was uncertainty as to the future employment of James O'Donnell and where both he and Roger Woolman were well aware of dissatisfaction within the plaintiff companies and of a potential reservoir of experts who would, in all likelihood, be prepared to work for such company if it were to be set up. It was also the case that there were good relations between the employees in Slovakia and Ireland and that therefore if James O'Donnell were to set up a competing company, such employees might well be willing to work for such company rather than to continue their employment with the plaintiffs. This flowed from the uncertainty of continued employment with the plaintiffs and the management style and working environment experienced by employees and contractors. At that time James O'Donnell and a number of the employees in Slovakia would have been well aware of certain technical or functional shortcomings in the NTAS product which could be addressed during the creation of a separate and distinct competing product. The technical evidence which was available to the Court demonstrated that the manner in which NTAS had been altered and amended over the years would have been likely to make it unwieldy and subject to problems and created a situation where it was expensive to amend and customise.

47. As part of the business conspiracy claim, the plaintiffs rely on the fact that Marian Klco gave in his notice on 2nd February, 2006 and on the 9th February, 2006 Jana Potocnakova gave in her notice. As is hereinafter set out the Court is satisfied that both those decisions were not based upon any pre-existing agreement or conspiracy but arose from separate and distinct matters personal to them and in both cases the decisions were significantly contributed to by the business style of George Sipko and the working environment in Slovakia. The Court accepts the evidence given by James O'Donnell (Transcript 25. question 134) that he did not encourage anybody to leave Koger's employment or to terminate their contractual relationship with Koger. In accepting that evidence the Court relies not only on the view that it has formed in relation to the truthfulness of James O'Donnell's evidence but also on the fact that such evidence is supported by the testimony of other persons who left Koger. The explanations given by those persons as to the reasons and circumstances for their departures confirm that such departures were in no way related to any actions taken by James O'Donnell or as part of a pre-existing business conspiracy.

48. By the start of February 2006 the situation within the plaintiff companies was unsettled. The Court is satisfied that this was not as a result of any steps taken in furtherance of a conspiracy but was as a result of the manner in which George Sipko was operating the companies and the working environment present within those companies. George Sipko was seeking to impose his directions and instructions and this was causing real problems for the persons working in Ireland and Slovakia. Matters came to a head for James O'Donnell on the 7th February, 2006 when he determined to give his notice to George Sipko and to terminate his employment. He did so in a detailed e-mail of the 7th February, 2006 and included in that e-mail was the following statement:

> "I have just returned from a trip to Kosice, where I found morale to be very low indeed. The people there are extremely distressed at the current situation. Since your return from your extended absence last year, the individuals are very upset and unhappy with the constant shouting on phone calls, the abuse in daily notes and e-mails and entirely being dictated to and ignored. They try very hard to accommodate your requests but they always have to second guess what it is you really want and so there is a possibility they get it different to your requirements. There has been a complete inability to listen to these people over the last six months. Instead they are constantly under threat of dismissal and unfair deductions from their salaries. Koger is no longer the only employer in Kosice and many are being attracted by other positions in other companies in Kosice. We have already lost a number of talented people because of this recently. What is really sad is that these people really do want to do a great job and build interesting and useful things and have the ability to do so. They are very competent people and are smart and also express concerns when it appears requested functionality may compromise the database. They should be listened to and rewarded well."

That account of the situation within the plaintiff companies, particularly in Slovakia, and the working environment is fully supported by the evidence heard by this Court. It explains why persons had left their employment with Koger and that document written in February 2006 is consistent with the evidence available to the Court as to why people had left Koger. The plaintiffs claim that James O'Donnell's e-mail of the 7th February, 2006 was part of his conspiracy to encourage persons to leave Koger. That was expressly denied in evidence by James O'Donnell and the Court accepts that evidence and is satisfied that the reason for the departure of key employees was not as part of a conspiracy but was in response to the uncertainty concerning future employment and the working

environment created by George Sipko's management style. The Court is satisfied that the e-mail of the 7th February, 2006 was not written as part of a conspiracy or to mask such a conspiracy but was written in an attempt to identify the real and actual problems which existed within the plaintiff companies as of that date and to provide an explanation as to why James O'Donnell had concluded that he should give a month's notice of his resignation. In the e-mail he indicated that he would continue to support Koger and to deal with any open issues during the one month notice period and that that month period would allow Koger to recruit another head of the Dublin office. The evidence is that during the period after the 7th February, 2006 up to the end of April 2006, whilst James O'Donnell remained employed by Koger that he continued to carry out his duties in a professional manner with integrity. Once that e-mail of the 7th February, 2006 was sent it was apparent that James O'Donnell would be leaving his employment with the second named plaintiff and that he would have to take steps to deal with the issue as to what he proposed to do with the rest of his career. James O'Donnell stated in evidence, and the Court accepts such evidence, that he wanted to stay in the same business as he was well known in the investment funds community. The steps taken by him after that date must be viewed in that light.

49. From February 2006 Roger Woolman and David Gross carried out a limited amount of work in preparing for the establishment of a potential independent business to create a product to compete with NTAS. Certain legal and financial implications were considered by Roger Woolman. In March of 2006 Roger Woolman was involved in the preparation of a preliminary and non-detailed business plan for a potential new company. The first copy of that tentative business plan is dated the 29th May, 2006 but an earlier version had previously existed as there is reference in the first copy to persons being employed as of March 2006. Those named persons included persons working for Koger and that fact is demonstrative of the aspirational and general nature of the business plan. The preliminary nature of the project is also demonstrated by the fact that no steps whatsoever had been taken to create, design or manufacture a product and the sourcing of funds had yet to take place.

50. In his e-mail of 7th February, 2006 James O'Donnell concluded by indicating that he did not really want to resign from Koger (Dublin) but that for the sake of the organisation as a whole he felt that he really had to do so and that he could not continue as he was unhappy. He went on to state that he held no personal grudge against George Sipko or his family and that his decision was based on professional reasons. If the plaintiffs' case in relation to there being a business conspiracy was well founded it would mean that those sentiments as expressed in that e-mail were entirely insincere and false. The Court has had the opportunity of seeing James O'Donnell give evidence and of considering his evidence and it is satisfied that such contention is unfounded. The description contained in the e-mail of the 7th February, 2006 as to the then morale within Koger is entirely consistent with the case now made by the defendants. It describes the working environment in Koger in terms similar to that established in evidence before this Court. Following receipt of James O'Donnell's e-mail, a telephone conversation took place that evening between James O'Donnell and George Sipko. It is common case that George Sipko's response, during that telephone conversation, was conciliatory and that he indicated that he would try and address the difficulties which had been identified in the e-mail. George Sipko indicated in evidence that he found it difficult to believe that James O'Donnell would resign and that he viewed it as his task to make an agreement, if it was possible, with James O'Donnell so that he would not leave the company. What is clear is that in the telephone conversation George Sipko indicated that he would try and find ways to resolve the issues which had been identified by James O'Donnell. There was no immediate written response from George Sipko and the only reply in writing came from his son, Robert Sipko. In particular, there was no response to the description of the working environment in Slovakia notwithstanding the stark and bald terms in which that had been described. The plaintiffs now make the case that James O'Donnell's visit to Kosice in Slovakia commencing on the 30th January, 2006 and extending until the 3rd February, 2006 was in fact part of the defendants' business conspiracy. That was reiterated in George Sipko's evidence when he stated (Transcript 20, question 64 – 66) that James O'Donnell's trip had contributed to the destabilisation in the location of Kosice and that he had also utilised the trip as part of a plan to establish a different competing business. On the evidence heard by this Court there is no basis for that contention. The Court has already stated that the description of the working environment in Kosice contained in the e-mail of 7th February, 2006 is consistent with the evidence heard by the Court: that it was not caused or contributed to by the actions of James O'Donnell but arose from George Sipko's management style and the working environment.

51. George Sipko's son, Robert, replied to James O'Donnell's e-mail on the 8th February, 2006. The evidence established that both Robert Sipko and Ras Sipko had listened in on the conversation between James O'Donnell and their father, George Sipko on the previous day. At that time Robert Sipko was the chief technology officer of the first named plaintiff. After that date difficulties arose between Robert Sipko and his father and twin brother, Ras Sipko, resulting in a court dispute which is being litigated in the U.S.A. There is no evidence that George Sipko or Ras Sipko were aware of Robert Sipko's written response at the time it was sent but George Sipko indicated in evidence that in March or April of that year he would have been aware of the e-mail from Robert Sipko of the 8th February, 2006. It is also clear that George Sipko came into possession of a copy of the e-mail sometime after it was sent as it was used by him in the proceedings brought by Robert Sipko to support his contention that it was Robert Sipko's actions which had destabilised the plaintiff companies. It was expressly relied upon by George Sipko in support of an argument that Robert Sipko had endeavoured to take over the company and had been disloyal. In Robert Sipko's e-mail he expressed the view that having listened in on the conversation between James O'Donnell and his father, that he believed that James O'Donnell's comments concerning the companies were very justified and that he too had grown frustrated over the changes of the past several months. It was also stated by Robert Sipko that James O'Donnell would appreciate George Sipko's personality and that for the most part that personality can be filtered but that others within the company who do not know him as well as James O'Donnell were in fear of him and might not understand George Sipko from time to time or most of the time. It is clear from Robert Sipko's e-mail that the conversation which he had heard between James O'Donnell and George Sipko had included the identification of what was considered by James O'Donnell to be serious and significant problems within the Koger companies. That is consistent with the evidence of James O'Donnell and is supportive of a finding that the problems within the plaintiff companies were real and genuine and were not caused or created by James O'Donnell or by the implementation of any conspiracy. It is also the case that when George Sipko obtained a copy of Robert Sipko's e-mail endorsing James O'Donnell's comments concerning the plaintiff companies as being justified, that George Sipko's response was to use that e-mail in support of an argument, within the U.S. proceedings, that Robert was trying to take over the company and was disloyal.

52. After the 8th February, 2006 James O'Donnell proceeded to work out his resignation period or notice. A situation had been reached where it was understood of all parties that George Sipko would endeavour to address the matters raised by James O'Donnell with a view to ascertaining whether or not James O'Donnell might be prepared to remain on working for the second named plaintiff. George Sipko was proceeding on the basis that he considered it unlikely that James O'Donnell would leave whilst the evidence demonstrates that James O'Donnell believed that it was highly likely that his employment with the second named plaintiff was coming to an end. James O'Donnell continued to work for the second named plaintiff and there was no response from George Sipko in relation to the issues which had been raised in the e-mail and telephone conversation. The first reply from George Sipko came over five weeks later on the 15th March, 2006. In that, none of the problems which had been identified by James O'Donnell were addressed and George Sipko indicated that he would like to assign James O'Donnell to a more challenging job, which was unidentified, and making an offer to send James O'Donnell on a two week holiday to either Alaska or Hawaii. That e-mail was responded to by James O'Donnell in an e-mail which is undated but appears to have been sent on the 17th March, 2006. In that e-mail James O'Donnell thanked George Sipko for his generous offer of a holiday and indicated that he believed that it had been offered with good intention but that he felt

that he had to decline the offer of a paid holiday as under the circumstances prevailing James O'Donnell was of the belief that it would be very insincere for him to accept such an offer. James O'Donnell's e-mail response consisted of some five and half pages and once again reiterated and spelt out James O'Donnell's opinion of there being significant problems within the plaintiff companies. On the final page of that e-mail James O'Donnell stated that he had been giving his position and his notice considerable thought and that he would really like to continue in the participation of the success of Koger but that his thinking was "that certain radical changes were required which would redress long-term imbalances in the organisation". He went on to state that George Sipko might very well be unhappy about some of James O'Donnell's ideas and concepts as described in that e-mail and that if that was so, "then it truly is time for us to now part company". The e-mail concluded by stating that Koger (Dublin) were having a client to Dublin on the 23rd/24th March and that James O'Donnell felt that for the sake of everybody involved it was necessary to clear up the situation which had been identified in his e-mails one way or the other as James O'Donnell did not feel that "it would be appropriate for me to provide services to Koger outside of a contract after the end of March and that I will have to advise the staff in Dublin accordingly as it is simply not fair on them that they did not know of the current situation". The situation referred to was the fact that James O'Donnell had tendered his resignation. That e-mail did elicit a response from George Sipko and on the 20th March, 2006 he sent an e-mail to James O'Donnell stating that James O'Donnell's e-mail had addressed various and complex issues which would need some time for consideration and that a decision one way or the other would be made no later than the 15th April, 2006. That deadline was identified by George Sipko and was chosen by him.

53. The e-mail response by George Sipko offering James O'Donnell a trip to Alaska or Hawaii which did not deal with the issues which had been raised had the effect of confirming James O'Donnell's belief that he would be ending his employment with the second named plaintiff. James O'Donnell stated in evidence that he considered the offer somewhat laughable and he had basically informed George Sipko that he would be leaving once the company audit was finished. Two days prior to the deadline proposed by George Sipko, he sent an e-mail to James O'Donnell indicating that all future business trips carried out by James O'Donnell would have to be approved in the U.S. office in advance and that also any amounts which James O'Donnell intended to charge clients had to be pre-approved in the same manner. The evidence is that that e-mail arrived out of the blue as there had been no dispute in relation to either business trips or charges. When the deadline passed without a response and given the e-mail of the 13th April, 2006 in relation to travel expenses and charges, a stage had been reached when it was clear that James O'Donnell's departure from the second named plaintiff was inevitable. On Friday the 14th April, 2006 George Sipko sent an e-mail requesting James O'Donnell to attend a meeting in New Jersey on the 8th May, 2006. James O'Donnell responded by e-mail on the 20th April, 2006 indicating that he had been hoping that the issues between them would have been brought to a conclusion by the specified date of the 15th April, 2006, as had been promised by George Sipko, and also detailing company matters which would have to be dealt with in the forthcoming weeks in the light of his imminent departure. James O'Donnell made a number of attempts to contact George Sipko by telephone and e-mail and on the 27th April, 2006 George Sipko phoned James O'Donnell. It is James O'Donnell's evidence that it was apparent from that telephone conversation that George Sipko had not given any real consideration of James O'Donnell's complaints or proposals. The Court is satisfied that that evidence is truthful as it was apparent from George Sipko's evidence that he had at no time identified any figure for a financial payment or inducement which might have encouraged James O'Donnell to remain on with the second named plaintiff. James O'Donnell ceased working with Koger (Dublin) Limited on the 30th April, 2006, returning his laptop to the company safe and locking the safe and providing his personal assistant with the safe and office keys. On the 2nd May, 2006 James O'Donnell sent an e-mail to George Sipko confirming that he had ceased providing any services for Koger (Dublin) Limited with effect from the 30th April, 2006.

54. The previous paragraphs have outlined the circumstances leading up to James O'Donnell's departure from Koger (Dublin) Limited. The departure was not precipitous and an opportunity was given to George Sipko to identify proposals to deal with problems that James O'Donnell had outlined. George Sipko did not make any response and by the date of the departure matters had progressed no further than a suggested meeting in the U.S.A. at the end of the first week of May, 2006. In the period of just over seven weeks from the date when James O'Donnell gave his notice to his actual departure, the evidence to the Court is that James O'Donnell assisted in the orderly management of the company, took steps to ensure that there would be persons available to carry out work previously carried out by him, ensured that the audit would be completed and offered to assist his replacement. The Court is satisfied he did not prolong his employment with Koger (Dublin) for the purpose of assisting in furthering a business conspiracy. The circumstances of James O'Donnell's departure as outlined above provide a context to that departure. From that evidence it is apparent that the departure was to a substantial extent precipitated and caused by the actions and inactions of George Sipko. As of the date of James O'Donnell's departure at the end of April 2006, the evolution of what was to become HMW was such that it was no more than an embryonic concept in respect of which a small number of tentative preparatory steps had been taken. Those steps were taken outside James O'Donnell's employment and HWM had by the 30th April no real existence as it had neither staff, premises nor had the development of any potential product commenced. The Court is satisfied that the manner and mode of James O'Donnell's departure from Koger (Dublin) is inconsistent with there having been any conspiracy in place. By the date of the 30th April, 2006 the state of progress in the development of a separate company, such as HWM, was so insubstantial as to be inconsistent with there having been a pre-existing conspiracy to develop such a company from the end of the previous year.

55. David Gross is also identified by the plaintiffs as one of the parties to the alleged business conspiracy. He was a former employee of Koger (Dublin) and had prior to his employment by that company been a consultant with Koger. He first carried out consultancy work for Koger in April 2001 and after Koger (Dublin) was established provided consultancy work for that company before becoming its employee in November 2002. David Gross gave evidence that in late 2003 he was contacted by the global head of Deutsche Banks fund administration business who was setting up a consultancy business and who requested him to join the new business. David Gross decided to leave Koger (Dublin) and joined Carne Global Financial Services in March 2004. The position, therefore, is that as of December 2005 David Gross was free to put in place and carry out the tentative and preliminary steps which eventually led to the setting up of an independent company. He was present at a meeting in January 2006 with James O'Donnell and Roger Woolman where the possibility of a future company was considered. David Gross gave evidence that at that stage the existence of a future company was still speculative and that there were many questions remaining. The Court accepts that that is a true statement and consistent with the facts and with the state of development or rather lack of development of the concept at that point in time. David Gross said in answer to a question in cross-examination that the state of development of what was to become HWM as of January/February 2006 was that it was very speculative at that point and that it was 50/50 whether it would go any further than a coffee table meeting (see Transcript 31, question 225). The Court is satisfied that that characterisation of the stage of development of what was to become HWM is accurate and truthful and consistent with the evidence and documentation available to the Court. David Gross's evidence is compatible with the evidence of James O'Donnell in that he stated that he was uncertain as to whether James O'Donnell would leave Koger (Dublin) and that whilst there might have been a domain name and "ideas from some persons sitting around a coffee table", "there was no real business at that point in time and it only came together after James O'Donnell left Koger".

56. A further person identified by the plaintiffs as being a participant in the business conspiracy is Roger Woolman. Roger Woolman first provided consultancy services for Koger in late 1999. In 2000 Roger Woolman commenced a business as a professional photographer specialising in the music industry and, to supplement his income from that business, he sought and obtained flexible part-time accounting work on a self-employed basis commencing with Koger in February 2001. When Koger (Dublin) was established

he volunteered to become a director to facilitate its establishment and was a director for the period from January to December 2002. After the establishment of Koger (Dublin), Roger Woolman provided services to that company until the middle of 2003 when he moved to live in Waterford. Even though he continued to reside in Waterford he re-commenced providing consultancy part-time accountancy services for Koger (Dublin) in mid-2004 and continued to do so up until the middle of September 2006. There is an issue in relation to the type and nature of the contract that Roger Woolman had with Koger (Dublin) and I will return to that later in this judgment. It is, however, clear that from the date of the incorporation of Koger (Dublin) that Roger Woolman was never in their full-time employment and when he was working for that company he was working as a part-time consultant. Roger Woolman's evidence (Transcript 32, question 235) was that he was free to offer services to multiple clients and that that is what he had been doing over the years and that he remained in that position after the amendments to his contract in the spring of 2006. Roger Woolman was part of the initial group involved in the preliminary discussions over the possibility of setting up a company and developing a product to compete with NTAS. Roger Woolman had registered the domain names hereinbefore referred to in December 2005 and in January 2006 he set about obtaining legal advice in relation to the issue as to whether former employees of either of the plaintiffs, and in particular the first named plaintiff, would be restricted from working for any future company that might be established which would be in competition with Koger. In February/March 2006 Roger Woolman commenced to work on a preliminary business plan which he identified in evidence as being of a pro-forma type and based upon a template from a business plan for another company. In the early stages the plan was theoretical as no decisions had been made and there were no premises, product or employees. This is confirmed by the evidence of Roger Woolman. The first business plan in draft form which was available to the Court is one of the 29th May, 2006 which was based upon earlier drafts. It is apparent from an examination of that document there had been some development from the earlier drafts, in that the names of potential employees were now included in the draft, as were basic costings and staff numbers. From an examination of the document it is clear that the project still remained at a basic stage and it was not until May of 2006 that Roger Woolman started to look at actual numbers and figures for the business plan in any detail. The proposed company at that stage had neither investment, premises, a product nor had the development of the product commenced. The issue as to whether Roger Woolman was free to carry out that work is raised by the plaintiffs and will be dealt with when the Court deals with the issue of his contract.

