Neutral Citation Number: [2009] IEHC 419

THE HIGH COURT

2009 5407 P

BETWEEN

HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

EAMON KEOGH TRADING AS KEOGH SOFTWARE

DEFENDANT

JUDGMENT of Miss Justice Laffoy delivered on the 15th day of July, 2009

Introduction
There are two interlocutory applications before the court, one brought by the plaintiff and the other brought by the defendant. The practical problem for which the plaintiff has sought to obtain a temporary solution on its application is of a most serious nature involving, as the plaintiff's officers assert and as the defendant acknowledges, a potential serious risk to the safety and health of patients in the care of the plaintiff.

The reliefs sought by the plaintiff on its application, as initiated, were mandatory orders compelling the defendant, whom the plaintiff contends is contractually liable to furnish support and maintenance for software and systems supplied by the defendant to the plaintiff and now in use at approximately 180 sites around the country in connection with radiology, accident and emergency, hospital billing, environmental health and parliamentary affairs, to provide those services pending the trial of the action. Simultaneously with the issuing of the plenary summons, late in the afternoon of Friday 12th June, 2009, the plaintiff made an *ex parte* application to this court for an interim injunction. On the basis of evidence that the defendant had not confirmed that he would not implement his threat to withdraw his services, an interim injunction was granted directing the defendant to -

> (i) provide the support and maintenance services which are specified under all written Service Level Agreements between the plaintiff and the defendant for the software applications and systems listed in the appendices/schedules to the said Agreements and which were annexed as a schedule to the order; and
>
> (ii) provide equivalent support and maintenance services as were ordered to be provided at (i) above for such of the software applications and systems which were specified in the schedule attached to the order and which were not covered by written Service Level Agreements.

The order was to endure until 16th June, 2009, when the interlocutory application was returnable, or until further order, and it was expressly provided that the defendant be at liberty to apply to vary or discharge the order by giving notice to the plaintiff of his intention so to do.

Initially, when the interlocutory application was returned before the court, the defendant was not legally represented. Subsequently, solicitors came on record for the defendant. At that stage, the defendant filed a comprehensive affidavit in which he put in issue many of the facts deposed to in the grounding affidavit sworn on behalf of the plaintiff on 12th June, 2009 by Pat Kelly, General Manager of ICT Services of the plaintiff. On 26th June, 2009, the defendant issued a motion in which he sought cross-orders for interlocutory relief against the plaintiff in the form of mandatory injunctions pending the trial of the action requiring the plaintiff to -

> (a) implement "the new fee structure in terms of the oral agreement between the parties hereto entered into on 3rd April, 2009, as regards October 2008 payments onwards for the purposes of the written, oral and/or implied service level agreements between the parties hereto";
>
> (b) pay invoices raised by the defendant which continue to be due and owing in relation to work done;
>
> (c) comply with its agreements agreeing to implement critical updates as regards the software to which the service level agreements relate on the usual terms;
>
> (d) waive its requirements for a Tax Clearance Certificate to be produced by the defendant prior to the payments referred to; and
>
> (e) suspend any and all requests and the process of expert determination for determining escrow release of the defendant's software codes pursuant to the escrow agreements between the parties.

In an affidavit sworn on behalf of the plaintiff on 30th June, 2009, Mr. Kelly "insofar as necessary" sought leave to amend the endorsement of claim on the plenary summons and the plaintiff's notice of motion by seeking an additional mandatory order directing "the temporary release of the escrow source codes pursuant to the short and long form software escrow multi-licence agreements", which had been exhibited in Mr. Kelly's first affidavit, "pending the trial of this action and/or pending the conclusion of the escrow agreement dispute resolution procedure".

The affidavits filed on the interlocutory applications are replete with factual conflicts which cannot be resolved on an interlocutory application.

On the defendant's part, he denies that he ever, in fact, suspended the provision of support and maintenance services to the plaintiff, although he concedes that he threatened to do so. He is aggrieved that the plaintiff sought an interim injunction and asserts that the *ex parte* application was brought unnecessarily and without any real basis. On the other hand, the defendant continues to assert that he had the right to withdraw his services on the ground of breach of contract by the plaintiff in failing to give consideration for the work the defendant performed, either by not paying invoices or by not implementing its agreement as regards a new fee structure. The defendant disputes the factual position set out on affidavit by the deponents for the plaintiff in very considerable detail. In particular, the defendant takes issue with an allegation made in Mr. Kelly's first affidavit that, on the Tuesday and Wednesday prior to the *ex parte* application, the defendant failed to respond properly to operational problems which were being experienced at Naas Hospital in relation to the radiology information system. In a detailed response, the defendant, and his son, Conall Keogh, ascribed the failure to address the problem to Conall Keogh being denied access to the system by the plaintiff. That factual controversy cannot be resolved on this application.