57. A further participant in the alleged business conspiracy was identified as Marian Klco. Marian Klco gave evidence to the Court and it was manifest that he is a highly experienced and able computer programmer. As hereinbefore set out, Marian Klco first worked for Koger in New Jersey in October 1998 and thereafter returned to Slovakia where he worked as an independent contractor for Koger. Marian Klco gave evidence that the working atmosphere both in Koger in New Jersey and in the Slovak offices was "very unwelcome". Marian Klco was an essential and important part of the Koger company as he was the most experienced and senior programmer. It is claimed that he is part of the business conspiracy orchestrated by James O'Donnell and that his departure from his employment as an independent contractor with Koger was precipitated by James O'Donnell. Marian Klco gave evidence as to the circumstances of his departure and swore that when he decided to leave Koger, having handed in a one month notice on the 2nd February, 2006, he did so for many personal reasons. It is also clear from his evidence that the working conditions within Koger were, in his view, difficult and unpleasant and that he was also aware that Jana Potocnakova was intending to leave the company. She would have been a significant point of contact for Marian Klco and her departure would have further impacted on his capacity to work with Koger. Marian Klco stated that by the end of 2005 he found that his employment by Koger had left him confused and tired and being required to carry out a considerable amount of work including working many weekends and working to the extent that he had only had about three weeks vacation during his seven years working with Koger. At that point his wife received an offer of a part-time job which was better paid than his job and his mother was unwell and he determined to resign. Marian Klco gave evidence (Transcript 26, questions 535 and 536) that he left for many personal reasons, one of the most significant being that his mother was seriously injured and his need to be with her and there were other factors like his wife getting a better paid job and the fact that he did not want to spend another year working twelve to sixteen hours a day, weekends, no vacations and that he simply had enough. He confirmed in evidence that he was not induced to leave Koger by James O'Donnell and that he had no discussion with James O'Donnell in relation to his intention to leave Koger before he informed Koger of such intention in February 2006. The Court is satisfied that that is truthful evidence. The Court has already referred, earlier in this judgment, to its finding that Marian Klco's evidence in relation to being threatened by George Sipko is to be preferred as opposed to George Sipko's denial in respect of that matter. That incident was part of the conduct which Marian Klco gave evidence about concerning the approach and management style of George Sipko. He identified that George Sipko threatened everybody within his employment and threatened to fire all management (see Transcript 27, question 277). Marian Klco was cross-examined in relation to the circumstances of his departure, it being suggested that he was in some way induced to terminate his contact with Koger by James O'Donnell. Marian Klco responded indicating that he did not discuss his intention to depart with James O'Donnell but merely informed James O'Donnell that he was leaving. The Court is satisfied that that account is a truthful account and that Marian Klco's departure from working for Koger was neither induced nor encouraged by James O'Donnell but was as a result of an independent decision taken for personal reasons. In those circumstances such departure could not form part of the alleged business conspiracy.

58. A further person who is alleged to have been part of the business conspiracy is Jana Potocnakova. She worked for Koger from August 2001 as an NTAS programmer based in Kosice. The Court has already dealt with the circumstances leading up to her departure earlier in this judgment. She gave evidence that by the end of 2005 the circumstances within the Kosice office were very difficult and that she was receiving telephone calls from George Sipko which were abusive and threatening and that he had repeated on many occasions that she could be fired at any moment and her contract could be terminated immediately. She described, in particular, one incident in October 2005 when she had come into work during the night and George Sipko had called from Dublin and had screamed at her for a protracted period. She stated that George Sipko screamed "I'm king, I have power, I have money, I don't need Seamus (i.e. James O'Donnell), I don't need Marian, I don't need you". She stated that she had to stay in the office all night and that after that occasion she decided to leave Koger and started to look for a new job and contacted recruitment agencies. The Court is satisfied that Jana Potocnakova's evidence in relation to the manner in which she was treated is truthful and accurate and is consistent with accounts given by other witnesses as to the abusive nature of phone calls made by George Sipko. It is clear from Jana Potocnakova's evidence that following October 2005 she visited a personnel agency and had started to view advertisements on the internet with the intention of obtaining an alternative job. She confirmed that there was no suggestion made that she might work for James O'Donnell at any future stage until after she had left Koger (see Transcript 29, question 64). The Court accepts that that evidence is truthful. Jana Potocnakova stated that it was after she was told to immediately leave Koger on the 9th February, 2006 that she received a call from James O'Donnell. She stated that the telephone call was to express his support for her and he told her that if there would be some opportunity to work together in the future he would like to work with her again. The Court accepts that that is an accurate account of what occurred as it is consistent with the embryonic stage of development of the company which led to HWM. The evidence also is that on the 9th February, 2006, the day before the telephone call with James O'Donnell, that Jana Potocnakova handed in her notice as she had obtained an alternative job in Siemens PSE in Kosice in Slovakia to commence on the 1st March, 2006. The Court is satisfied that there is no basis for the claim that Jana Potocnakova was in any way induced to leave her employment with Koger by James O'Donnell but that the true position is that the decision to do so was as a result of the manner in which she had been treated by George Sipko. The fact that she went out and sought and obtained alternative employment in Slovakia and that that was in place before she gave her notice further confirms the Court in its view that her account is truthful. Jana Potocnakova, in fact, worked for Siemens for a number of months before she commenced to work as a contractor for the fourth

named defendant in September 2006. During the period of her employment with Siemens in June of 2006, she attended a planning meeting. That meeting was at the very commencement of the ManTra product where the persons present discussed the initial concepts and ideas for ManTra. The June 2006 meeting which took place in a secluded location in Slovakia was a preliminary discussion as to the nature of a product that might compete with NTAS and Jana Potocnakova accepted in cross-examination that the meeting could be described as a meeting brain-storming the idea of a new business venture (see Transcript 29 question 134). As is apparent from the foregoing, the position is that the Court is satisfied that Jana Potocnakova left her employment with Koger for reasons that were entirely unconnected with James O'Donnell or any potential future business venture but rather was as a result of the manner in which she had been treated by George Sipko and her desire to cease being employed by Koger. It follows that there is no basis for any suggestion that the departure of Jana Potocnakova was part of a business conspiracy.

59. Another former employee of Koger who subsequently worked for HWM was Ivan Mesarc. The Court has already indicated the circumstances of his departure. In June 2006 he had arranged a two week holiday with his family in Egypt and when he informed Koger that he was taking a vacation he was told that he had to stay at work or otherwise he would be fired. Notwithstanding that threat he decided to go on his vacation as he had already paid for the holiday and when he returned he was told that he had been fired. The Court accepts that as an accurate account of the circumstances of Ivan Mesarc's departure from his employment with Koger. His evidence also is that in July and August of 2006 he was looking for a new job and had interviews with a number of companies and that in October 2006 he commenced work as a self-employed contractor for a company providing services to HWM. On the basis of that evidence there is no ground to support any claim that Ivan Mesarc's subsequent employment by a firm providing services for HWM could form any part of the alleged business conspiracy. Similarly, the circumstances of Martin Madej's departure from Koger which is described above, namely, that he was fired without notice on the 18th October, 2005, leads to the conclusion that his departure from Koger could in no way be linked to any business conspiracy. Even though he ultimately was to work for a company providing services to HWM, that only arose after he had had a period of employment from the 15th November, 2005 working for Siemens as a computer programmer. He represents one of a number of former Koger staff who were available to be employed by HWM or to carry out services for them. They were available because they had either been fired or had independently chosen to cease their employment with Koger. The fact that these persons subsequently worked on the development of the ManTra product and thereafter continued to provide services for a company working for HWM does not, on the facts of this case, in any way support a claim for a business conspiracy. Their availability arose in circumstances entirely independent of any steps taken by James O'Donnell or any of the other promoters of HWM. It was obvious that James O'Donnell was aware of these persons and of their expertise but the fact that they were available to work for HWM was not as a result of any inducement or conspiracy but as a result of other factors. The Court is satisfied that there is in each and every instance a credible and coherent explanation for their departure from Koger independent of HWM or any of its promoters. This position also applies to Mikulas Klasovsky. The evidence establishes that as of October 2006 the development of HWM had progressed to the extent that a product was in development, premises had been obtained and some finance was in place. That enabled HWM to offer employment to persons who either worked for or formerly worked for the plaintiff companies. This is what occurred in relation to Alex Gissing who gave evidence and confirmed his précis of evidence. He worked for Koger (Dublin) for a number of years and after HWM was sufficiently established to be in a position to employ persons was approached by James O'Donnell in October 2006. He decided to resign from Koger and did so on good terms and thereafter commenced to work for HWM on the 7th November, 2006.

60. The one former employee of the second named plaintiff who is in a different position from the other former employees is Dylan O'Brien. This is because the dates and circumstances of his first involvement with HWM were at a time when he was employed by the second named plaintiff. Dylan O'Brien is currently the operations manager of HWM and has worked for that company since the 16th November, 2006. Dylan O'Brien joined Koger (Dublin) as a business analyst in April 2003 having qualified from university in economics and having spent several years working in the recruitment industry as a recruitment consultant and having spent a year teaching English. In Koger his work included testing software and also client support and he reported directly to James O'Donnell. Dylan O'Brien gave evidence to the Court and stated that his affiliation was with James O'Donnell as he had worked with him for a number of years. It was against that background that when Dylan O'Brien became aware of the project to establish HWM in or around the time when James O'Donnell left his employment with Koger (Dublin), that he accepted an offer to work with James O'Donnell. The evidence establishes that it was proposed that the first involvement of Dylan O'Brien with the HWM project would be to attend the brain-storming meeting in Slovakia at the start of June, 2006. There is no evidence of Dylan O'Brien being involved in the HWM project prior to that date. Due to his decision to attend the meeting at the start of June 2006, Dylan O'Brien resigned from his employment with Koger (Dublin) on the 30th May, 2006. He then went on holiday and he used that holiday to attend the HWM meeting in Slovakia at the start of June 2006. At that time he was still an employee of Koger (Dublin) and even though he had resigned he had not worked out his notice period and was on holiday from his employment. In those circumstances, Dylan O'Brien had placed himself in a problematic and difficult position as he continued to owe obligations to his employer. The evidence shows that at the time Dylan O'Brien travelled to the brain-storming meeting in Slovakia that it was his intention to resign from Koger (Dublin) but attending that meeting whilst still employed created the potential for a real conflict of interest. The Court does not have to directly address this issue as there is no claim in person against Dylan O'Brien. This matter is further complicated by the fact that upon his return to Koger (Dublin), after the meeting in Slovakia, Dylan O'Brien was offered an improved package and an enhanced position within Koger (Dublin) and accepted that position. He remained working with Koger (Dublin) for a number of months ultimately resigning in October 2006. Dylan O'Brien gave evidence to the effect that when he had decided to resign for the second time that he then informed James O'Donnell of his decision and of his desire to join HWM and it was agreed that he would do so and he did so from the 16th November, 2006. Dylan O'Brien was cross-examined in relation to his loyalties and clearly in the period from the start of June 2006 up to his final departure from Koger (Dublin) there is an issue in relation to a potential conflict of interest or split loyalty. However, there is no evidence available to indicate that any material, documentation or information was in any way transmitted to HWM or its promoters and the fact that it was Dylan O'Brien who informed James O'Donnell of his second resignation is indicative of that being the true state of affairs. After Dylan O'Brien had accepted the enhanced salary and position in June 2006, there is no evidence that HWM or its promoters had any contact with him until he resigned for a second time.

61. The meeting in Slovakia at the start of June 2006 was the first meeting at which the potential product of HWM was considered. It lasted a number of days and the Court has had the benefit not only of oral evidence as to what occurred at that meeting but also has had the opportunity of considering photographs of the flip charts that were used and generated at that meeting. It is quite clear from the evidence and the contents of the flip charts that the potential product of HWM was at an embryonic stage and that the discussions were conceptual and exploratory. There is no indication that that meeting had any access to the NTAS product even though it is manifest that a number of the persons attending the meeting had detailed knowledge of the NTAS product, having worked with it and developed it over a number of years. Such knowledge of the NTAS product as was required to enable a competing product to be developed was known by a number of persons at the meeting from their own knowledge and without the need for any access to the NTAS product. The contents of the flip charts identify areas of discussion. Those charts and the evidence of the persons attending the meeting leads the Court to conclude that the NTAS product was not used nor was it required to be used at that meeting. The presence of Dylan O'Brien who had a potential conflict of interest is not a matter of any great relevance in relation to the early conceptual design and approach to the ManTra product. It is clear from the flip charts and the testimony of the other persons present at the meeting that it was the design concept and makeup of a potential product which was under consideration.

Dylan O'Brien was neither a computer programmer nor a software designer. He was a tester and, therefore, given the content of the meeting he could have some input into the discussions. However, he gave evidence that during the first two or three days of the meeting he had no input whatsoever. Dylan O'Brien categorises his involvement in that meeting in his evidence (Transcript 32, question 525) as being effectively zero from an input point of view. The Court accepts that evidence as there were trained and experienced persons present, other than Dylan O'Brien, well capable of dealing with an early design concept. The position, therefore, is that even though there is an issue in relation to a conflict of interest on the part of Dylan O'Brien, there is no claim against him in person nor is there any evidence that the fourth named defendant or its promoters gained any real benefit from his attendance at the meeting in Slovakia at the start of June 2006.

62. The central contention of the plaintiffs' case as set out in the amended plaintiffs' statement of case is that the defendants had access to and use of an unauthorised copy of NTAS and that thereby the defendants were able to develop the fourth named defendants' ManTra product and release it onto the market at an earlier date and to a higher quality. The Court must therefore consider the evidence which is available to it in relation to the development of ManTra and the speed and manner in which it was developed. The first and significant point is that consideration of all the evidence and documents available to the Court does not provide any direct evidence showing that the defendants had a copy of NTAS available to them including during the period of the development of the ManTra product from October 2006 to March 2007. Examination of the evidence and documents in relation to ManTra does not demonstrate the evidence of the presence of NTAS specific files nor actual disc copies of NTAS nor logs showing that NTAS software was copied nor screenshots showing that NTAS was in use by the defendants. The plaintiffs seek to rely on indirect evidence which is categorised by the defendants in their closing submissions as a claimed "deductive inference". Specifically, the plaintiffs claim that this arises from the speed of the development of ManTra. On the balance of probabilities the Court is satisfied that the inference that the plaintiffs invite the Court to make is a false and erroneous inference. The Court's finding on this matter is based in part upon the categorical and absolute denial by each of the persons involved in the development of ManTra that they had any access to a copy of NTAS. The Court is satisfied that the evidence given by these witnesses was both credible and coherent and represents a true account of what occurred. In arriving at its view that there was no access by the defendants to a copy of NTAS, the Court has been reinforced in that finding by the evidence which is available to it in relation to the development of ManTra.

63. The evidence led by the plaintiffs to support a claim that ManTra was developed in an excessively short time period and to a quality that could not have been achieved other than by access to a copy of NTAS is based upon flawed deduction and reasoning. In particular, the deductive inference which the plaintiffs ask the Court to make makes no real or proper allowance for the knowledge, experience and expertise of the individual defendants and the persons working with them in the development of ManTra. The evidence establishes that those persons had the exact and precise expertise, training, information and knowledge necessary to enable them to develop the ManTra product. An examination of the ManTra product does not, on the face of it, indicate or manifest how or in what manner that product would have benefited in its development from access to NTAS. The products are fundamentally different in design. The Court will return to this matter later in its judgment. It is also the case that an examination of ManTra, given its fundamental differences from NTAS, established that ManTra is not an adaptation of NTAS either for the purpose of the Copyright and Related Rights Act 2000 or otherwise.

64. The evidence establishes that it was at the meeting in Slovakia at the start of June 2006 that the development of ManTra commenced. Present at that meeting were James O'Donnell, Marian Klco, Jana Potocnakova, Martin Madej and Dylan O'Brien. The Court has heard evidence from each of those witnesses and has also had access to photograph copies of a number of flip charts that were used at that meeting. Those flip charts identified features which it was proposed might be present in a transfer agency system to be developed. Copies of the flip charts survived as a result of Marian Klco taking photographs of same for his own use. Those photographs have been of considerable assistance as they demonstrate and confirm the oral evidence as to the embryonic status of development and confirm the categorisation of that meeting as a brain-storming session. The persons present at that meeting had considerable and diverse knowledge and expertise of transfer agency systems. James O'Donnell had long experience of the agency transfer business and he had extensive contact with clients and was fully cognisant of the requirements of potential clients or users of such a system. Marian Klco had worked as a professional software developer since 1994 with experience in PowerBuilder and Sybase ASA. He was not only an expert professional developer but he also had a detailed knowledge of the NTAS product and of the uses which clients required of that system and he had worked from September 1998 to March 2006 as the lead programmer on the NTAS product. In his evidence to Court Marian Klco demonstrated an excellent knowledge of and expertise in computer program development. Martin Madej had worked as a software programmer on the NTAS product for Koger from 2000 until he was dismissed on the 15th October, 2005. Jana Potocnakova had worked in a senior role in the development of the NTAS product and had been the person who had dealt with the day to day issues of bringing together the requirements of the clients and matching those with the technical expertise necessary to satisfy such requirements. In considering the nature and speed of the development of ManTra, neither the plaintiffs nor their experts gave any real or sufficient allowance for the knowledge, experience and expertise of the persons developing ManTra. Between them these persons had a detailed and comprehensive knowledge of transfer agency systems and the requirements of clients and potential clients using such systems and the mastery and know how of computer programming and the development of software using PowerBuilder and SQL based database management systems. To a large extent this arose from their work experience with Koger where they had acquired a detailed knowledge of NTAS including its strengths and weaknesses. This knowledge would have been available without the need for any copy of NTAS due to their thorough involvement with the NTAS product. There was also a failure on the part of the plaintiffs' witnesses and their experts to make any sufficient allowance for the manner in which the persons developing ManTra were able to carry out their work. The people involved in the development were free to work in a constructive, co-operative and dynamic environment in contrast to the environment within Koger. The persons developing ManTra were in open, direct and constant contact with one and other. Having heard those persons give evidence the Court is satisfied that they had a good working relationship and a real ambition to succeed in the development of the ManTra product. The manner in which the persons who developed ManTra were able to proceed enabled them to develop the product in a truly agile environment where there was little or no bureaucratic requirement and where the necessity for documentation was limited and where the knowledge as to the requirements and business needs of potential clients was well known. This resulted in a situation where there was no need for detailed specifications or written directions.

65. It was part of the plaintiffs' case that the defendants used NTAS as a visual, functional specification when designing ManTra. This claim was not particularised and the plaintiffs, including their expert, Harry Goddard, were unable to identify any specific part of ManTra which demonstrated a manifestation or a trace of the suggested design by reference. It is also the case that the architecture of the PowerBuilder code in NTAS is fundamentally different from that of ManTra. The expert evidence available to the Court is that once a particular applications architecture is established then it is difficult to convert it to another architecture, particularly in circumstances where the two architectures are fundamentally different. Whilst it was alleged on behalf of the plaintiffs that the structures are similar, the evidence of the defendants and their experts identified appreciable differences. In the database structure the entities table in ManTra fulfils the function of up to eight tables in NTAS. When compared, the NTAS and the ManTra database structures contained substantive differences. It is also the case that such similarity between the two products as is present is entirely to be expected as the two products were designed and produced for use in the same business and with the same requirements. The appreciable difference between the two products is further demonstrated by the fact that the structure of the

data access code is different in the two products. It is also implemented using two different platforms and the two approaches to data access are different. The ManTra product uses SQL stored procedures while in NTAS it is contained in PowerBuilder code. In those circumstances it is difficult to see how the ManTra data access code could have been derived from that contained in NTAS. The evidence in Court established that the user interfaces of the two products are dissimilar. There is a certain visual resemblance in that both are Windows applications but other than for that the interfaces are unalike. An examination of the two products also demonstrates that in the main areas of meaningful functionality the functions were implemented in different ways. This is demonstrated by the fact that the ManTra World-Check solution was less complicated and generic than that of NTAS and by the fact that the ManTra solution for fee calculation was more generic than that of NTAS and that the ManTra solution for integration used Microsoft Integration Services whilst the corresponding NTAS solution used a proprietary design known as GRID.

66. The one true area of similarity between the two products is in the requirements that they meet. Given that they are addressing the same business this is inescapable. The plaintiffs contended that this demonstrated that NTAS had been used as a functional specification for ManTra. However, that contention disregards the fact that the persons developing ManTra possessed of their own knowledge a detailed and extensive awareness of such requirements and how to meet them. The plaintiffs failed to demonstrate to the Court how the persons developing ManTra would have needed to use a copy of NTAS to remind them of such requirements or how to implement them. The Court also has regard to the evidence of Joan Kehoe who is the founder and chief executive officer of a company known as Quintillion which is a licensed fund administration services provider and who has used both NTAS and ManTra. She gave evidence that ManTra contains a number of features which are not within NTAS. It is against the above background as to the design and function of the two products that the plaintiffs are, in effect, forced to limit their complaint to a claim that ManTra was developed in an excessively rapid timeframe and that the defendants must have designed ManTra by reference to NTAS. They also contended, insofar as it could be argued, that there were no specific instances to confirm that the design of ManTra arose by reference to NTAS and that such lack of incidences arose from the fact that the defendants concealed such evidence. Having considered this the Court is satisfied that the evidence establishes that ManTra was not developed within a timeframe or to a design quality which required access to NTAS nor was ManTra designed by reference to NTAS. Indeed, as pointed out elsewhere in this judgment, access to a copy of NTAS would not have been of any real help to the persons developing ManTra. It would therefore follow that the lack of evidence showing that ManTra was designed by reference to NTAS is not caused by concealment but rather to the fact that ManTra was not designed by reference to NTAS. The Court is satisfied that the weight of evidence demonstrates that ManTra was developed at a speed and to a quality which arose from the abilities, expertise and knowledge of the persons developing the product and from skilful and informed design choices.

67. The evidence of James O'Donnell as to what took place at the June 2006 meeting was that the purpose of that meeting was to discuss a business proposition and to outline, in the light of what the market was doing, what might be built or created which was different and obviously better than the existing products and, in particular, the plaintiffs' product. He stated that the purpose of that meeting was "Really to start to put thoughts as to the architecture and technology and database design functionality of the system, but more so to ensure that these guys would wish to join me, effectively and collaborate with me" (Transcript 25, question 208). The copies of the flip charts which survive from that meeting show that the discussions included the major areas of the design system and the germinal thoughts in relation to a database design. Those copies are entirely consistent with the individual oral evidence of the persons who were present at that meeting and the evidence of those persons looked at in the round is both coherent and logical. The witnesses confirmed in evidence, which the Court accepts, that the design concepts and data structure discussed at that meeting was not generated by reference to NTAS. The evidence establishes that there was no further significant development of the ManTra product in the months following June 2006 meeting until the meeting in October of that year. In the intervening months there had been progress in relation to the business plan, the circulation of that plan and the raising of limited finance. By October 2006 HWM had progressed to the extent that there was certain finance in place and some persons were employed. It was then possible to arrange a trip to Kosice in Slovakia in October 2006 so that a discussion could take place to identify the main components of a new system that HWM proposed to build.

68. In the first week of October 2006 there was a meeting of approximately a week's duration held in Kosice to discuss the development of the ManTra product. That meeting was attended by James O'Donnell, Roger Woolman, Marian Klco, Jana Potocnakova, Martin Madej and Ivan Mesarc. In advance of that meeting an agenda was prepared by James O'Donnell. One of the matters to consider was the choice of the technology platform. James O'Donnell described that meeting in the following terms (Transcript 26, question 423):

> "We then, when I got finance, arranged a trip to Kosice in October and we started to discuss the main components of the system we wanted to build. Effectively as a milestone for that week we said, well, we should get at least the core tables for the database put together. We essentially said, okay, we needed to break it down into the counterparties that were all going to be associated with transactions which ultimately became the entities. We then needed to have tables that associated investment itself which was any specific rule for the class and any specific rule for the accounting question as essentially a separate layer. Then we had a set of discussions as to what the models of performance fees we would be trying to accommodate in the system which evolved into a discussion as to the database design for valuations or navs, using the name at that point in time. Then we had a separate section of discussion as to what the type of processes we would be recording in ManTra, from essentially commitments down to orders to trades and so on. So each of those four distinct areas has corresponding tables behind them and essentially the counterparties, we use a table entities and as I say we were aware of the sort of structures we needed to cover and using NTAS language there was fund group, counterparties we had to track, there was portfolios, there was legal entities, there was series groups, there was fund IDs, there was holders, there was holders accounts and there would be related parties. These are essentially all of the contacts, all of the counterparties within any transaction, but of course there is also structures in there.
>
> Now, in case there is any conflict here, each of those tables exists separately in the NTAS system. The nature of the relationships exists as a function of the business. So in essence we were able to say, well, we can put all of the common elements of each of those relationships into one table and we'll call it entities and we will be able to create relations between the parent and child for each of those and track those on the entities tables."

That description is compatible with the evidence from the other witnesses who were present at that meeting. That evidence demonstrates the early stage of development of ManTra at that point in time and it establishes the framework and design decisions upon which ManTra was created.

69. An issue which was raised in the cross-examination of Marian Klco by the plaintiffs related to the decision to use PowerBuilder and Microsoft SQL at that meeting. It was suggested that the agenda for the October 2006 meeting did not identify the issue of a choice of technology platform but rather confirmed one which had already been made. In support of this contention the plaintiffs relied upon the fact that in July 2006 Marian Klco had created a stripped down version of PowerBuilder base foundation classes and the plaintiffs argued that this demonstrated that a decision to use PowerBuilder had already been made and that the work done by Marian Klco in

creating the stripped down version in July 2006 established such claim. Marian Klco gave evidence as to the circumstances in which he came to create the stripped down version of PowerBuilder base foundation and the Court accepts that evidence as being true. The Court is supported in that finding by the fact that James O'Donnell was in correspondence, on or about the 10th October, 2006, with an external company in respect of the use of Java for the production of ManTra. There is also an express reference to the potential use of Java as a platform to be used for ManTra in the agenda for the October meeting. There would be no logic in referring to Java if a decision to use an alternative platform had already been made. In those circumstances the Court is satisfied that as of the commencement of the October meeting no decision had been taken as to the platform and that it was as a result of the discussions at the meeting that the defendants proceeded to create ManTra's source code using PowerBuilder and Microsoft SQL.

70. Arising out of the October 2006 meeting, Jana Potocnakova recorded the structure for 28 database tables and they were moved into a PowerDesigner file called PDM (Physical Data Model) folder from a CDM (Conceptual Data Model) folder on the 12th October, 2006. The evidence establishes that each of those 28 tables have subsequent modification dates and in their present state, that is the state in which they are available to the Court, carry table names such as "currencies", "countries", "languages", and "addresses". When it was put to Harry Goddard, an expert on behalf of the plaintiffs, (Transcript 17, question 46 onwards):

Did he accept that every one of these tables has been altered and did he dispute Mr. Thomas's statement that 3,074 changes took place between October and the 12th May, 2007 in relation to the database?

He replied that he had not counted them but that there was a lot of them.

71. Part of the plaintiffs' case of an alleged use of an unauthorised copy of NTAS is based upon the claim that the NTAS copy served as a reminder to the defendants of what functions it was necessary to implement and to include in their program. The evidence demonstrates to the Court that the individual defendants and the persons working with them would not have required any real assistance to remind them as to what functions were necessary to implement. This arose from the fact that those persons had extensive pre-existing knowledge of NTAS and of the hedge fund or transfer agency business. It is clear that the functional requirements are relatively basic and straightforward to any person who was expert and knowledgeable of the transfer agency or hedge fund business. A number of the persons developing ManTra had long and detailed exposure to the NTAS system and would inevitably have come to know the functions which that system provided. The NTAS system was widely used by third parties and had been promoted by means of a demonstration CD. There was disputed evidence as to whether or not the demonstration CD was secured. However, what is clear is that the persons developing ManTra had been involved in the development and implementation of NTAS for a number of years. In NTAS, details of the database structure are in a number of instances displayed to the users of the program. In fact, to avail of certain features in NTAS, the user must understand the database structure. The evidence was that exposing a database structure in this manner is unusual but the fact is that the Koger NTAS product had been developed in this way which had the inevitable consequence that persons frequently using NTAS would have become familiar with the NTAS database structure. It is also the case that the database structure used in NTAS represents well known terms, concepts and relationships. The evidence to the Court was that the terms, concepts and relationships contained in the NTAS database structure are commonly understood in the field of hedge funds and transfer agency systems. An independent expert producing database structures for these businesses would be required to produce similar data models. This flows from the fact that the database structure is merely a depiction of widely understood business concepts and relationships using common business terms. It is also the case that significant aspects of the NTAS system had been made public by the plaintiffs at different times and the plaintiffs' website carried screen shots of NTAS in operation for a number of years. The present Koger website includes information about features of NTAS. It is also the case that publications, such as the Barrington Report which was produced in evidence, have details in relation to the functionality contained in NTAS.

72. The Court is satisfied that on balance the evidence supports a conclusion that the experience and knowledge of the persons developing ManTra was such that they were well capable of generating the 28 database tables incorporated into their data model on the 12th October, 2006 from memory and pre-existing knowledge without any requirement to use a copy of NTAS.

73. The plaintiffs contend that an NTAS copy must have been used as a reminder to the defendants of what functions to implement. Given the amount of information in the public domain, the experience and knowledge of the persons developing ManTra and their knowledge of the hedge fund or transfer agency business, this does not necessarily follow. Indeed, given the differences between NTAS and ManTra and the fact that the NTAS user interface is different from ManTra's, access to NTAS during the development of ManTra could even have been counterproductive. This follows from the fact that since the NTAS user interface is different from ManTra that even similar functions would tend to look distinct and work in a different manner. Therefore, if a person developing ManTra was using NTAS as a reference there would be a need to translate between the two and that would tend to slow down the process of development and to create a situation where confusion could arise.

74. The defendants gave evidence of how they developed ManTra. It was suggested to them in cross-examination and through the expert evidence called on behalf of the plaintiffs that there were two main areas where copying had occurred, namely World-Check interface and fee calculations. The defendants' evidence in relation to the development of the World-Check interface in ManTra was that the design began with a format similar to that used in NTAS. The defendants' design involved a generic two table solution designed to work not just with World-Check files but with any similar files from other third party providers. However, during the design process the defendants identified a preferred approach and ultimately used a simpler design which would work only with World-Check files. The case made by the plaintiffs is that the initial ManTra design for World-Check is so similar to the NTAS design that the defendants must have taken that design from a copy of NTAS. However, that argument fails to have regard to the knowledge and experience which the ManTra developers had of the NTAS system and the World-Check interface. That knowledge and experience was such that the defendants' evidence that they could replicate the NTAS design for World-Check from their own memory of previously implementing it in NTAS is credible. Persons with a high level of proficiency in a particular area exposed over a long period of time to working with software will inevitably acquire a detailed knowledge of the structure and algorithms in use. That is knowledge which would be built up over a period of time and would be retained by the persons. Recall would not require the use of a copy of NTAS. The plaintiffs and their experts also point to the similarities in the column names used in the World-Check interfaces in ManTra and NTAS. It is suggested that this is evidence that the ManTra design or format was copied from NTAS. The evidence to the Court, however, demonstrated that the common column names come from the data file provided by World-Check. The similarities in column names therefore emanates from a common source rather than from the use of NTAS. Indeed, this claim as pursued by the plaintiffs was a further illustration of a willingness on their part to search far and wide for any similarities and if there were such similarities to claim that such was proof of copying rather than consider potential alternative explanations when they were readily available as in this case, namely that the similar column names emerged from the use of the same source.

75. A second significant area which the plaintiffs claim demonstrates an instance of copying relates to fee calculations. However, a consideration of how fee calculations are dealt with within NTAS and ManTra demonstrates that they are implemented in an entirely different manner. It is quite clear that fee calculations would be a central and integral part of any transfer agency system or system

being used within the hedge fund industry. The defendants' design within ManTra for equalisation fee calculation uses a different approach from NTAS. Within NTAS, each equalisation method had its own piece of code and this results in a situation that when it is necessary to add a new calculation method then a new program code must be written. The persons who developed ManTra would have been well aware of that design approach and of the problems and expense that it caused when it came to adding a new calculation method. In ManTra different fee calculation methods are implemented in a single piece of code. Its behaviour is controlled by configuration parameters that the user enters. That approach makes it possible for a person using ManTra to define new equalisation fee methods without the need for any additional code, thereby removing the necessity of writing any new program code. The Court is satisfied that the implementations as to fee calculations are so different within NTAS and ManTra that there is no basis for the claim that the ManTra fee calculations method emanated from access to an NTAS copy. It is the case that the ManTra design contains implemented fee calculation methods, such as formulae, which NTAS also implemented, however, the methods used amount to principles and are in the public domain and therefore would not be present as a result of copying and would not be protected by copyright.

76. In their submissions the plaintiffs identify as the first building block of their technical case the allegation of the implausible development velocity of ManTra. In this they particularly rely on the report of their expert, Harry Goddard, which is exhibit HD7 in the papers before the Court. It is claimed that that report demonstrates that the defendants' case in relation to the development velocity does not stack up. After the October 2006 meeting, the defendants' development team met over a two week period in early November 2006. The technical experts who had embarked on creating ManTra were present and in direct and continuous contact with one and other. Harry Goddard in his report conducted an analysis from the documents which were available which led him to the conclusion that, given the quality of the ManTra product and the development and design of the source code, both of which he rated very highly, and having examined the materials, as design artefacts, he came to the conclusion that the pace of development was extraordinary. He expressed the view (Transcript 23, question 104) that the pace of development was extraordinary for a small group of people and that the data in front of him would suggest that with no design, in a period of some months two or three people built about 80% of the application. A difficulty which arises in relation to Harry Goddard's consideration of this matter and his expert opinion thereon is that he was relying on the data material and documents which were available when the evidence establishes that a considerable proportion of the design and source code development took place without the generation of data, material or documents. In limiting his consideration of development velocity to such documents, records and data as were available Harry Goddard failed to consider the full picture. This is illustrated in the cross-examination of Harry Goddard (Transcript 24, question 148). In commenting on the suggestion that the data indicated a lack of real activity from the 1st November to the 17th November, 2006, which included the two week period where the defendants' experts had met together for the purposes of developing ManTra, Harry Goddard explained his assertion in relation to there being a lack of development activity by stating that he was specifically commenting in relation to e-mail activity and design discussions. He commented on there appearing to be radio silence during that period and that separately there is activity in the PDM file. The evidence establishes that what was in fact occurring during the first two weeks of November 2006 was that the development was taking place in an agile manner with all the developers being in the one location and directly communicating with one and other. That fact explains the absence of e-mail activity and the so-called radio silence and illustrates the frailty of the approach adopted by Harry Goddard in limiting his consideration to documents, records and data and paying no regard to what was actually occurring or the evidence in relation to same.

Harry Goddard in his evidence questioned as to how the defendants could have produced ManTra to such a high quality within such a short timeframe. His conclusion was that this was explained on the basis that the persons developing ManTra had access to and use of an unauthorised copy of NTAS. In considering this issue the Court has had the benefit of hearing in evidence the persons who actually developed ManTra and, in particular, the central figure of Marian Klco. The evidence available to the Court from James O'Donnell, Marian Klco and the other persons who participated in the development of ManTra identified a dynamic environment where the participants had direct and meaningful contact with one another. This was in contrast to the situation that existed in Koger which was described by Marian Klco in his evidence (Transcript 27, question 257) in the following terms: "In Koger it was simple: one day I was working on a task next day the person disappear and nobody know what happen. So that it was like working always with a brand new team". The evidence identified that when ManTra was being developed, it was done by a small highly experienced and able group who had the correct mix of skills in all the relevant areas and were working in an environment where there was a clear demarcation of responsibilities. The group of people included persons experienced in business analysis and who had a wide ranging pre-existing knowledge of the hedge fund transfer accounting business. The Court is satisfied, having had the opportunity of observing those persons give evidence that they formed a team which was capable and experienced and had knowledge of a technology similar to that used in the development of ManTra, namely PowerBuilder with an SQL based relational database. The persons working on the development were well aware that the financial wellbeing of HWM was dependent upon an early completion of its product. Due to the background of the developers, those persons had a detailed and intuitive understanding of what was required and from their extensive experience within Koger would have developed an appreciation of what would and would not work. Also in addressing the argument concerning development velocity, a proper consideration of the evidence must appreciate that ManTra started out with a well thought out database structure and using a suitable development framework, namely, BFC foundation classes. The ManTra developers also used the appropriate technologies to support design and development, that is PowerDesigner which is a database design tool, version control software, SharePoint collaboration software, etc. The project of creating a new product for general use meant that there was an absence of demands created by any contractual relationship with a client. If there had been such a contractual relationship there would have been detailed specifications but in this instance the persons working on the development were aware of what was required from their own knowledge and could work, as demonstrated in their evidence, without the need of written specifications. The Court is satisfied that the evidence establishes that the persons developing ManTra made proper use of a suitable agile methodology without the constraints which would be imposed by the need to specify contracts contractually and of having to sign off on designs. It was also the case that the evidence established that the appropriate use of PowerBuilder DataWindows and particularly dynamic DataWindows as a software development platform enabled the developers to capitalise on the advantages of the agile development. The evidence also established that the developers made good use of object orientated design practices to assist in guiding development and to maximise code re-use. In the light of the above, when one takes into account the evidence of what was actually done and one does not limit the consideration of the evidence to the material and information found in documents and data, the Court is satisfied that the development velocity of ManTra is not such that such speed was implausible. This conclusion is also supported by the findings made by this Court, later in the judgment, in relation to the individual allegations set forth at paragraph 3 of the plaintiffs' statement of case.

77. The development of the ManTra source code proceeded after the November 2006 meeting and the source code which had been completed up to the 19th December, 2006 was placed in a QVCSE source control folder. That source control folder is a separate folder used by QVCSE which centrally stores and tracks changes to source code in development and it was labelled PB10. PB10 is shorthand for source code that was developed using PowerBuilder Version 10. Later, on the 20th February, 2007, the source control which was then located in the PB10 folder was re-located to a new source folder called PB10.5, that is to say PowerBuilder Version 10.5. The evidence available to the Court identified that there were 1,943 changes made by five different persons assisting in the development of ManTra over the two month period from the 19th December, 2006 to the 20th February, 2007. Development continued after the 20th February, 2007 and by early April 2007 the first version of the ManTra product was available for a controlled

release. That first version of ManTra was made available to a firm known as Quintillion who tested the product for evaluation purposes. Work continued on developing ManTra and expanding the scope of its applications and a second version was available for release in October 2007.

78. The limited nature of the ultimate claim pursued by the plaintiffs based upon alleged unauthorised access and use of the NTAS code is identified in the answers given by Harry Goddard, the plaintiffs' expert, to the Court on Day 24 (See Transcript 24, questions 187 to 189). Harry Goddard stated that it was his view that given enough time that the persons creating ManTra could have created the product that they did and that "the dichotomy" that he struggled with was the amount of time available to them to complete the product and the material which was available to him to enable him to review the development velocity. Harry Goddard stated (question 189):

> "There is no doubt that with enough time that the organisation, the individuals in question could have created the product that they had based on the contents in their head and their expertise, they clearly have very deep expertise across the team."

Harry Goddard concluded that the speed of development was such that the persons developing ManTra had to have access to and use of NTAS. However, the Court was provided with no clear or convincing evidence as to how the availability or use of a copy of NTAS would have improved the quality of ManTra. The evidence was that as regards source code size, ManTra is only one eight of the size of NTAS. The number of distinct main database tables in ManTra is somewhat less than 100 since the main data tables are replicated for the purposes of auditing and others exist only to provide primary key values. That evidence established that whilst ManTra is not an insignificant application, it does not have a particularly large codebase. The evidence about the nature of the functionality in ManTra is that a majority of the functions are routine "CRUD" data operations, that is (create, retrieve, update and delete). Given that the defendants had a prior well designed data model and a strong development framework, the design of these functions is not particularly complex. The evidence was that only a small percentage of the functions in ManTra have complex functionality, in particular, fee calculation, World-Check interface and integration functions. It is the design of these functions which would have been more time-consuming but the persons developing ManTra had the benefit of prior exposure to working with those functions and the knowledge as to what did and did not work.

79. The appreciable differences not only in the size and design as between ManTra and NTAS, but also in architecture (the PowerBuilder code in NTAS is quite different from that in ManTra), results in it being difficult to discern how and in what manner the availability or use of a copy of NTAS would have improved the quality of ManTra. The differences in the software architecture between NTAS and ManTra include the fact that ManTra makes extensive use of inheritance while NTAS does not. In the expert testimony available to the Court, Harry Goddard sought to minimise the significance of inheritance but the evidence of Marian Klco correctly identified that the proper use of inheritance can reduce programming time, minimise the cost of change and produce more reliable code. A significant difference between the two products, as identified in evidence is that NTAS was developed at least initially using cut and paste code replication. That provided the benefit that where there is existing code that a new function could be added relatively quickly. That was how NTAS operated as it had existing code and there was regular client demand for additional or new functions. However, that approach creates significant difficulties in operating and servicing the code in the event that a problem appears. ManTra was designed on a different basis. ManTra has a framework which consists of foundation classes to guide development and provide structure and this results in a position that much of the work required to create a new function is already in place. It is also the case that within the ManTra code the business logic is encapsulated in SQL stored procedures, thereby allowing independent testing and modification. In NTAS the business logic is intertwined with the user interface logic in PowerBuilder code and therefore cannot be modified and tested independently. ManTra was developed at a much later date than NTAS and in a situation where the persons developing the product had a detailed pre-existing knowledge of the development platform and the industry for which the product was being developed. That resulted in the developers of ManTra being able to use an architecture which provided advantages for ManTra over NTAS and had the result of making the development of ManTra both easier, quicker and less error prone. The evidence also established that the persons developing the ManTra product were aware and had worked with and were familiar with NTAS and therefore were aware of its architectural deficiencies. That resulted in those persons creating ManTra in a different and more efficient way. The desire and indeed the effective requirement of designing ManTra in a different manner to ensure that it would not repeat the architectural flaws within NTAS makes it difficult to see how access or use of NTAS would assist in such process and is supportive of the testimony which is given by the persons who developed ManTra that they did not have access to nor did they use NTAS. The Court has already indicated that it accepts that evidence.

80. The Court has already commented on the fact that the experts who gave evidence on behalf of the plaintiffs have to a significant extent limited their consideration to the documentation or data available. That approach created an unbalanced judgment and such distortion is one of the factors that the Court has taken into account in preferring the expert evidence led on behalf of the defendants. The Court has also had regard to the fact that none of the experts who gave evidence on behalf of the plaintiffs had any appreciable first hand experience of working with PowerBuilder. This placed the plaintiffs' experts in a difficult position in that they had a real and appreciable difficulty in addressing specific technical issues to do with development such as the impact of the BFC library on the ManTra development. It also resulted in a situation where the features which are incorporated within PowerBuilder which have the consequences of saving time during development, such as DataWindows, could not be fully or adequately addressed by the plaintiffs' experts. The evidence available to the Court was that PowerBuilder incorporates the time-saving feature DataWindows and that that was used by the defendants.

81. In considering the experts' testimonies, the Court has also had regard to the extremely limited scope of Michael Turner's evidence. There is no doubt but that Michael Turner is an expert forensic practitioner in the area of computer and data examination and that he identified forensic deficiencies in the discovered material. However, his consideration was limited to identifying those deficiencies and his evidence made it clear that even when alternative source information was available which would deal, either in whole or in part, with such deficiencies, he did not consider such alternative sources of information. This was particularly so in relation to the Metadata. The Court also found the plaintiffs' evidence in relation to literal copying of the NTAS database to be both incomplete and ill-considered. Michael Turner did not consider alternative sources of information even when those sources of information were identified and in the area of literal copying his view was not supported by Harry Goddard.

82. The Court has already pointed out that Harry Goddard had little experience of PowerBuilder and no first hand programming experience and was reliant upon the assistance of persons within his firm who had used PowerBuilder. It was also apparent from his reports and evidence that his predominant experience was of situations where there was the requirement of contractual client supplier relationships. This resulted in a situation where he failed to adequately address the true benefits of the form of agile development practised by the ManTra developers. The type of contractual work which he had experienced is far removed from the type of development which took place when ManTra was created. This was highlighted in the area of his evidence where he expressed his opinion on the level of documentation that he would have expected to exist. The level of documentation which he indicated he expected to exist would have arisen from a contract client/supplier relationship where there would be written

specifications and express client demands. That was not the situation when ManTra was being developed as it was created in a situation where there was no contractual client relationship. A number of persons within the ManTra team, in particular, James O'Donnell, were fully cognisant of the requirements of the hedge fund transfer agency business and therefore could identify the specifications which were effectively required during the discussions between the developers at the concept stage removing the necessity for any extensive written specifications. This frailty in Harry Goddard's approach was all the more significant as he was dependent in arriving at his opinion as to access and use of NTAS on the lack of documentation or data. The lack of documentation to the extent that he expected was an important factor in his opinion and that opinion is significantly undermined by his lack of experience of or regard to the form of agile development practised by the defendants.

83. The Court in favouring the expert testimony of the defendants' experts has taken into account the evidence in relation to key design artefacts. Harry Goddard in his evidence discounted the importance as design artefacts of the BFC library and the ManTra database structure whilst the evidence which was available to the Court, and which the Court accepts, is that both of those formed a strong design framework for ManTra and, in effect, provided much of its architecture. Having considered the factual evidence and the expert evidence tendered by both the plaintiffs and the defendants, the Court comes to the conclusion that the defendants' account of the development of ManTra is consistent, logical and coherent. The type of agile development identified by the defendants and the background expertise and abilities of the persons developing ManTra was such that the Court is satisfied that ManTra could and was developed within the timeframe involved and to the high standard which it achieved without access to or use of NTAS.

84. The Court shall now deal with the individual particulars set forth at paragraph 3 of the plaintiffs' statement of case insofar as they have not been dealt with earlier in this judgment.

85. The first particular identified by the plaintiffs in support of their claims as set out in the particulars at paragraph 3(a) is a claim that there was the presence of NTAS specific variable names in ManTra. In evidence to the Court this particular was pursued on the basis of the presence of NTAS specific column names in ManTra rather than variable names. The evidence identified instances of variable names appearing in both NTAS and ManTra only in the common code (namely, f_parse_to_array, etc.) and there was no dispute that those variable names were in the public domain and could not be evidence of copying from NTAS to ManTra. The prime instance relied upon by the plaintiffs of an NTAS column name appearing in ManTra was in the function "of_pla_export". In support of this claim the plaintiffs argued that the evidence established that the defendants admitted to an undoubted breach of confidence and breach of copyright by the misuse of the Quintillion NTAS database for the purpose of developing ManTra routines. Marian Klco acknowledged in evidence that this function was written by him to export data from ManTra to NTAS. Marian Klco gave evidence for the reason that that function was written and also the manner in which it was written. His evidence was that in writing that function he referred to the IMPORTQ file which contained data provided by Quintillion for importing into ManTra (see Transcript 28, question 530 onwards). Marian Klco's account of the circumstances and reason for the creation and writing of the function of_pla_export is both credible and logical. The plaintiffs cross-examined on the basis that the creation and use of that function meant that it was necessary to access the NTAS database. This was expressly dealt with by Marian Klco (Transcript 28, question 537) where he stated that such access was not necessary for him and that he developed the function by reference only to the IMPORTQ file. In accepting that evidence it follows that there is nothing suspicious in the presence of the NTAS column names in the ManTra code. This conclusion is supported by the evidence of Joan Kehoe of Quintillion who gave evidence that it was in fact Quintillion who carried out the testing. It follows that the presence of the IMPORTQ function does not evidence access to a copy of the NTAS application. Whilst in theory the defendants potentially had full access to the NTAS database structure, table and column names, etc., at that time, the evidence the Court heard was that only Jana Potocnakova actually accessed the NTAS database. The evidence was that she took the data from the NTAS database to make the IMPORTQ file for subsequent loading into ManTra (see Transcript 29, question 12). Marian Klco's evidence was that he used the IMPORTQ file for reference when he created the of_pla_export function (see Transcript 28, question 540). There was evidence supporting these accounts in that the NTAS database was a Sybase database and so could not have been opened by the instance of Microsoft SQL Server being used by the ManTra developers. That is the reason for an intermediate file to be created in Microsoft SQL Server format (the IMPORTQ file). The Court accepts the evidence of Jana Potocnakova and Marian Klco on these matters. There were other examples of similarities in the column names appearing in NTAS and ManTra such as ERISA, VALOREN and NAV. Those column names represent industry standard terms and the Court is satisfied that the use of such names provides no evidence of copying as it is to be expected that such industry standard terms would appear in both NTAS and ManTra. The plaintiffs, through the evidence of Harry Goddard, stressed the similarity within NTAS and ManTra in the ERISA register reports within the two products. Harry Goddard identified common columns within the two products that produce data for the ERISA register reports. Harry Goddard identified thirteen columns out of forty nine, representing some 27% that matched between the GROUP BY clauses in NTAS and ManTra. However, the evidence was that the ERISA register reports were dealing with legislation in the USA relating to pension investments. The legislation on which the reports were being prepared within ManTra and NTAS was identical which inevitably led to an overlap in content. Since the two reports have similar purposes and are dealing with identical legislation the fact that there was thirteen similar columns out of forty nine is not unexpected and the Court is satisfied that such similarity does not amount to any evidence of copying.

86. The second particular relied upon by the plaintiffs is their claim that there was replication of errors in the NTAS product within ManTra (including per share, ERISA, Hi-Lo and Lo-Hi functionality). George Sipko's evidence was that several features were implemented incorrectly within the NTAS system and that those incorrect implementations were replicated within ManTra. It was claimed that that demonstrated that ManTra had been copied from NTAS. The features highlighted in evidence were the ERISA functionality, consolidation processing and fee calculations (per share, Hi-Lo and Lo-Hi). David Gross gave evidence in relation to this claim (Transcript 31, question 191) and disputed the claim that features were implemented incorrectly and gave evidence that there were no functionality errors contained within NTAS which were replicated in ManTra and that all features within ManTra were properly implemented. Both James O'Donnell and David Gross gave evidence of the specific reasons for the manner in which each of the features in issue had been implemented. Both those witnesses are business analysts with extensive experience of the requirements within the hedge fund transfer agency business and the Court is satisfied that the evidence which those two witnesses gave in relation to their claim that the features in issue had been properly implemented was both credible and informed. The background and experience of James O'Donnell and David Gross in relation to the requirements of the fund transfer agency business is more detailed and extensive than that of George Sipko and the Court is satisfied that their evidence is to be preferred over George Sipko's opinion. The evidence failed to demonstrate that there were functionality errors replicated within ManTra of the nature claimed by George Sipko and the Court accepts the evidence that the features in issue were properly implemented. In any event, even if there were replication of errors in the NTAS product within ManTra, that would not demonstrate access to or use of an unauthorised copy. The persons who developed ManTra had a deep comprehensive knowledge of how matters were implemented within NTAS and a replication of those features within ManTra is not unexpected and is not evidence of copying.

87. The third particular relied upon by the plaintiffs is a claim that the replication in ManTra of business logic and relationship structures found in the NTAS database is evidence of access to and use of an unauthorised copy of NTAS. Firstly, as in a number of other areas, it is to be expected that business logic and relationships should be similar in NTAS and ManTra given their common

purpose. The replication of certain business logic and relationship structures is all but inevitable given the common purpose for which both systems were developed. No definition was provided as to the term "business logic" but it appears that the term is used in this case to mean program code devoted to the implementation of business rules, algorithms and constraints. An example of this business logic would be the program code which is used to calculate performance fees. However, an examination of the evidence demonstrates that it was acknowledged that ManTra implements business logic in a different way from NTAS. In ManTra the business logic code is written primarily in SQL and held in stored procedures in the database whilst in NTAS the business logic code is written in PowerBuilder code and held in the NTAS application. Due to the different way in which the two applications implement business logic, there is no reality in the suggestion that one implementation could be a literal copy of the other or that there could have been some automated translation from one to the other. Therefore, it would appear that the plaintiffs' claim under this heading relates to a claim that similarities in the business rules, algorithms and constraints are represented in the respective products' implementations and not to the implementation (code) itself. In considering this head of claim it is necessary to appreciate that business rules, algorithms and constraints are aspects of the business world which a software designer must endeavour to encapsulate in code. In effect, it is inescapable that similar business rules, algorithms and constraints will be implemented in NTAS and ManTra since both products are intended for use in the same segment of the business world. The business rules, algorithms and constraints required to be used would be well known to any business analyst who was well versed in hedge fund transfer accounting. In the absence of a computer software program the fund manager would be obliged to implement those matters using manual processes. The Court therefore does not accept the plaintiffs' argument that the implementation of similar business rules, algorithms and constraints is in any way supportive of a claim that the defendants had access to or copied NTAS. The second portion of the third particular is a claim that there is a replication of the NTAS relationship structures to be found in the ManTra databases. The only evidence adduced by the plaintiffs in support of this claim was a chart created by George Sipko and produced by him in evidence which was in the form of a side by side diagram. The diagrams created and produced by George Sipko were of very limited use in demonstrating or supporting a claim of the replication of relationships. This is because it transpired that in answer to questions raised by the Court appointed independent expert, Dr. McGinnes, that what the tables showed on the NTAS side of the chart was the foreign key relationships but only those where George Sipko had found a match in ManTra and vice-versa. The two diagrams were prepared on the basis that where an apparently similar foreign key relationship existed between apparently similar tables in NTAS and ManTra, they were shown in George Sipko's chart. In answer to Dr. McGinnes, George Sipko acknowledged that on the ManTra side of the chart foreign key relationships were omitted due to the fact that they did not match relationships in NTAS. The effect of preparing the chart on such basis resulted in a chart being produced in evidence which had the capacity to be not only incomplete but potentially misleading (see Transcript 22, question 105 onwards). The diagram selectively showed only a small number of tables and relationships which were apparently similar, taken out of a much larger number in the two databases. The defendants also gave credible evidence that the tables and relationships which were shown in the diagram were not all equivalent and that some had been misinterpreted by George Sipko. In any event, since both products were intended for use in the same business sector, it would follow that there would be significant similarities in the relationships between core tables in both databases. This follows from the fact that the relationships reflect the business relationships which actually exist in the real world. An example of this is the relationship which links an account and the owner of an account. The corresponding database relationship might stipulate, for example, that each account can be owned by one and only one account owner. When implemented, relationships become constraints implicit in the database structure. Any such constraint exists first in the business world and a database merely represents it using a suitable data structure. Although there is some leeway in the manner of representation, the person designing a database cannot deviate to any appreciable extent from the pre-existing business relationships and is bound to reflect those pre-existing relationships in the database structures. It follows that the Court is satisfied that any rationally designed database seeking to represent the real hedge fund transfer account business would tend to have similar structures to other databases operating in the same business including the relationships. The Court is therefore satisfied that insofar as there are similar relationships appearing in NTAS and ManTra databases, that that is not demonstrative of evidence of copying.

88. The fourth particular provided by the plaintiffs in support of their case is the alleged replication in ManTra of some 90/95% of the functionality of the NTAS product. As pointed out above, both products are targeted at the same business area and it follows that each will have to address the functions which hedge fund managers most require and find most useful. It is also the case that the plaintiffs failed to identify a clear basis for arriving at the purported figure of 90/95%. Neither George Sipko , nor Ras Sipko provided a definition of the plaintiffs' use of the word functionality. Insofar as the Court can identify the plaintiffs' case, it appears that the plaintiffs are claiming that there is a 90/95% overlap in the list of requirements which both products claim to address. However, the fact that two products address a given requirement and that there is a significant overlap is of little or no benefit to the plaintiffs in support of their claim. The fact that both products address the same requirements says nothing about how extensively those requirements are addressed. The evidence was that the plaintiffs' NTAS product is a more feature rich product than ManTra. This, to a large extent, flows from the fact that it is a more mature product. The more feature rich nature of NTAS was evidenced from the various screen prints produced in evidence. If, as is the case herein, NTAS has more features, yet addresses much of the same requirements as ManTra, this can only arise if NTAS addresses some or all of the requirements in a substantially more comprehensive manner than ManTra. It follows that a claimed figure of 90/95% replication of functionality would not in any way be a reliable guide as to the extent of common functionality.

The evidence was that the technical architecture of the design of both ManTra and NTAS is different (see evidence of Harry Goddard, Transcript 22, question 322). The limited nature of the plaintiffs' claim under this heading was demonstrated by Harry Goddard's answer in cross-examination (Transcript 23, question 298) when he acknowledged that in his view NTAS was used as a visual reference point and it had not involved a function by function reference point. Harry Goddard went on to state (Transcript 23, question 301):

> "I think I have said that I don't see there being any niche functionality, or functionality of a level of complexity that exists in NTAS and was copied across into ManTra. I'm not particularly aware of there being any such complexity that exists in either system that would, that could not have been created from scratch."

The limited nature of the plaintiffs' ultimate claim against the defendants is further illustrated in another part of Harry Goddard's evidence. His evidence was that the functional similarities between ManTra and NTAS were not relevant to his belief that NTAS was used as a visual reference point. Harry Goddard's evidence was to the effect that the use of NTAS by those developing ManTra was as a reference which they could share among themselves to facilitate discussion around the design (see Transcript 22, question 325). Paul Rooney, an expert witness called by the defendants, who has experience of working for fund administration companies for some twelve years gave evidence that there were many points of divergence, at a detailed level, between the functionalities provided in the two products. This divergence was apparent even in circumstances where the two products were claiming to meet essentially the same requirements at a "headline" level. Paul Rooney also gave evidence that there was functionality within ManTra which is not in NTAS and that much of the overlapping functionality is industry standard and is to be found in rival products. It was also his evidence that NTAS had not been used as a visual reference in the creation of ManTra as in his opinion it would not have been necessary. The Court is satisfied that any overlap in functionality which is to be found in the two products is not indicative of copying or of design by reference but is rather an overlap that is to be expected in two products which are both aimed at the hedge fund transfer accounting

business. This overlap is demonstrated by the evidence of Joan Kehoe, of Quintillion, who is a person involved in the fund administration business and has used both NTAS and ManTra. Having used both products and based upon her experience within the business, she stated (Transcript 33, question 14):

> "I would visually think they look quite different to use. The core functionality, as is with any investment or servicing system, is pretty standard. You hold the registration information, you hold the financial information and you produce data from it."

The Court is satisfied that the alleged replication in ManTra of a large percentage of the functionality in NTAS does not support the plaintiffs' claim of copying and is not indicative of copying or design by reference.

89. The fifth particular relied upon by the plaintiffs at sub-paragraph (e) in support of the claim of access to and the use of an unauthorised copy of NTAS is based upon a claim that:

> "The fact that detailed knowledge of the NTAS database structure (including table names, column names and relationships) was required to enable the Defendants develop the "IMPORT2.SQL" script, which script could only be developed and/or tested by way of access to the NTAS product and which could only run by reference to the NTAS product (or a copy of the database thereof)."

The evidence to the Court was that the defendants were given access to Quintillion's NTAS database for the purpose of extracting data for loading into ManTra. There is nothing necessarily untoward about such access being provided by a third party company. Such access would be necessary if that company was changing from one database system to another. The evidence to the Court was that the script IMPORT2.SQL was developed for the purpose of extracting Quintillion's data from NTAS so that it could be incorporated into ManTra. Jana Potocnakova's evidence was that she was the person who created IMPORT2.SQL and that she first loaded the data into an SQL Server database called IMPORTQ, so that it could be transferred using IMPORT2.SQL to the ManTra database. IMPORTQ was not a replica of the NTAS database and it held only the data that was required for loading into ManTra in an intermediate form. Database structures such as relationships were not explicitly included but appear to have been implicitly present in the data itself. Evidence was given by Jana Potocnakova as to the steps which she took in relation to the transfer of data from NTAS to ManTra and those steps appear to be consistent with industry practice implemented at the time of transfer from one system to another. Jana Potocnakova's evidence was supported by the evidence of Joan Kehoe of Quintillion who gave evidence that the defendants were not given access to Quintillion's copy of NTAS but were given access to the database. That evidence was further supported by the evidence of John Dixon, an expert witness, who gave evidence that IMPORT2.SQL could not have opened a database file in Sybase format and therefore could not have opened a copy of the NTAS database because NTAS works with Sybase not with SQL Server. The Court accepts that evidence and it is apparent from such evidence that the defendants were given access to the NTAS database at a late stage in the ManTra development but such access was for routine data transfer purposes. Even if any knowledge was gained at that point in time, and there is no evidence to support same, such knowledge would have been of little or no use in the design and the development of ManTra as it is common case that the transfer within the Quintillion system took place around March/April 2007. By that date ManTra was at test stage. The evidence does not support the claim that the defendants were given access, at any point in time, to a copy of the NTAS product. The date upon which such access is claimed is so late in the development of ManTra that it could have had no benefit in the design of the ManTra application. This was acknowledged by Harry Goddard in evidence when he stated that in terms of the design of the application, access to the NTAS database at that point in time would have been of no advantage (see Transcript 24, questions 72 and 74). The furthest that Harry Goddard went in evidence in relation to this head of claim was the possibility that access to the NTAS database, as suggested by him, could perhaps been of benefit to the defendants, at that point in time, in order to facilitate testing. The Court has already indicated that it accepts Jana Potocnakova's and Marian Klco's evidence as to the limited use of the NTAS database which was to create the IMPORTQ file. It follows that the Court is satisfied that it was not used in the manner suggested by Harry Goddard.

90. The sixth particular provided by the plaintiffs in support of their claim was that:

> "The defendants' development of the 'of_pla_export' file and its subsequent modification required reference to and reliance upon the NTAS database structure (including database table and column names)."

The code in question within ManTra contained reference to certain table names and column names found in the NTAS database. Marian Klco gave evidence that the function of the "of_pla_export" was written by him for the purpose of exporting data from ManTra to NTAS. Marian Klco's evidence of how and why that code was written was both plausible and consistent. In his précis of evidence, Marian Klco gave evidence as to the circumstances in which this function was written and its purpose and the Court accepts that evidence. The evidence is that the code was not used nor indeed could it have been used for any other purpose than to export third party data from ManTra to NTAS. The evidence also was that the code was disabled, that is commented out, at an earlier stage, and that fact is consistent with Marian Klco's explanation that James O'Donnell asked him to stop working on it as soon as he became aware of its existence. It is also the case that Harry Goddard's evidence was that Marian Klco's statement as to the functionality of the code as contained in his précis of evidence and the description given therein as to the use to which the code was put was consistent (see Transcript 22, question 236). The Court is satisfied that in relation to the sixth particular that there is no evidence to sustain the claim that the development of the "of_pla_export" file in any way supports the allegation of illegal access or use of an unauthorised copy of NTAS by the defendants.

91. The seventh particular relied upon by the plaintiffs relates to the e-mail communication between the developers and designers of ManTra and the claim that they made detailed and specific reference to NTAS specific variables. The Court has already dealt with the claim relating to design by reference earlier in this judgment. The design by reference claim was articulated by Harry Goddard in his evidence in answer to a question by the Court concerning the fact that, given that there was a different technical design between the two products, and that the technical architecture of the design of both ManTra and NTAS was different, what use could have been made by persons developing ManTra of NTAS. Harry Goddard stated (Transcript 22, question 325):

> "I think if you were going to try to break NTAS down into its constituent parts and then rebuild it into ManTra, that would take a lot of time and it would be a lot of unnecessary effort. I think that if you said, I'm going to use that as a point of reference which I am going to share with others and use that to facilitate the discussion around the design, well then I think it could be of some use."

He went on to state (Transcript 22, question 327) that NTAS could have been used as "a sort of visual function and specification, if you will, in some respects". In support of this approach, Harry Goddard relied upon e-mails that had been produced in Court. He concluded that NTAS was used as an aide memoir or visual reference for the detail requirements of ManTra. The e-mails identified by Harry Goddard were e-mails exchanged between David Gross and Jana Potocnakova concerning the implementation of the integration

of data supplied by WorldCheck in the ManTra system and an e-mail from Jana Potocnakova to James O'Donnell of the 21st November, 2006 and an e-mail of the 16th October, 2006 from James O'Donnell to Jana Potocnakova. Those e-mails were available to the Court. The plaintiffs place reliance upon the fact that in the e-mails referred to NTAS provided a reference point for the designers and NTAS terminology was used. Having considered the e-mails and the evidence, the Court is satisfied that the references to NTAS terminology does not demonstrate or establish that the persons developing ManTra had a copy of NTAS or were referring to a copy of NTAS but rather demonstrates that the persons designing and developing ManTra were intimately familiar with NTAS. That familiarity was of such duration and extent that the persons were able to communicate with one and other using NTAS terms when discussing the design of ManTra. The Court accepts the evidence that the persons who designed and developed ManTra did not have a copy of NTAS nor were they referring to a copy. The background, training, education and experience of each of the persons involved in the design and development of ManTra was such that they had a shared knowledge of the NTAS architecture and functionality and that knowledge would have provided them with a common conceptual language. There is no evidence to indicate that such knowledge required the presence or use of a copy of NTAS and the Court is satisfied that the defendants and their witnesses gave truthful evidence when they stated that such knowledge as they carried in relation to NTAS was as a result of their experience, training and use of NTAS over an extended period of time. Because of the common exposure to NTAS and the shared knowledge of its architecture and functionality, the persons developing ManTra had the capacity, and the evidence establishes that they did, to communicate with one and other using a common conceptual language which they had acquired from working with NTAS. This issue was addressed by Harry Goddard (Transcript 22, question 292) when dealing with the use of NTAS specific table names or terms in the development of ManTra when he stated:

> "There is an element of starting with what you know but also there is a potential element of starting with what you may have access to."

The Court is satisfied that the evidence establishes that the true explanation for the use of NTAS specific table names and terms in the development of ManTra is that such names and terms were well known to the persons developing ManTra and represented a common conceptual language and that their use was not as a result of any use of or access to an unauthorised copy of NTAS.

92. The eighth particular is a claim that the e-mails and other design materials created by the developers and/or designers of ManTra demonstrate that the NTAS product was used as a reference point for the design, functional specification and development of ManTra. The Court has already dealt with the issue of design by reference both earlier in this judgment and in the preceding paragraph. The Court is satisfied that the balance of the evidence available to it demonstrates that, given the technical architecture and design differences present in ManTra as opposed to NTAS, and given the evidence from the defendants and their witnesses as to their experience, knowledge and actual work methods, that the significant reference point in the design of ManTra was the defendants' own knowledge and experience. Insofar as NTAS was a reference point, the evidence establishes that any reference point in relation to design, function and specification within NTAS emanated from the knowledge and experience of the persons developing ManTra and not from access or use of an unauthorised copy of NTAS. The Court has already indicated that it accepts the evidence of each and every one of the persons who developed ManTra when they informed the Court that they did not use or have access to a copy of NTAS. There was no evidence of the presence of NTAS specific files nor evidence of actual disk copies of NTAS nor was there evidence of logs showing that NTAS software was copied, nor were there screenshots showing that NTAS was in use by the defendants at a certain date. The plaintiffs in this case relied upon indirect evidence which they claim collectively establishes that the defendants had a copy of NTAS and the Court is satisfied that based upon the evidence available to the Court and the experience and knowledge of the persons developing ManTra that such inference or interpretation has not been established and that the weight of evidence is to the effect that ManTra was developed by the defendants without access to or use of a copy of NTAS.

93. The ninth particular identified by the plaintiffs relates to the "deletion of the first version of ManTra (version BP10) at the time it was deleted, in August 2007 (following a direction by a US judge in the US proceedings between the parties dealing with similar infringement issues that the source code of ManTra be made available for expert examination on behalf of the plaintiffs). This particular was relied on in the plaintiffs' written submissions under the heading of the alleged systematic removal of and failure to preserve vital evidence in relation to ManTra's development. The plaintiffs claim that one of the most significant aspects in this case was the extraordinary absence of PowerBuilder or SQL Server script code in the entire period from October 2006 up to February 2007 and what was categorised as the extraordinary deletion of the entire range of materials that would have evidenced the initial content of the PowerBuilder and Microsoft SQL Server code for all iterations of ManTra up to February 2007. The defendants deleted the contents of the PB10 folder. Marian Klco gave evidence as to how and in what circumstances he deleted the contents of the PB10 folder. He stated that he deleted the contents in February 2007 and not in August 2007 as contended for by the plaintiffs. If the Court was to accept Marian Klco's evidence, and it does, what was deleted by him in August 2007 was a remaining empty folder. Marian Klco's evidence was that he deleted the folder contents in February 2007 because there was a configuration problem in QVCS (Version Control System) for the PB10 folder. His evidence was that he deleted the folder contents using the Windows file system rather than using QVCS. The plaintiffs contend that this evidence is extraordinary and is not to be believed and claimed that deleting a folder from Version Control in this manner is not best practice and therefore provides support for the claim they make in relation to the systematic removal and failure to preserve vital evidence. Even if such deletion was in contravention of best practice, on the evidence available to the Court it did not create any real or significant risk to the defendants. There was no real risk to the defendants in deleting the PB10 folder and its contents, given that the contents had been upgraded to the PB105 and subsequent versions of the ManTra code. Marian Klco's evidence was that the PB10 version of ManTra was limited to the BFC Foundation Classes and a few windows. That evidence is consistent with the other evidence led by the defendants concerning the development timeline of ManTra. It is also the case that because the PB10 version was not used for any client release of ManTra that there was no particular reason to keep it and in those circumstances the Court is persuaded that such deletion cannot be deemed extraordinary and the Court is satisfied that the evidence given by Marian Klco as to the circumstances and reason for the deletion is both credible and consistent.

Harry Goddard gave evidence on the deletion of PB10 (Transcript 22, question 347):

> "… It is my experience certainly that while it is one thing for developers to delete sections of code that they are no longer using, I have yet to find developers that would delete entire projects for fear that there might be some nugget in there that at some stage in the future they may want to refer to and find that they have in fact lost it forever."

The changes in code which were no longer available because of the deletion would have included changes which were carried out some time ago and as most problems with program code tend to be identified relatively quickly, particularly during rapid development and at the early stages of development, the older change history is less useful. The Court was therefore not surprised by Marian Klco's evidence that he did not see a major risk in losing the change history at that stage. The plaintiffs contend that the deletion of PB10 was deliberate and had the effect of intentionally hindering the plaintiffs in advancing their case. The evidence to the Court provided by Marian Klco identified that the inheritance structure (of the BFC Foundation Classes) dictates the architecture of ManTra strongly. To that extent, no large transformation in the code structure would have been possible prior to the surviving version. That

evidence is logical and it follows that the contents of the PB10 should be predictable in that it would be a smaller and less well developed version of the PB105 code. That evidence, which the Court accepts, undermines the plaintiffs' contention that the contents of the PB10 code would have provided assistance to the plaintiffs in support of their claim that the contents of PB10 were derived from NTAS. As the inheritance structure of the BFC Foundation Classes and the ManTra database structure together dictate the architecture of ManTra to a significant extent, it follows that no large transformation in the code structure would have been possible prior to the surviving version. The contents of the PB10 folder can then be predicted to some extent from the PB105 version. The Court is satisfied that the deletion of the PB10 files/folder was not done in a malicious or systematic manner nor was it done with the intention of hindering the plaintiffs in the presentation of their case. Rather the Court is satisfied that Marian Klco's explanation as to the circumstances of the deletion is both credible and consistent with the other evidence and that the PB10 folder would have contained only an earlier version of the code that survives rather than evidence of transformation from NTAS.

93. The tenth particular pleaded by the plaintiffs in support of their claims relates to the alleged failures by the developers of ManTra to keep backups of ManTra as it was being developed, contrary to standard development procedure. The evidence to the Court was that the persons who developed ManTra did keep a backup but that the backups were not retained permanently. If they had been, a considerable amount of the speculation which was placed before the Court would have been capable of being dealt with conclusively. However, the fact that backups were not retained indefinitely must be considered in the light of the evidence that the Court heard as to the circumstances in which ManTra was developed and the requirement for it to be done with dispatch. The reason for the limited backup retained by the defendants is set out in the evidence of Marian Klco in cross-examination where he stated (Transcript 27, question 665):

> "... but this is disaster recovery backup. We do backup of our product when we compound and release, then we just make the branch and version control system. But at that point on starting company we didn't have clients, we didn't have anything, we just need to build something as quickly as possible. So we didn't do any maintenance like this, there was no point to do it."

Later in his evidence he stated (Transcript 27, question 842):

> "... I do backups when necessary normally but, as I say, they are overwritten after a period of time. So I have just disaster recovery backup."

The plaintiffs contended that the permanent retention of backups is standard development procedure. The Court appreciates that evidence in so far as it relates to large organisations with existing clients but the situation identified in evidence by the defendants illustrates a different type of organisation. The Court is satisfied that the developers who gave evidence on behalf of the defendants were truthful in their description of the manner and circumstances in which the development was carried out. There was financial pressure to complete the development as quickly as possible and in those circumstances the procedures which evolved were the minimum procedures required to protect the integrity of the development process. In the initial stages the ManTra development team operated in an informal manner and did not follow what could be described as industry best practice. The Court is satisfied that there was no intention to deliberately conceal any material by the defendants in their failure to keep source code backups indefinitely and that the explanation which was proffered in evidence that backups were kept for disaster recovery purposes only is both credible and consistent. The Court is therefore satisfied that the failure on the part of the defendants to retain ManTra development backups indefinitely does not lead to any conclusion that such failure was an attempt to hide the true development process and such failure does not lead the Court to form any adverse conclusion against the defendants.

94. The eleventh particular pleaded by the plaintiffs relates to the alleged creation of twenty eight tables which is said to be an entire database design file of unaccounted for origin, comprising hundreds of columns and a complex relationship structure "readymade" for ManTra on 12th October, 2008, which largely replicated the function and relationship structure of equivalent tables and columns in the NTAS product. The date 2008 contained in the particulars is a typographical error and should read 2006. As apparent from the earlier part of this judgment the Court is not satisfied that the structure for ManTra largely replicated the structure of equivalent tables and columns in NTAS. The Court heard evidence in relation to the origin of the initial twenty eight table ManTra data model and has held that credible and consistent evidence was given by the persons present at the development meeting in October 2006. That evidence established that one of the main matters under consideration at the meeting was the preparation and completion of a draft data model for ManTra. The persons present were true experts and this was acknowledged by Harry Goddard, the expert called on behalf of the plaintiffs, when he stated in relation to the development of the twenty eight tables, as follows (Transcript 24, question 189):

> "There is no doubt that with enough time that the organisation, the individuals in question could have created the product that they had based on the contents in their head and their expertise, they clearly have very deep expertise across the team."

The modelling exercise carried out by the defendants in October 2006 is a recognised approach and practice within the IT industry and the Court is satisfied that it is entirely plausible that such a modelling exercise could produce a model consisting of twenty eight core tables, each with 5 – 15 columns. The Court accepts the evidence of the defendants' witnesses in relation to how and in what manner they produced the twenty eight tables and is satisfied that there was a sufficient period of time available to enable them to do so. Insofar as the plaintiffs contend that some of the NTAS database structure was physically copied and modified to create the Mantra database structure, the Court does not accept that contention. Whilst it is theoretical possible that that could have been done given that the NTAS database structure contained hundreds of tables and thousands of columns, the time involved in deconstructing the NTAS database structure would be considerably greater than the time necessary to create the model from scratch. The Court accepts the evidence of the persons who developed ManTra that they developed the model from scratch. The persons who developed ManTra stated in evidence that the initial twenty eight table model as of October 2006 was merely a first cut design and was subject thereafter to considerable additions and modifications. Insofar as the plaintiffs relied upon the evidence of Darren Thomas as to the time estimate required for the development of the ManTra data model, that time estimate was based upon the time involved in the design and construction of the finished database of April 2007 and by that date the database contained several hundred tables and thousands of columns. In those circumstances the Court received no assistance from Darren Thomas's evidence in relation to his estimate of the time involved and the Court is satisfied that the evidence given by the persons actually involved in the development, given their expertise and knowledge, is true. The defendants gave evidence as to the circumstances of the development meeting. There was evidence as to the tool used to prepare the data model which was PowerDesigner. The persons present at the meeting covered all the areas required for the development of a data model and it was apparent to the Court from having had the opportunity of hearing their evidence that they could communicate both effectively and on technical matters in the English language. The Court is satisfied that the evidence given by those persons was both truthful and consistent and that arising from that evidence the Court is satisfied that there was no need or requirement for a copy of NTAS or the NTAS database to be used.

95. The twelfth particular provided by the plaintiffs relates to the alleged absence of any material evidencing the genesis or development of the tables, columns and relationship structures referred to in the previous particular. The Court heard evidence from the persons involved in the development of the ManTra data model that they identified that what was produced was a relatively simple twenty eight table model. Once that was produced it was entered into PowerDesigner to create a physical data model for SQL Server. Once that was done the twenty eight table model formed the basis for a process of data modelling spanning several months, which ultimately resulted in the development of a much larger and more complex database design for ManTra Version One. The defendants' evidence was that they progressed straight to a physical model and that the CDM file existed only because it was produced as an interim step, and that what occurred was that the first PDM file that was produced was saved as a Sybase design but needed to be saved as a SQL Server design. This was done by first saving the Sybase PDM file as a CDM file. Since the CDM file was therefore of no interest to the defendants, as it did not contain a conceptual data model, it was not retained. The court finds this evidence credible and consistent. The data models discovered are to be found in the PDM files and the lack of any CDM file being discovered has a rational explanation. In arriving at the conclusion that the defendants are to be believed in relation to this matter the Court has not only relied upon its judgment in relation to the truthfulness of the defendants' witnesses but has also taken into account the fact that the first version of the ManTra data model ("PDM file") contains date stamps which can be used to reconstruct the bones of the model as it appeared in its earliest form. That must be subject to the caveat that some names may have changed and some elements may have been removed. To reconstruct the model in such a way is a relatively simple task enabling the shape and starting point for the ManTra database to be identified. The plaintiffs in their presentation of evidence placed considerable emphasis on the fact that they could not reconstruct a version of the initial model which was one hundred per cent accurate and that such a model was not capable of being retrieved due to subsequent modifications. It is true that it is not possible to recreate the initial model to one hundred per cent accuracy but there is sufficient material available which enables a reconstruction which establishes the shape and starting point or gist of the earliest model. The Court accepts the evidence led in relation to such capacity and the evidence of the persons who developed ManTra that such process results in the identification of the genesis or development of the tables, columns and relationship structures in the earliest manner and is consistent with the evidence given by the defendants' witnesses.

The plaintiffs rely upon the lack of evidence of genesis of the ManTra data model. The plaintiffs' argument in relation to the lack of early material is circular. The plaintiffs contend that the first PDM represents not the start of the ManTra database design, but the end point of a process by which the NTAS data model was transformed into the twenty eight table model for ManTra. It is suggested that since there is no evidence that any such process took place, that the absence of such evidence is itself evidence and that the defendants must be concealing earlier stage data models in order to conceal the transformation process which was used. The Court is satisfied that the absence of evidence of something, in this case the transformation process, would be significant only if there was evidence that such transformation process had in fact taken place. There is no evidence of same and the Court is satisfied that the evidence given by the persons who developed the model was both truthful and accurate. The Court, therefore, does not accept the plaintiffs' contention that the absence of material is to be taken as evidence of *mala fides* on the part of the defendants. The Court accepts the evidence that such material did not exist and that therefore its absence is of no significance.

96. The thirteenth particular alleged by the plaintiffs relates to the alleged absence of the CDM file or files relating to the development of ManTra and/or the defendants' failure to discover same. If the CDM file had been available then a considerable amount of Court time would have been saved which was taken up in speculation as to its contents. If the file had been present such speculation would have been unnecessary. However, the Court is satisfied that it has been shown and established to the Court that it is unlikely that the contents of the CDM file would be appreciably different from the twenty eight table model which formed the first version of the ManTra physical data models. They were discovered. As pointed out in the previous paragraphs the Court is satisfied that the gist of the earliest model can be recovered identifying the genesis or development of the tables, columns and relationship structures. The plaintiffs contended that the absence of the CDM file is supportive of their case and is evidence of *mala fides* on the part of the defendants in endeavouring to cover or hide the fact that ManTra was a re-engineered version of a subset of the NTAS database. The persons who developed ManTra gave evidence and stated that the existence of the CDM file is an insignificant by-product of saving the developers' PowerDesigner physical data model as a SQL Server model at their October 2006 meeting. The Court is satisfied that the defendants' account in relation to this is both consistent and credible. Jana Potocnakova and James O'Donnell gave a detailed and convincing explanation as to how this occurred and the Court accepts that evidence. That evidence is supported by the fact that the Court is satisfied that if the defendant developers had reworked the NTAS database to create the ManTra structure that that re-engineering, to create the initial twenty eight table data model, would have been both more difficult and time consuming than creating the model from scratch. This conclusion is further supported by the fact that it was clear from the evidence that there were many weaknesses as well as strengths in the NTAS data model and since the persons developing ManTra would have been aware of those weaknesses and strengths, due to their work with and on the NTAS data model, it would have been both quicker and better for those persons to create a new and better data model from scratch without having the need to refer to a copy of NTAS. In relation to the express claim relied upon by the plaintiffs that the defendants failed to discover the CDM file, the Court is satisfied that the evidence given by Jana Potocnakova in relation to this matter is both credible and consistent. Her evidence was that the file was transitory and that there was no need to keep it. The Court accepts that evidence. The method of development of ManTra, as established in evidence, is that the database structure evolved to become many times the size of the initial model. The Court accepts that evidence and in those circumstances there would have been no reason or requirement for the ManTra developers to have kept the early version.

97. The fourteenth particular relied upon by the plaintiffs relates to the alleged bulk introduction of 25% of "right first time" pre-prepared code by way of stored procedures on 1st February, 2007 and a further 24% of such code during February 2007. The plaintiffs contend that the introduction of "right first time" code in the percentages claimed supports a claim that the defendant developers were concealing the actual or real development timeline for the stored procedures. This claim is made notwithstanding that the plaintiffs provide no explanation as to what development process the defendants might wish to conceal. The bulk introduction of stored procedures demonstrates to the Court that the defendants were developing stored procedures in the months leading up to February 2007 and that is consistent with the defendants' evidence in relation to the timeline for the development of ManTra in the period from October 2006 to April 2007. There is no obvious reason put forward by the plaintiffs or identified in evidence to require the development of stored procedures for any given function until the relevant database tables have been designed and created. Stored procedures refer directly to the data in the tables and perform operations on the data. It follows that stored procedure development is only required once the database structure has reached a reasonable level of maturity. The evidence provided by the defendants in relation to the development was that such reasonable level of maturity would not have been present until the end of 2006 or the start of 2007. The Court accepts the defendants' evidence in relation to the development process and that evidence is entirely consistent with the fact that stored procedure development would not have started until late 2006 and would have continued for the rest of the development period.

Inherent within the plaintiffs' contention as outlined in this particular is that the defendants in some way translated business logic from NTAS PowerBuilder code into business logic in ManTra SQL code. However, the evidence available to the Court satisfies the Court that such argument is implausible given the nature of the stored procedures. The majority of stored procedures inevitably relate

to routine data access procedures whose logic can be deduced from the ManTra database structure. Jana Potocnakova gave evidence that the procedures developed up to the end of February 2007 were concerned mainly with routine "CRUD" data operations (Create, Retrieve, Update and Delete). The task of creating or writing procedures such as those from scratch is relatively straightforward and there would be no need to refer to NTAS equivalent code and to do so might indeed cause a time delay. In the minority of stored procedures where more complex business logic required to be implemented, the Court is satisfied that the NTAS implementation would be of little potential benefit. This follows from the fact that the ManTra architecture and design are significantly different and hence the algorithms would also be different. The evidence established the different architecture and design which lead to a situation where the implementation of the same process required by a client will have to be done in two entirely different manners. This is illustrated in relation to equalisation fees which are implemented in the two products with different languages, different functional requirements and different algorithms. This fact again demonstrates the credibility of the defendants' witnesses in relation to how and in what manner ManTra was developed and the implausible nature of the plaintiffs' contention that the defendants used the business logic within NTAS in the creation of the business logic in ManTra. Also, as identified in this judgment, the ManTra developers had a good knowledge of the business logic that needed to be implemented and would not need to consult a copy of NTAS.

The persons who developed ManTra gave evidence in relation to why 25% of the stored procedures were not introduced until the 1st February, 2007. Marian Klco stated that it was at that time that Version Control was introduced and that prior to that time, stored procedures were held in locations such as the SQL Server data base which were not subject to Version Control. The evidence was that although stored procedure development had started in 2006, that its initial results became visible only once Version Control was introduced in February 2007. The Court accepts that evidence as both credible and consistent and it provides a perfectly innocent explanation as to the bulk introduction of stored procedures. In making the argument in relation to this matter, the plaintiffs' expert witness, Harry Goddard, relied on an e-mail dated 16th October, 2006 from James O'Donnell to Jana Potocnakova. Harry Goddard interpreted that e-mail as meaning that stored procedures already existed. The Court believes that such interpretation is incorrect and that the evidence given as to the introduction of stored procedures following the introduction of Version Control in February 2007, given by the defendants' witnesses, is truthful.

98. The fifteenth particular alleged by the plaintiffs relates to the alleged absence of any material evidencing the genesis, design or development of the database code, specifically the business logic of the first release of the product. Part of the case argued on behalf of the plaintiffs was based upon a claim that there was a lack of design material or audit trail for the development of the stored procedures. The majority of the stored procedures would have been routine data access procedures which would require minimal design. Both their purpose and logic would have been obvious to any experienced developer. This particular, therefore, must primarily be directed at the lack of written specification for the more complex procedures. Harry Goddard highlighted the lack of formal design documentation which he suggested should have been present. The Court has already commented on the manner in which the defendants developed ManTra. The defendants dealt with the alleged lack of written specifications in evidence by highlighting the agile collaborative manner in which they developed ManTra. The more formal or bureaucratic method which one would expect to find if one was dealing with a contract with a well established company or if a non-agile methodology was being used would be that there would be written specifications, testing requirements and other documentation. However, in this case the persons developing the product were working for themselves and were in direct and constant contact and were all experienced in the area in which the development was being carried out. This enabled each of the developers to have a good understanding of the requirements leading to a situation where there was a minimal requirement for formal design documents. The Court has already indicated that it accepts the evidence of the defendants' witnesses in relation to how the ManTra product was developed and is satisfied that the lack of formal design documents is explained by the truly agile collaborative manner in which ManTra was developed. By avoiding the production of written design documentation and specifications, the defendants were able to expedite the development of ManTra. The cost of that expedition was that the defendants did not have the insurance provided by detailed written specifications and documentation but the evidence establishes that is how the defendants chose to develop ManTra. There was a dispute in evidence as to the extent of the design documentation which was provided by the defendants. The plaintiffs' experts claimed that a minimal amount of such material was discovered whilst the defendants, through the evidence of James O'Donnell, claimed that considerable documentation was provided. As the case progressed it became apparent that a significant number of documents had been provided by the defendants and the plaintiffs agreed that a quantity of material had been provided but it would appear that neither Harry Goddard nor Michael Turner had examined all of the documentation in detail. This situation appears to have arisen from the fact that the plaintiffs were expecting to encounter more formal design documentation and written specifications and do not appear to have taken any, or any sufficient regard, to the informal nature of the development of ManTra and the fact that it was developed in an agile collaborative manner using PowerBuilder. The lack of consideration by the plaintiffs of available material was illustrated by the plaintiffs' experts' failure to consider the photographs of the flipcharts which were available from the June 2006 meeting which provided the genesis of the ManTra product. Those photographs demonstrated the approach which was taken by the defendants' developers and the lack of consideration of those photographs or their contents by the plaintiffs' experts is indicative of the plaintiffs' misunderstanding of the nature of the defendants' development process and led to the perpetuation of a claim based upon an alleged lack or absence of material or evidence when, in fact, such material was available, albeit that the material was in a different format and less extensive than envisaged due to the methods followed by the defendants' developers. The Court does not draw any adverse conclusions as a result of the amount or nature of the material provided by the defendants and is satisfied that it is consistent with the oral evidence given by the defendants' witnesses, as to how ManTra was in fact developed.

99. The sixteenth particular pleaded by the plaintiffs relates to the alleged lack of evidence of refactoring of source code which would be compatible with the alleged agile development of ManTra in the period October 2006 to March 2007. In this instance the term "refactoring" refers to modifications made to a program's structure during the agile development. Modifications become necessary because agile methods do not allow for advance requirement specifications and design. In agile development, a developer works closely with a client to build software without much advance knowledge of requirements. In normal circumstances, a typical agile developer is already cognisant of a client's initial priorities and the client would have a general knowledge of the requirements but would not have a technical or intricate knowledge. This results in the requirements emerging and crystallising during the development process. This leads to additional enhanced and new requirements being discovered during the agile development process and it is at that stage that refactoring becomes necessary. In agile development there is less advance design done than in traditional development, so it is possible that incremental development will eventually result in unwieldy program structures. Refactoring can also occur when a developer decides that a given part of the program code could be rewritten in a better way either to be more efficient, logical, reusable or easier to understand.

The plaintiffs contend that there is insufficient evidence of such refactoring in the records of the development of ManTra. However, the evidence available to the Court shows that the experts who analysed the QVCSE logs and produced statistics demonstrated a consistent pattern of modification with many thousand of changes made over the course of several months. Analysis carried out by the plaintiffs identified that about 21% of the two hundred and fifty nine ManTra scripts required high or medium levels of change. The plaintiffs sought to characterise that percentage as evidence that an excessive amount of the ManTra code was right first time. The Court does not accept that contention for a number of reasons. The fact that 79% of the scripts required only low levels of

change is of itself uncontroversial and is consistent with industry experience. What was referred to as the 80/20 rule was raised in evidence before the Court by the Court's own independent expert, which is a rule of thumb in software development where experience has indicated that 20% of the tasks require 80% of the effort. The figure of 21% of ManTra scripts requiring high or medium levels of change would be consistent with that experience and also where a large proportion of the stored procedures dealt with routine data access and were, therefore, relatively uncomplicated. Secondly, the plaintiffs and their experts failed to have any sufficient regard to the makeup of the team developing ManTra. Not only were the individual members experienced, knowledgeable and well-trained but they knew the particular area in which the development was being carried out in a detailed manner and they had a capacity to communicate effectively and directly with one and other. This resulted in the situation occurring that the effective clients in the ManTra agile development process were HWM's business analysts and those persons knew their requirements intimately and in advance. That reduced the necessity for such persons to change their minds or to make a mistake about their requirements. The Court is satisfied that Marian Klco, the lead developer, was technically highly expert and had an impressive insight into the requirements. He arrived at the start of the Mantra development in a position where he had an excellent understanding of how best to structure the proposed program based upon his long experience with meeting similar requirements whilst working for Koger and developing NTAS almost amounting in effect to 20/20 hindsight in advance. The other developers had similar attributes and the group of persons carrying out the agile development were all experienced and none were unfamiliar with the necessary requirements. It was also the case that the evidence established that the ManTra development was constrained by the BFC library and the database Schema, both of which had been precisely formulated by expert designers in advance. ManTra was limited to a two-tier physical architecture (client-server), which prevented the implementation of a separate middleware layer and therefore there was no separate business object model. Harry Goddard gave evidence that he believed that there was a prior design for ManTra which he had not seen but this belief appears to have disregarded the importance of the BFC library and the database structure which together provided that design especially given the absence of a middle tier or business object model. The evidence also established that the testing of the ManTra product was done by the business analysts who knew the business requirements inside out. It was also crucial to the speed of development that those business analysts had sufficient technical know-how to carry out tests in a speedy and effective manner and the ability to use an informal process with less documentation and overheads than would be required in a more formal testing process. The evidence also established that the development process adopted by the defendants meant that problems which arose could be rectified in a speedy manner often taking place during telephone conversations. In the light of the factors identified concerning the nature and ability of the team which developed ManTra, the Court is satisfied that the extent and nature of the evidence of refactoring is commensurate with the circumstances prevailing at the time that ManTra was developed and by whom it was developed.

100. The seventeenth particular is that based upon particulars ten to sixteen inclusive taken together and individually it is claimed that such particulars provide evidence that an unauthorised copy of NTAS was being used as a reference point for the design, functional specification and the development of ManTra. For the reasons which the Court has set forth in the previous paragraphs, the Court does not accept that argument. The matters relied upon by the plaintiffs do not establish that a copy of NTAS was used as a reference in the design or development of ManTra. The Court is satisfied that such access was not required and from the evidence adduced before the Court, the Court has failed to identify any significant advantage which the defendants would have gained from such access. The Court is also satisfied based upon its conclusion on the credibility of the defendants' witnesses that the evidence which those witnesses gave that they did not use or have such access is true.

101. The eighteenth particular pleaded by the plaintiffs relies upon the alleged absence of valid metadata in relation to the development of ManTra and the supplied design materials. Under this heading the plaintiffs appear to be referring to the file system metadata, such as date stamps, which were overwritten. It does not appear as if the plaintiffs are referring to application metadata since that was present and largely intact. The essence of the plaintiffs' allegation under this heading is that the defendants intentionally altered the metadata and that the purpose of such alternation was to hide or cover the true development dates for the early versions of ManTra. 102. This was expressly pleaded in the nineteenth particular by the plaintiffs where it was alleged that the defendants made efforts to shield ManTra and its design materials from objective scrutiny. The Court will deal with particulars eighteen and nineteen within this section of the judgment. In relation to the alteration of the metadata it is true that dates were overwritten. The plaintiffs contend that this was done deliberately. That claim was denied by the persons involved in the actual development of ManTra. The Court accepts that evidence and is satisfied that the alterations which occurred were accidental and not intentional. More significantly, the Court is satisfied that any alternations cannot have been for the purpose of shielding ManTra, as alleged by the plaintiffs or hiding the true development dates. This is because the Court is satisfied that the ManTra code was developed in the time period identified by the defendants' witnesses and in the manner described by them. The evidence from the persons involved in the development of ManTra concerning the development timeline was inherently logical and was also consistent with other evidence such as date stamps. The timeline identified by those witnesses was logical in that the development of each part of ManTra would have been dependent upon other parts of ManTra. No ManTra development could have been done until a decision had been made on the development platforms. The evidence established that various platforms were considered including Sybase, Oracle and SQL Server for the database and Java and PowerBuilder for the front end of ManTra. The evidence established that it was in October 2006 that a decision was made by the defendants to use an SQL Server and PowerBuilder. A database could not be created until an initial data model had been developed and the defendants' evidence was that that was produced as a result of the October 2006 meeting. Thereafter there was credible and cogent evidence of the incremental development of the database structure. The stored procedures could not be developed and tested until the relevant database tables were in place and again the evidence from the defendants was that that occurred from late 2006 onwards and that by the 1st February, 2007, approximately 25% of the eventual number of stored procedures had been created. It is also the case that the PowerBuilder code could not be developed until an appropriate framework (BFC) had been created and at least some of the stored procedures were present and again the defendants' evidence is that this occurred mainly in the first few months of 2007. Even though the earliest versions of ManTra PowerBuilder code were not discovered (PB10) there is evidence of incremental development of PowerBuilder code from December 2006 onwards. Only the BFC framework was independent of any other part of ManTra and the defendants say it was created during the middle part of 2006. The timeline as to the development of ManTra which could be gleaned from the evidence of the defendants' witnesses was consistent with the documentation which was available and was inherently logical. It was consistent with other evidence such as date stamps. All that evidence confirms the Court in its conclusion that ManTra was developed in the manner and timeframe as identified in the defendants' evidence. Indeed, that evidence is of such inherent consistency that the Court is satisfied that the ManTra code could not have been developed over a substantially different period from what was described by the defendants in their evidence. If the defendants had followed a different timetable, merely overwriting some file system metadata would have been insufficient to conceal the true timetable. It would have been necessary to alter the application metadata and other evidence such as e-mail and SharePoint records to make it appear that the above timetable had been followed. Such scenario is implausible and there is no evidence to suggest that it was done and the only conclusion which the Court can make is that the defendants' evidence as to the development timeline of ManTra is true.

The use by the ManTra development team of the BFC library assisted the defendants in creating ManTra in a short timeframe. The BFC library and its use dictated to a large extent the structure of subsequent ManTra PowerBuilder code and saved the developers time and reduced the need for testing. Marian Klco gave evidence that he developed the BFC library during the middle part of 2006

independently from the ManTra development. The Court accepts that evidence and such evidence is consistent with the timeline identified above. The plaintiffs contended that Marian Klco's development of the BFC library was not done independent of the ManTra development but that was expressly denied by Marian Klco and the Court accepts that denial.

The plaintiffs also raised a number of other issues in relation to a claim that the defendants endeavoured to shield ManTra from objective scrutiny. The first matter under this heading is the suggested failure to agree on the appointment of an independent expert before the commencement of this case. Consideration of the correspondence relating to this matter is inconclusive and demonstrates a complete failure of a meeting of minds and a manifest lack of trust. Secondly, the plaintiffs contend that the defendants failed to provide the correct discovery materials for expert review. No application for further discovery was pursued by the plaintiffs even though as the case developed, including during the trial, the plaintiffs suggested that more and more documents might have been relevant. However, this disregards the fact that the joint expert terms of reference and the materials to which the experts were to have access were agreed. Those materials were to a very significant extent provided. The agreed terms of reference did not stipulate the exact form in which the ManTra code was to be provided. Michael Turner gave evidence that he had stated his requirements in writing, to his side, and notwithstanding that it is clear that the terms of reference as agreed between the parties did not include Michael Turner's stated requirements. In those circumstances the Court is satisfied that there is no basis for entertaining the plaintiffs' subsequent complaints given the agreement that was reached in relation to the documentation and materials that were to be provided to the experts instructed by both sides. The plaintiffs also contended that the defendants should have followed the procedure of taking forensic copies of their code during development. Again this would have been of assistance given the manner in which this case evolved but the Court heard no evidence to suggest that such a procedure would be routine or expected. What did occur was that the defendants in developing ManTra used a version control system which is a process routinely followed by developers. Having considered the entirety of the evidence, the Court is satisfied that the defendants did not deliberately or intentionally take steps to shield ManTra or its design materials from objective scrutiny and that there is valid metadata available in relation to the development of ManTra entirely consistent with the defendants' evidence as to the manner and speed of its development.

103. The twentieth particular relates to an allegation that ManTra was developed at an extraordinary pace. For the reasons outlined earlier in this judgment the Court is satisfied that there is no basis for that allegation and that the evidence available to the Court establishes that ManTra was developed independent of NTAS and without the use or access to NTAS over the time period identified in the defendants' witnesses' and in the manner identified by them. The Court also is satisfied that the evidence of George Sipko in relation to the pace of development of ManTra is of no real value to the Court. This stems from the fact that it is his experience with NTAS which would have informed and influenced his understanding as to the speed of development. NTAS did not use agile methodology but followed a more traditional documentation based method. NTAS was a mature product which was modified continuously over a ten year period and started with a poor architecture which was originally created by a developer who was inexperienced in PowerBuilder. It was a product which could not easily be replaced or improved once it was developed. The manner in which NTAS was improved or altered was likely to have been hampered by the lack of use of a more modern and up to date development support such as PowerDesigner. It is also the case that the working environment within NTAS was such that due to management interference and an atmosphere of fear and distrust that the speed of work was significantly hampered. This was likely to have been exacerbated by language difficulties. This would have led to Geoge Sipko having an unrealistic view as to the time involved in the development and improvement of software. Koger was a well financed established company which could afford the cost of an inefficient software process whereas HWM were not and required the efficiencies that resulted from a highly trained and committed staff. Neither George Sipko nor his experts appeared to understand the effect which the defendants' very different software process had on development productivity and this led to unsupportable assumptions being propounded by the plaintiffs in relation to the defendants' software development productivity. For the reasons outlined in this judgment the Court is satisfied that Mantra was not developed at an extraordinary pace but that its development productivity was consistent with the ability and talent of the developers and the software processes adopted by the defendants.

104. The twenty first particular relied upon by the plaintiffs is the alleged lack of the range, type and quality of design materials that would be compatible with the alleged agile development of ManTra in the period October 2006 to March 2007. The Court is satisfied that there is no basis for this allegation as the evidence established that the defendants chose and used an agile process for the development of ManTra. That decision had the consequent effect of avoiding the need for documentation and significantly reduced the amount of documentation that was produced from what would arise from a more traditional software development. Throughout the case the plaintiffs have raised issues in relation to the extent of the documentation without having recognised the true consequences of the use of an agile development process by the plaintiffs. In a traditional development process documentation is the main vehicle of communication between the persons participating in the project. That process also requires an identified written step by step approach fully documented and the typical documentation would include detailed project plans, extensive requirement specifications, architecture and design documents, program specifications, test plans, cases and results and implementation plans. In this case the defendants chose and used an agile development process and did so in circumstances where the persons participating in the development had the real expertise and technical knowledge to fully operate such a process. That minimised the need for documentation and the evidence established that there was direct collaboration and communication between the developers, that the business analysts participating in the development effectively acted as the client, and that the developers proceeded with the development incrementally, thereby removing the necessity to document each stage of the process. The evidence established that the agile development process adopted and followed by the defendants in this case effectively included an outline project plan, a statement of requirement priorities but not requirement specifications, revision of the requirements and priorities as the development proceeded and a system architecture which in this instance was contained within the system framework itself. The defendants also provided cogent and consistent evidence of how they tested the application. The clear and credible evidence from the defendants was that they chose to use agile development methods and the evidence which they adduce supported that claim in that they identified and confirmed the use of practices necessary in a true agile method such as direct collaboration between the developer and the client. As identified above, the effective clients in this case were the business analysts working as part of the defendants' development team and this removed the necessity for any contractual relationship between the developer and the client. The evidence established that the agile development process followed by the defendants included the fact that the project plan and requirements prioritisation could be dealt with in a direct contact format using e-mail, telephone and face to face contact and person to person conversation rather than requiring documentation.

The evidence of Jana Potocnakova established that she acted as the "hub" in the development process directing requests and forwarding information from the analysts to the developers. That evidence was both credible and consistent with the other evidence adduced by the defendants and, significantly, the Court heard the evidence from Marian Klco who is the person who created the significant and technically difficult portions of ManTra. The Court is satisfied from considering his evidence that Marian Klco had the ability to carry out that work with little or no requirement for program specifications, thereby significantly reducing any requirement for documentation. The Court is satisfied that the material and documentation produced by the defendants including the design materials were compatible with the agile development of ManTra as actually carried out by the defendants and that there is no basis for the plaintiffs' claim that the defendants failed to produce such material or that there is a lack of material. As already indicated,

the informal design materials produced by the defendants include the outline project plans stating milestones which was the plan agreed at the October 2006 meeting which was confirmed in subsequent e-mails and SharePoint postings which were available in documentary form. There was no need, within the agile process, to produce a formal project plan document as there was no external client and there was therefore no reason to communicate with that client. The materials also included requirement priorities which were agreed between the persons participating in the development of ManTra at the June and October 2006 meetings. Those requirements were confirmed in subsequent e-mails and SharePoint postings. The documentation also included the system architecture and Marian Klco gave evidence of a comprehensive and self- documenting architecture in the form of the BFC class library. That together with the well designed ManTra data model and use of stored procedures to implement business logic provided a system architecture for ManTra. Harry Goddard in his evidence failed to have any sufficient regard for the presence of the BFC library as a primary architectural component and instead sought to identify a middleware style object model. However, the evidence in this case established that there was no need for such a level of complexity in the ManTra design as ManTra was limited to a two-tier physical architecture which prevented the implementation of middleware proper. This was explained in the evidence of James O'Donnell when he stated that the compromise solution implemented by the defendants was to implement a virtual third tier in the form of stored procedures in the SQL Server database and that evidence was both credible and consistent with the other evidence adduced by the defendants. The documentation produced by the defendants also identified documents relating to the platform choices and the reasons for making such choices, that is, the decision to use PowerBuilder and SQL Server rather than Java, Sybase or Oracle.

The plaintiffs lay considerable emphasis, in the presentation of their case, on the alleged absence of test documentation. The evidence established that the ManTra code and database structure were of high quality. The evidence also established that the defendants adopted working practices so that the application which they were creating was easily accessible to all persons participating in the project, regardless of location. That, together with the excellent knowledge of the business analysts and good communications, facilitated an agile approach to testing and removed the necessity for documentation. The plaintiffs commented that there was a lack of documents such as requirement specifications, design documents, program specifications and test plans. However, those documents would be more typically associated with non-agile development and the plaintiffs in seeking such documentation failed to recognise the true nature of development being carried out by the defendants. The Court is satisfied that the evidence establishes that there was no lack of range, type or quality of design materials compatible with the agile development of ManTra as pursued by the defendants. The material which was produced was consistent with the evidence given by the defendants as to the actual method followed by them and the plaintiffs' complaint in relation to the lack of documentation is without basis.

105. The twenty second and final particular relied upon by the plaintiffs is an allegation that despite the deletion of much of the history of the evolution of the source code, evidence remains which indicates a migration from the NTAS database structure to the ManTra database. It is common case that the defendants deleted the first and earliest source code folder that is PB10. The Court heard evidence in relation to this matter and the Court is satisfied that that folder must inevitably have held little of significance because it represented the very early stage in the development of the PowerBuilder code for ManTra. The Court accepts the defendants' evidence in relation to this matter and that evidence is corroborated by a number of other items of evidence including the dates of the PDM file and the stored procedures. The plaintiffs contend that the defendants deleted "much of the history" of the evolution of the source code. That would only be the case if the source code had gone through a substantial transformation from NTAS to ManTra in or before the PB10 version. The plaintiffs contend that such substantial transformation actually took place despite there being a complete lack of evidence to support such contention. The Court does not accept nor is there evidence to support an allegation that the PB10 folder was deleted to conceal such a substantial transformation. That is so because the Court is satisfied that there was no such substantial transformation from NTAS to ManTra in or before the PB10 version. The Court has already dealt with the deletion of the PB10 file and has indicated that it accepts the evidence of Marian Klco in relation to the date and circumstances of deletion.

As part of this particular the plaintiffs claim that evidence remains which indicates migration from the NTAS database structure to the ManTra database. The evidence which the Court has heard does not support that contention. The earliest data model available for ManTra, the twenty eight table model in the first PDM file, is consistent with early stage data modelling *ab initio*. The Court heard no evidence of any model derived from NTAS being transformed or migrated to create the twenty eight table model. The Court is further satisfied that there is no practical reality in relation to the claim that the initial twenty eight table model might have been generated in such a manner. The NTAS database structure contained hundreds of tables and relationships and it would have been both time consuming and pointless to endeavour to reduce that structure to twenty eight core tables. The Court is satisfied that it would be more practical, efficient and quicker to model the core twenty eight tables from scratch. That was the defendants' evidence and the Court accepts that evidence as credible.

The plaintiffs also sought to rely on certain Sybase SQL statements within ManTra as evidence of migration from NTAS to ManTra. The evidence to the Court was that the code in question is designed to retrieve the structure of any Sybase database and the plaintiffs therefore suggest that this could have been used to programmatically extract the structure of the Sybase NTAS database in order to create a SQL Server copy as the basis for ManTra's database structure. However, the plaintiffs led no evidence to show that that actually occurred. Marian Klco gave evidence providing an explanation for the existence of the code in question and the Court is satisfied that that evidence is credible.

A further issue raised by the plaintiffs in support of a claim of evidence of migration was the use in ManTra of certain table and column names which are the same as those in NTAS and the subsequent replacement of some of those terms with non-NTAS equivalents. The Court does not accept the plaintiffs' contention that the use of terms and their subsequent replacement is evidence of migration from the NTAS database structure. The terms in question were common knowledge to the persons developing ManTra and it was perfectly logical for those persons to use such terms. They had long experience of using such terms and they each knew the precise meaning of each individual term. The defendants gave evidence as to the reason for adopting alternative terms which was to make the terms more up to date, understandable and appropriate. The term "TRI" was replaced by "Audit". The term "NAV" was replaced by "Valuations" and the term "Exrate" became "Fxrate". The defendants' explanation in relation to the reasons and circumstances for the use of alternative terms was entirely credible. The plaintiffs' expert witness, Harry Goddard, endeavoured to suggest that the defendants re-naming of tables and columns was an indication of an attempt to cover up the fact that they were copying NTAS. However, as was apparent from the evidence of the defendants, the reason for the re-naming was to provide more understandable, appropriate and up to date terminology. Such approach is entirely consistent with the iterative development that takes place during data modelling and within agile projects. The Court is satisfied that there is nothing suspicious about such re-naming and in fact it can be considered a form of refactoring. The inconsistency of Harry Goddard's criticism is illustrated by this in that he complained that such re-naming was an indication of copying whilst simultaneously claiming that evidence of refactoring was absent. The Court accepts the defendants' explanation in relation to the replacement of NTAS terms and that such replacement had nothing to do with any attempt to cover up the copying of NTAS as such copying had not occurred.

A further matter raised by the plaintiffs in relation to this particular was that the plaintiffs identified NTAS column names in ManTra

code which had been commented out. Some of those NTAS column names had also been altered. The plaintiffs contended that the alteration was evidence of migration from the NTAS database design to the ManTra database design. The plaintiffs' expert questioned why the defendants would have edited code which was commented out and claimed that such conduct was indicative of copying. Marian Klco gave evidence in relation to this matter. It is standard practice to desire to re-name variables during development but PowerBuilder which was being used by the defendants' developers lacked refactoring tools to allow variable names to be easily altered. Marian Klco explained in evidence how that problem was dealt with which was by the use of global replacement (find and replace). This had the effect of changing every occurrence of a given variable name, in both live and commented out code. The resulting alteration of variable names is therefore no ground for suspicion and the Court accepts the evidence of Marian Klco in relation to this matter.

106. In the plaintiffs' written submissions they reiterated their opening legal submissions and stated that:

> "The plaintiffs' case is ultimately fact dependent: did the defendants in developing ManTra and launching their rival business use without authorisation confidential and proprietary information of the plaintiffs, including confidential and proprietary information relating to the source code and database structure of NTAS? …. It is respectfully submitted that the answer to that question is indeed yes."

Having considered the entirety of the evidence in relation to the claim under paragraph 2 of the plaintiffs' statement of case and each of the individual particulars relied on as set forth in paragraph 3, the Court is satisfied that the defendants in developing ManTra did not use any copy of NTAS either as a functional and/or design specification for developing ManTra. The Court is satisfied that there is no evidence that the defendants had access to or used an unauthorised copy or any copy of NTAS. For completeness sake it is also the case that the evidence satisfies the Court that the defendants were able to develop ManTra and release it onto the market as a result of the defendants' own independent work and that such development and date of release was in no way dependent, as alleged, on access to and use of an unauthorised copy of NTAS. The plaintiffs have recognised that their case is ultimately fact dependent and on the facts of this case the Court is satisfied that the plaintiffs have failed to establish a case against the defendants to support their claim.

107. Paragraph 4 of the plaintiffs' statement of case claims:

> "The making of the unauthorised copy of NTAS constitutes an infringement of the plaintiffs' copyright under the 2000 Act. Further, the use of the unauthorised copy of NTAS as described in the development of ManTra constitutes the adaptation of the NTAS product within the meaning of s. 37 of the 2000 Act thereby infringing the plaintiffs' copyright in the NTAS product."

The Court has already determined that the defendants did not have access to or the use of an unauthorised copy of NTAS. Therefore, the claim under this heading fails. However, for completeness sake it is appropriate to deal with the matter raised within that plea as to whether or not ManTra constitutes an adaptation of the NTAS product. Section 2 of the Copyright and Related Rights Act 2000 (the 2000 Act) defines literary work in the following terms, namely:

> "'Literary work' means a work, including a computer program, but does not include a dramatic or musical work or an original database, which is written, spoken or sung."

Database is defined in the same section as follows:

> "'Database' means a collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by any means but excludes computer programs used in the making or operation of a database."

Section 17(2) of the 2000 Act provides that:

> "Copyright subsists, in accordance with this Act, in -
>
> (a) original literary, dramatic, musical or artistic works,
>
> (b) …
>
> (c) …
>
> (d) original databases."

Chapter 4 of the 2000 Act deals with the rights of copyright owners and s. 37 identifies acts restricted by copyright in a work. Section 37(1) provides:

> "(1) Subject to the exceptions specified in Chapter 6 and to any provisions relating to licensing in this Part, the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of the following acts, namely:
>
> (a) to copy the work;
>
> (b) to make available to the public the work;
>
> (c) to make an adaptation of the work or to undertake either of the acts referred to in paragraph (a) or (b) in relation to an adaptation,
>
> and those acts shall be known and in this Act referred to as "acts restricted by copyright".
>
> (2) The copyright in a work is infringed by a person who without the license of the copyright owner undertakes, or authorises another to undertake, any of the acts restricted by copyright.
>
> (3) References to the undertaking of an act restricted by the copyright in a work shall relate to the work as a whole or to any substantial part of the work and to whether the act is undertaken directly or indirectly."

The plaintiffs have claimed in this case that ManTra constitutes an adaptation of the NTAS product within the meaning of s. 37 of the 2000 Act. The evidence does not support a claim that ManTra is an adaptation of NTAS. As identified earlier in this judgment, the architecture of the code in NTAS is different from that of ManTra and once an application's architecture is established, it is difficult to convert it to another architecture particularly in circumstances where the two architectures are fundamentally different. There are significant differences in the database structures and the structure of the data access code is different in NTAS and ManTra. It is also implemented using two different platforms which require different algorithmic approaches, that is to say, SQL stored procedures in ManTra and PowerBuilder code in NTAS. There was also no evidence led to the Court to indicate that any specific part of ManTra could be identified as having telltale traces of the alleged design by reference to NTAS. Section 43(2)(d) of the 2000 Act expressly deals with the term "adaptation" as referred to in s. 37(1)(c) and sub-paragraph (d) of s. 43(2) deals with a computer program in the following terms:

> "A computer program, includes a translation, arrangement or other alteration of the computer program."

The evidence which the Court heard fails to demonstrate that the ManTra code could be said to be an adaptation, translation, arrangement or other alteration of NTAS. The plaintiffs failed to adduce any evidence of the process of the transformation from NTAS to ManTra and whilst ManTra does contain some ideas or principles from NTAS, such contents do not amount to an adaptation and do not amount to any breach of the 2000 Act.

There is no issue but that the first named plaintiff, Koger, owns the copyright in the NTAS product excluding the components of that product authorised by or supplied by third parties. However, the plaintiffs have failed to establish that the defendants had access to or use of NTAS in the development of ManTra. Nor have they established that ManTra is an adaptation of NTAS under the 2000 Act. The plaintiffs have therefore failed to establish any breach of copyright.

In considering whether or not there was a breach of copyright in the NTAS product, the Court has considered that matter and applied the definition and approach to source code identified in the judgment of Laddie J. in *Psychometric Services Ltd. v. Merant International Ltd.* [2002] F.S.R. 8 at p. 147 and his explanation as to what a source code is (at p. 152):

> "A computer functions in response to a set of electronic signals supplied to it. The software is the combination of data and instructions which controls the computer. The software which directly controls a computer is written in a language which computers understand but which is incomprehensible to humans. It is said to be a low-level language. …

> However, computer programs are, in large part, written by or under the control of humans. The authors, that is to say the computer programmers, have to understand what they are doing in order to refine any software and to correct any defects in it. A computer programmer must be able to understand the program, appreciate which parts control which functions and so on. For these reasons the software will be created in a form known as source code. It is a high-level language which is comprehensible to humans (or at least a group of suitably trained ones)."

In considering the issue as to whether or not there was a breach of copyright and arriving at the conclusion that there has not been such a breach, the Court has followed the approach to the alleged breach of copyright in computer software identified by Mr. Justice Jacob in *Ibcos Computers Ltd. and Another v. Barclays Mercantile Highland Finance Ltd. and Others* [1994] F.S.R. 275. That case considered a claim for copyright infringement in computer software under the U.K. Copyright, Designs and Patents Act 1988. In his judgment, Jacob J. identified four questions which require to be addressed in determining whether or not there was a breach of copyright, namely:

> (1) What are the work or works in which the plaintiff claims copyright?

> (2) Is each such work "original"?

> (3) Was there copying from that work?

> (4) If there was copying, has a substantial part of that work been reproduced?

In applying that test to the facts of this case, the Court is satisfied that the first named plaintiff, Koger, owns the copyright in NTAS and that subject to the proviso in relation to the exclusion of components within NTAS authorised by or supplied by third parties, that such work is original. The evidence which the Court has heard has led the Court to the determination that the defendants have not copied NTAS and that therefore there has not been a breach of copyright. It therefore follows that the issue as to whether a substantial part of the work of NTAS has been reproduced in ManTra does not arise.

In considering the question of whether or not there was copying of the NTAS software, the Court has applied and the test identified by Jacob J. in the *Ibcos* case where he identified the approach to take in relation to the issue as to whether or not there was copying in the following terms, namely(at pp. 296 and 297):

> "For infringement there must be copying. Whether there was or not is a question of fact. To prove copying the plaintiff can normally do no more than point to bits of his work and the defendant's work which are the same and prove an opportunity of access to his work. If the resemblance is sufficiently great then the court will draw an inference of copying. It may then be possible for the defendant to rebut the inference – to explain the similarities in some other way. For instance he may be able to show both parties derived the similar bits from some third party or material in the public domain. Or he may be able to show that the similarity arises out of a functional necessity – that anyone doing this particular job would be likely to come up with similar bits. So much is common ground between the parties. The concept of sufficient similarities shifting the onus onto the defendant to prove non-copying is well recognised in copyright law."

In determining that there has been no copying by the defendants, the Court has heard evidence that where there is identical text within the two products that such text emanates from third party material readily available in the public domain. It follows that that material is of no benefit to the plaintiffs, in relation to their claim for breach of copyright. It is also the case, as is apparent from the earlier part of this judgment, that such limited similarities as arise between ManTra and NTAS arise out of a functional necessity. In addressing that functional necessity the persons developing ManTra did so using their own expertise and knowledge and did not do so by the use of a copy or access to NTAS. The product or code within ManTra was as a result of independent design.

In considering the issue of whether or not there was breach of contract the Court has applied the principle contended for by the plaintiffs, as identified in the judgment of Pumfrey J. in *Cantor Fitzgerald International v. Tradition (U.K.) Ltd.* [2000] RPC 95 and, in particular, the portion of his judgment which identifies that:

> "… the 'architecture' of a computer program is capable of protection if a substantial part of that programmer's skill, labour and judgment went into it. In this context, 'architecture' is a vague and ambiguous term. It may be used to refer to the overall structure of the system at a very high level of abstraction." (see p. 134).

The evidence in this case established that the defendants worked out, separately and independently, relying on their own personal knowledge and expertise an independently developed product whose architecture was so different as to bear no real resemblance to NTAS. The defendants in this case did not borrow a substantial amount of the skill or labour expended by the plaintiffs and embedded in NTAS but rather relied on their own knowledge and experience. In considering the evidence the Court is satisfied that when one has regard to the knowledge and expertise of the persons developing ManTra that ManTra was developed by those persons using their own skill and experience and not as a result of any misuse of NTAS.

108. Paragraph five of the plaintiffs' statement of case pleaded a further and alternative claim to the effect that the use of the NTAS product constitutes a misuse of confidential information and ManTra consists of the fruits of such misuse. That plea is based upon a claim that the defendants used the NTAS product. The Court has already concluded that the defendants did not have access to or use of an unauthorised copy of NTAS during the development of ManTra. The right to prevent the misuse of confidential information and to grant relief for breach of confidence was set out by Costello J. in *House of Spring Gardens Ltd. v. Point Blank Ltd.* [1984] I.R. 611. That case identified a number of steps which were necessary for a party to succeed in a claim for breach of confidence. Firstly, the Court must decide whether there existed from the relationship between the parties an obligation of confidence regarding the information which had been imparted and then to decide whether the information which was communicated could properly be regarded as confidential. Once the Court was satisfied that it had been established that an obligation of confidence existed and that the information was confidential, then the Court proceeded on the basis that the person to whom it was given had a duty to act in good faith which meant that that person must use the information for the purpose for which it was imparted to him and could not use it to the detriment of the informant. In arriving at that decision, Costello J. had relied in part on the judgment of Lord Greene, M.R. in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* [1948] R.P.C. 203. In that case it had been held that if a defendant was proved to have used confidential information, directly or indirectly, obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he would be guilty of an infringement of the plaintiff's rights. Information communicated by the plaintiffs to their then employees during the course of their employment would have the clear intention, irrespective of any express provision in a contract of employment, to be categorised as confidential information placing on the party receiving that information, such as an employee, an obligation of confidence regarding that information. It would however have to be confidential information and the person receiving it must use that information. In this case the plaintiffs allege that former employees used confidential information by making a copy of NTAS and by having access to such copy and using such unauthorised copy as they were developing ManTra. The plaintiffs have failed to establish such use in evidence and have failed to identify any confidential information which was used by the defendants in and about the development of ManTra. What has been established in evidence is that former employees of the plaintiffs had accumulated a body of knowledge during their employment which was used in and about the independent development of ManTra. The plaintiffs have failed to identify the use or misuse of any identifiable trade secrets. No claim is made that the defendants used or applied skill, expertise know-how and general knowledge gained during the course of their employment. Indeed, such a claim could not succeed. There is clear authority for the fact that protection cannot legitimately be claimed in respect of skill, expertise, know-how and general knowledge acquired by an employee as part of his job during the course of his employment, even though it might equip him as a competitor of his employer. As stated by Mummry L.J. in the judgment of the Court of Appeal in *FSS Travel and Leisure Systems Ltd. v. Johnson* [1999] F.S.R. 505, dealing with the issue of confidential information and contracts of employment relating to a computer program, one of the well settled legal propositions affecting restrictive covenants in an employment contract include (p. 512):

> "(4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer."

That judgment identified that the critical question to consider was whether the employer had trade secrets which could be fairly regarded as his property, as distinct from the skill, experience, know-how and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the services of a competitor. In considering that distinction, a court must examine all the evidence relating to the nature of the employment, the character of the information, the restrictions imposed or its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer. On the facts of this case the plaintiffs have failed to identify the misuse of particular trade secrets which can be fairly regarded as their property. Lack of precision in pleading by the plaintiffs, and the absence of solid evidence in proof of any trade secrets, results in this Court being satisfied that there has been no breach of confidential information or any misuse of information protected by a contract of employment by any of the defendants. The plaintiffs have expressly relied on a claim that their NTAS product was copied and was then accessed and used by the defendants in the development of ManTra. Having examined closely the evidence relating to this matter, the Court is satisfied that such unauthorised taking of a copy did not occur and that there was no unauthorised use or access by the defendants. It is clear that the plaintiffs' claim in relation to breach of confidence is fact dependent and as contended for at paragraph 397 of the plaintiffs' closing submissions, it was claimed:

> "It is respectfully submitted that, in accessing and/or taking away and relying upon the plaintiffs' source code and database structure and using it to develop the ManTra product, the defendants committed a clear breach of confidence to the detriment of the plaintiffs, such as to make out all the elements of the cause of action in both equity and contract."

The Court is satisfied that the plaintiffs have failed to establish such claimed access or use and have failed to establish the taking away and relying upon the plaintiffs' source code and database structure by the defendants and in those circumstances the plaintiffs' claim in breach of confidence cannot succeed.

109. The sixth and final paragraph in the plaintiffs' statement of case raises the claim that in addition to breach of copyright and breach of confidence claims, that the plaintiffs also claim that the first and second named defendants, that is, James O'Donnell and Robert Woolman, acted in breach of their contracts with the plaintiffs and also were in breach of their fiduciary duties to the plaintiffs. Particulars of such breaches are set out and five separately identified paragraphs and are relied upon by the plaintiffs.

A claim for breach of contract is made against James O'Donnell and Roger Woolman. It is necessary to identify the evidence which the Court heard in relation to those two persons' contracts of employment. The plaintiffs contend that a non-solicitation clause contained in the contract between Koger, the first named plaintiff, and James O'Donnell, the first named defendant, remained in force and formed part of James O'Donnell's employment terms up to the date of his departure on the 30th April, 2006. Clause 7 of the agreement of 21st December 2000 between James O'Donnell and Koger provided contract terms and conditions which contained a non-solicitation clause which prohibited James O'Donnell from directly or indirectly soliciting or attempting to offer any service,

product or other application which is the same as or similar to the services, products or other applications offered or in the process of being developed by the company within the last year prior to termination of his contract with any company or any company customers for a period of one year after the termination of his contract with the company. There was also a term within clause 7 prohibiting, for a period of one year after the termination of his contract with the company, James O'Donnell from soliciting or attempting to solicit any employee or consultant of the company where such employee or consultant had rendered services to the company at any time within the six months immediately preceding the termination of James O'Donnell's contract. There was a conflict of evidence in relation to what was the contractual relationship between James O'Donnell and the plaintiffs. James O'Donnell gave evidence of direct and completed negotiations between him and George Sipko regarding the exclusion of post-termination, non-compete and non-solicitation obligations from his contracts with both Koger and Koger (Dublin). A non-solicitation clause was included in the contract of 21st December 2000 and that was common case. That contract was with Koger as Koger (Dublin) had not yet been incorporated. James O'Donnell gave evidence that his position changed when he became an employee of Koger (Dublin) and he signed his first contract with that company by a contract of 1st November 2002. He thereafter signed a number of contracts and James O'Donnell's evidence was that, in relation to the non-solicitation clause that had been contained in the 2000 contract with Koger, that he had a discussion in relation to that matter with George Sipko and it was agreed that the non-solicitation clause and non-competition term of the earlier contract could be excluded (see Transcript 25, questions 49-56). James O'Donnell's evidence was that following discussions between himself and George Sipko that it was agreed that the non-competition and non-solicitation elements of the 2000 contract could be removed and it was on that basis that he signed the contract with Koger (Dublin). George Sipko stated that he had no knowledge of such conversation and the plaintiffs sought to rely on a claim that the non-solicitation clause within the December 2000 agreement between Koger and James O'Donnell remained in force. There was a straightforward conflict on this matter and the Court is satisfied that the evidence of James O'Donnell is both truthful and reliable in relation to this matter and is to be preferred from that of George Sipko. This follows not only from the Court's considered view as to the relative credibility of those two persons, but also from the fact that the actual contract signed by James O'Donnell dated the 1st November, 2002 with Koger (Dublin) contains no non-solicitation competition clause and further, expressly provides that that agreement was in substitution for all previous contracts of service between the company and the employee, if any, which shall be deemed to have been terminated by mutual consent as and from the date on which this agreement commences. That contractual position was mirrored in the later contracts of the 1st January, 2003 and in the contract of the 1st April, 2004. Therefore, the Court is in the position that not only does it find the evidence of James O'Donnell more credible in relation to this matter but that the available documentation is entirely consistent with his evidence. It follows that the Court is satisfied that the contract of employment which James O'Donnell had with the second named plaintiff as of the date of his departure did not include any non-solicitation/competition clause nor any express term in restraint of trade. James O'Donnell was not employed by the first defendant, Koger, as of that date and his only contract was with Koger (Dublin). James O'Donnell therefore did not owe any post-termination non-solicitation or anti-competition obligations to Koger (Dublin). The plaintiffs have failed to identify a legal basis for their contention that James O'Donnell was under a non-solicitation obligation to either Koger or Koger (Dublin) following the termination of his employment on the 30th April, 2006. It is also the case that the plaintiffs have entirely failed to particularise such claim and have failed to identify any customers of the plaintiffs which it is alleged that James O'Donnell solicited or any former employees or consultants of the plaintiffs that it is alleged that James O'Donnell solicited or any evidence as to how such obligations, if they existed, were in fact breached.

110. The second defendant in respect of which a claim is made in relation to breach of a contract of employment is Roger Woolman. The plaintiffs claim in relation to Roger Woolman that he is a former employee and managing director of the second plaintiff and that he commenced employment with the first plaintiff on the 2nd October, 2000 as a business analyst and that he transferred to work for the second plaintiff in August 2003 where he worked as a consultant between August 2003 and October 2006. It is claimed that he was managing director of the second named plaintiff in January to December 2002 and that his last consultancy agreement was entered into with the second plaintiff on the 1st January, 2006 and that that contained obligations of confidentiality and non-solicitation in identical terms to those which it is claimed applied to James O'Donnell. The plaintiffs also claim that as part of the so-called business conspiracy plan that James O'Donnell and Roger Woolman backdated amendments to his 2005 and 2006 contracts to clear the way for him to work for HMW whilst continuing to work for the plaintiffs and inherent within that argument is a claim that any removal of an obligation of confidentiality or non-solicitation would be unenforceable and that Roger Woolman remained bound by his alleged earlier agreement. The evidence available to the Court from Roger Woolman and as confirmed by the documents is that the only non-solicitation obligation contained in any contract was, contained in the contract entered into between Koger and Roger Woolman. No contract between Roger Woolman and Koger (Dublin) ever contained a non-solicitation clause. The evidence established that in 2003 Roger Woolman ceased to provide consultancy services for the plaintiffs and that he did not provide any services for approximately one year and recommenced a contractual relationship with the second named plaintiff in April 2004. In 2005 and 2006 the evidence established that Roger Woolman was working as an independent part-time consultant for Koger (Dublin). The Court is unable to identify any basis upon which it can be contended that the agreements that Roger Woolman entered into with Koger prior to ceasing to provide any services for either of the plaintiffs in 2003 could be binding on him after he recommenced to provide services in April 2004. New contracts were entered into thereafter and the terms of those contracts do not contain a non-solicitation/competition clause or a restraint of trade clause. In 2005 and 2006 the evidence established that Roger Woolman was working as a part-time consultant for Koger (Dublin). Insofar as there is a dispute as to the circumstances concerning the altered contract of 2005/2006 that is dealt with earlier in this judgment and the Court has already indicated that it is satisfied that that contract and the terms therein set out were at the behest of Koger (Dublin's) auditors and not as a result of any conspiracy between James O'Donnell and Roger Woolman. It is also the case that the terms of the 2006 contract entered into between Roger Woolman and Koger (Dublin) correctly identified the nature of the contractual services which Roger Woolman was providing for Koger (Dublin). The letter of the 27th March, 2006 from Karen Maher, associate director within KPMG, the auditors of Koger (Dublin) stated on its third page:

> "As you are aware, the Revenue focus on the distinctions between employment and self-employed income (consultancy income). As the company is obliged to offer PAYE on all employment income, it is important that the company be satisfied that this income is correctly classified as consultancy income and under a contract for services and therefore PAYE/PRSI need not be operated. I attach an appendix with further details. This area can be complex, if you would like to discuss this further, please do not hesitate."

Following receipt of that advice the evidence was that Roger Woolman signed a contract dated 1st January, 2006 with Koger (Dublin) which made it clear that he was self-employed and that contract was consistent with the information contained in the appendix attached to the KPMG letter. The contract expressly provided that there were no restrictions of trade and that the contractor, namely Roger Woolman, may provide similar services to other third parties. The agreement which Roger Woolman had with Koger (Dublin) did not have a non-solicitation clause nor a restraint of trade clause and expressly provided that he was free to provide similar services to other third parties. The Court is satisfied that there is no legal basis for the plaintiffs' contention that Roger Woolman had a contractual obligation which contained a non-solicitation clause and/or a restraint of trade clause during 2005 or 2006 and there is no basis for the plaintiffs' claim that Roger Woolman was in breach of contract with the plaintiffs.

111. In paragraph six of the plaintiffs' statement of case, it is alleged that James O'Donnell and Roger Woolman were in breach of their

fiduciary duties to the plaintiffs. In paragraph 403 of the plaintiffs' written submissions it was contended that such breach arose from the fact that James O'Donnell and Roger Woolman had clear duties as directors of the second named plaintiff to act at all times *bona fide* in the interests of the company. It was also contended that such duties to act in the best interests of the second named plaintiff would also embrace the duty to act in the best interests of the Koger Group, given the relationship between the two. The evidence which the Court heard was that Roger Woolman had been a director of Koger (Dublin) from the date of its incorporation but that he ceased to be a director from December 2002. The Court also heard evidence that James O'Donnell was a director of Koger (Dublin) but that as of the 30th April, 2006 he resigned his employment with Koger (Dublin) and also resigned as a director. The documentation which is available to the Court from the Companies Registration Office records confirms that evidence. The evidence was that neither James O'Donnell nor Roger Woolman were ever directors of Koger. The plaintiffs contend that the actions of James O'Donnell and Roger Woolman involved a flagrant violation of the fundamental rule of "no conflict" "no profit" and that they were bound by such rules to the two plaintiff companies. The plaintiffs claim that James O'Donnell and Roger Woolman involved themselves in flagrant violation of that fundamental rule and it is claimed that they participated in the defendants' plan to hijack the plaintiffs' business which it is claimed is evidenced by the material set out in five numbered paragraphs in paragraph 6(b) of the plaintiffs' statement of case.

The evidence is that Roger Woolman was not a director of Koger (Dublin) from the end of 2002 and that any argument based upon his obligation as a director would cease as from that date. James O'Donnell remained a director up until the date of the termination of his employment. The Court has already analysed in detail the claim which the plaintiffs have put forward in relation to an alleged business conspiracy. The Court has already identified its conclusions on the defendants' business activities from February 2006 and the conduct of James O'Donnell up to the date of his departure from Koger (Dublin) on the 30th April, 2006. The Court is satisfied that the business plan in existence prior to his date of departure was no more than an aspirational document of no real substance. There is no evidence that James O'Donnell prepared or assisted in the preparation of the initial draft during his working hours with Koger (Dublin). It is also the case that the business plan was in draft format and had not been circulated and that there was no breach of a "no conflict" "no profit" rule. After his departure on the 30th April, 2006 James O'Donnell was entitled to be involved with the preparation and completion of the business plan of the fourth named defendant and such involvement was not a breach of any obligation which he owed to either of the plaintiffs. Roger Woolman's involvement with the business plans of the fourth named defendant did not represent any breach of any obligation which he owed to the plaintiffs and the plaintiffs have failed to identify any obligation that he owed to either of the plaintiffs during 2006 which would have prohibited him from such involvement. The second particular relied upon by the plaintiffs in relation to the claim that the defendants planned to hijack the plaintiffs' business relates to communications between the defendants and the plaintiffs' employees and/or contractors directed at hijacking the plaintiffs' business. The evidence established that the defendants sought to develop a product which could compete with the plaintiffs' product. The plaintiffs have failed to identify any communications between the defendants and the plaintiffs' employees or contractors which were impermissible or in breach of any obligations that either James O'Donnell or Roger Woolman owed to either of the plaintiffs. The individual complaints in relation to business conspiracy have been dealt with earlier in this judgment. Particulars three and four in paragraphs 6(b) relate to complaints concerning alleged approaches and presentations to clients and prospective clients of the plaintiffs including IBT and Caledonian and the timing thereof by the defendants and the alleged solicitation by the defendants of clients and prospective clients of the plaintiffs. These complaints are not particularised but it is apparent from the submissions of the plaintiffs that the complaint is in relation to IBT and Caledonian. This claim is based upon the contention that Dylan O'Brien provided inside information to the defendants about presentations that Koger (Dublin) were due to make to those companies. The evidence established that neither of those companies were in fact clients of the plaintiffs but that the plaintiffs were seeking to have those companies become clients. James O'Donnell and Dylan O'Brien both gave evidence expressly denying that any information was shared in relation to either of those companies or any information of that type. James O'Donnell gave evidence that he made contact with the managing director of Caledonian who was a long-time friend early in November 2006 with a view to visiting him when James O'Donnell was to be in the Cayman Islands in November 2006. That account was not disputed. The Court accepts James O'Donnell's evidence in relation to same. James O'Donnell's presentation took place in the Cayman Islands to Caledonian in relation to the business which that company operated in that location whilst the plaintiffs' presentation to Caledonian took place in Dublin. The Court is satisfied that James O'Donnell's evidence in relation to the circumstances as to how he came to meet with Caledonian is truthful and based on that evidence there is no basis for any complaint by the plaintiffs concerning such meeting. In relation to IBT, James O'Donnell gave evidence (Transcript 32, question 282 onwards) that it was IBT who contacted him in September 2006 seeking his expertise in relation to equalisation accounting. That evidence was supported by contemporaneous e-mails produced to the Court. James O'Donnell went on to state in evidence that whilst providing that service for IBT, they informed him that they were in the market for a new transfer agency system and they provided him with an opportunity to make a presentation on behalf of the fourth named defendant. The Court accepts that account and it follows that no complaint can be made by the plaintiffs in relation to the dealing between the defendants and IBT and that such dealings can in no way support any of the claims made by the plaintiffs nor were either of the two contracts, in respect of which complaint was made, a result of any information from Dylan O'Brien.

The final particular contained in paragraph 6(b) of the plaintiffs' statement of case related to the suggested unauthorised copying and use by the defendants of the proprietary content of the plaintiffs' license agreements and employment contracts. No relief is claimed arising out of such alleged misuse, nor were any submissions made of such alleged misuse. There is no relief claimed from such alleged misuse nor has either of the plaintiffs led any evidence of any alleged loss or damage occurring to either of them arising from such alleged misuse. The plaintiffs have no claim under this heading.

112. In the light of the above findings the Court is satisfied that the plaintiffs have failed to establish an entitlement to any of the reliefs sought in their claims against the defendants or any of them. The plaintiffs' claims are dismissed.

THE HIGH COURT

COMMERCIAL

[2008 No. 4333P]

BETWEEN

PLAINTIFFS' STATEMENT OF CASE

1. The Plaintiffs own the copyright in the NTAS product which consists of source code, data base structure (including table names and column names and the relationship structure between them) and SQL creation scripts (the "NTAS product"). The NTAS product and its constituent elements constitute a work which is protected by copyright under the Copyright and Related Rights Act, 2000 (the "2000 Act"). Further, the NTAS product and its constituent elements constitute confidential information.

2. In breach of copyright and/or in breach of confidence, the Defendants took a copy of the NTAS product, (the "unauthorised copy of NTAS") and used the unauthorised copy of NTAS as a functional and/or design specification for developing ManTra. But for their access to and use of the unauthorised copy of NTAS, the Defendants could not have developed ManTra and released it onto the market as quickly as they did and to such a high quality.

3. The Plaintiffs rely on the following particulars in support of the claims at paragraph 2:

   (a) The presence of NTAS-specific variable names in ManTra;

   (b) The replication of errors in the NTAS product within ManTra (including per share, ERISA, Hi-Lo and Lo-Hi functionality);

   (c) The replication in ManTra of business logic and relationship structures found in the NTAS database;

   (d) The replication in ManTra of some 90-95% of the functionality of the NTAS product;

   (e) The fact that detailed knowledge of the NTAS database structure (including table names, column names and relationships) was required to enable the Defendants develop the "IMPORT2.SQL" script, which script could only be developed and/or tested by way of access to the NTAS product and which could only run by reference to the NTAS product (or a copy of the database thereof);

   (f) The Defendants' development of the "of_pla_export" file and its subsequent modification required reference to and reliance upon the NTAS database structure (including database table and column names);

   (g) Email communication between the developers and designers of ManTra make detailed and specific reference to NTAS-specific variables;

   (h) Emails and other design materials created by the developers and/or designers of ManTra demonstrate that the NTAS product was used as a reference point for the design, functional specification and development of ManTra;

   (i) The deletion of the first version of ManTra (version PB10) at the time it was deleted, in August 2007 (following a direction by a US Judge in US proceedings between the parties dealing with similar infringement issues that the source code of ManTra be made available for expert examination on behalf of the Plaintiffs);

   (j) The failure of the developers of ManTra to keep backups of ManTra as it was being developed contrary to standard development procedure;

   (k) The alleged creation of 28 tables, an entire database design file of unaccounted for origin, comprising hundreds of columns and a complex relationship structure 'ready made' for ManTra on 12 October 2008, which largely replicated the function and relationship structure of equivalent tables and columns in the NTAS product;

   (l) The absence of any material evidencing the genesis or development of the tables, columns and relationship structures referred to at (j) above;

   (m) The absence of the CDM file or files relating to the development of ManTra and/or the Defendants' failure to discover same;

   (n) The bulk introduction of 25% of 'right first time' pre-prepared code by way of stored procedures on 1 February 2007 and a further 24% of such code during February 2007;

   (o) The absence of any material evidencing the genesis, design or development of the database code, specifically the business logic for the first release of the product;

   (p) The lack of "re-factoring" of source code which would be compatible with the alleged agile development of ManTra in the period October 2006 to March 2007;

   (q) Items (i) to (p) above individually and collectively evidence that the unauthorised copy of NTAS was being used as a reference point for the design, functional specification and development of ManTra;

   (r) The absence of valid meta-data in relation to the development of ManTra and the supplied design materials;

   (s) The Defendants' efforts to shield ManTra and its design materials from objective scrutiny;

(t) The extraordinary pace of development of ManTra;

(u) The lack of the range, type and quality of design materials that would be compatible with the alleged agile development of ManTra in the period October 2006 to March 2007;

(v) The fact that, despite the deletion of much of the history of the evolution of the source code, evidence remains which indicates a migration from the NTAS database structure to the ManTra database.

4. The making of the unauthorised copy of NTAS constitutes an infringement of the Plaintiffs' copyright under the 2000 Act. Further, the use of the unauthorised copy of NTAS as described in the development of ManTra constitutes the adaptation of the NTAS product within the meaning of Section 37 of the 2000 Act thereby infringing the Plaintiffs' copyright in the NTAS product.

5. Further and in the alternative, the said use of the NTAS product constitutes a misuse of confidential information and ManTra consists of the fruits of such misuse.

6. In addition to its case in breach of copyright and in breach of confidence, the Plaintiffs claim that the first and second Defendants acted in breach of their contracts with the Plaintiffs, and also in breach of their fiduciary duties to the Plaintiffs.

PARTICULARS

(a) The particulars set out above in relation to breach of copyright and breach of confidence are relied on in this regard.

(b) Their participation in the Defendants' plan to hijack the Plaintiffs' business as evidenced, *inter alia*, by:

(i) The timing and contents of the Defendants' business plans dated February 2006, 19 May 2006, 20 June 2006, 4 July 2006, 11 August 2006 and 18 September 2006;

(ii) Communications between the Defendants and the Plaintiffs' employees and/or contractors directed at hijacking the Plaintiffs' business;

(iii) The approaches and presentations to clients and prospective clients of the Plaintiffs, including IBT and Caledonian and the timing thereof;

(iv) The solicitation by the Defendants of clients and prospective clients of the Plaintiffs;

(v) The unauthorised copying and use by the Defendants of the proprietary content of the Plaintiffs' licence agreements and employment contracts.

(7) The Plaintiffs claim injunctive relief and such other relief as may be appropriate to the above breaches as set out in the prayer for relief in the Statement of Claim.