On the plaintiff's part, it denies the existence of the factual bases asserted by the defendant as entitling him to the mandatory relief he has sought in his notice of motion of 26th June, 2009. For example, the plaintiff's position is that, whereas there were negotiations between the parties in relation to a revised fee structure and an offer was made by the plaintiff on 3rd October, 2008, the parties have failed to agree all of the relevant terms and there is no concluded agreement, as asserted by the defendant. Further, the plaintiff absolutely rejects the defendant's assertions that the plaintiff owes him money for support or anything else over and above payments which the plaintiff acknowledges are due but cannot be paid by the plaintiff because the defendant has not supplied a current tax clearance certificate. The defendant's claim, which was quantified at €89,729.99 in the defendant's letter of 29th May, 2009, to the plaintiff's solicitors, has been analysed in depth in Mr. Kelly's second affidavit sworn on 18th June, 2009. The only payments which it is acknowledged by the plaintiff are outstanding are due on foot of invoices dated respectively 1st March, 2009 (€3,579.50) and 15th April, 2009 (€797.04), although the plaintiff has indicated a willingness to make certain payments in respect of 2010 support on a without prejudice basis, even though it is contended they are not due. The defendant acknowledges that his tax clearance certificate expired on 30th April,, 2009, and that he has not been in a position to obtain a current certificate. The position of the plaintiff is that it has paid the defendant the fees due for all of the services to be provided under the service level agreements in the year 2009, and has paid for many of the services to be provided thereunder in the year 2010.

The most significant fact to emerge from the plethora of affidavit evidence put before the court is that, with effect from 29th May, 2009, the defendant made all of his fourteen staff members, who had previously serviced the plaintiff's account, redundant. In consequence, the defendant asserts that he is not in a position to continue to comply with the court order because he does not have the staff to carry out the functions required and he does not have the expertise to do so himself.

The interim order has been continued since 12th June, 2009, and it has been complied with. The necessary services have been provided by Conall Keogh, who was made redundant on 29th May, 2009. At the end of the protracted hearing of the interlocutory application on the third day, 9th June, 2009, the defendant undertook with the court to continue to deliver the services the subject of the interim order until this judgment is delivered.

Position adopted by the parties at the hearing of the interlocutory application

At the hearing, the plaintiff did not formally abandon its claim for orders compelling the defendant to provide the support and maintenance services. However, counsel for the plaintiff informed the court that it was accepted that the court might find that it would be futile to grant an interlocutory injunction. It was accepted that, in the light of the replying affidavits from the defendant and Conall Keogh, the court, in the exercise of its discretion, might conclude that such orders could not be effectively granted and policed.

The defendant's position was that the basis on which the defendant sought the cross-orders was that, if the court were to make the mandatory orders sought by the plaintiff against the defendant, the court should grant the defendant the orders he seeks against the plaintiff. Counsel for the defendant accepted that it would be an unusual exercise of the court's jurisdiction to direct mandatory payments to the defendant. He made it clear that the defendant's position was that the court should refuse to grant any of the reliefs sought by the plaintiff. It was indicated that the defendant would cooperate in having an early hearing of the substantive action.

The case which was actually pursued on behalf of the plaintiff at the hearing was for an order directing the temporary release of the source codes. That is the issue I propose to address.

I reiterate what I stated more than once during the course of the hearing – that, in the circumstances which prevail, seeking to compel the defendant to provide support and maintenance services is not a practical solution to the plaintiff's serious problem. I cannot assess to what extent the engagement of the parties over the past six months has involved brinksmanship on either side. However, I have come to the conclusion that, having regard to the steps which the defendant took unknown to the plaintiff in effectively ceasing to carry on business before the proceedings were instituted, it would serve no useful purpose to grant mandatory orders compelling the defendant to supply the support and maintenance services. I am also of the view that it would be impossible for the court to supervise the implementation of such orders. As Geoghegan J. stated in *O'Murchú t/a Talknology v. Eircell Ltd.* [2001] IESC 15:

> "First of all there is the well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter, as to whether such injunctions are being obeyed or not."

The factual controversy which the affidavits on these applications disclose in relation to the Naas Hospital support incident convince me that it would be extremely difficult for the Court to adjudicate on the issues to which a motion to attach and commit for alleged breach of mandatory orders of the type originally sought in this case would give rise.

For those reasons, I refuse the relief originally sought by the plaintiff.

Temporary release of source codes
As I understand the position, there was no objection by the defendant to the amendments to the endorsement on the plenary summons and the notice of motion sought by the plaintiff. I will allow the amendments. However, there was strenuous resistance by the defendant to an order for release of the source codes in the terms sought by the plaintiff. It is necessary to consider the factual background to the source code issue in some detail.

Factual background
The background to the source code escrow agreements is set out in Mr. Kelly's affidavit of 12th June, 2009, which grounded the interim application. In it, he deposed to the fact that approximately twelve months ago the defendant agreed, in return for the payment of a substantial fee by the plaintiff, in the region of €60,000, to place the source code for certain of his software systems with a third party escrow provider for the benefit of the plaintiff on the basis that the plaintiff would be entitled to access the source code if certain trigger events occurred, including that the defendant had breached his contractual obligations to the plaintiff by failing to provide support. Mr. Kelly helpfully explained what he meant by "source code" - the human-readable form of the computer program which makes up the relevant software, which can be used to assist supporting, maintaining and fixing that software whenever problems occur with it. Three escrow agreements were executed and are in place involving an escrow service provider established in the United Kingdom, NCC Escrow International Limited (NCC).

A feature of the first affidavit, on which the defendant relied in resisting the application for temporary release, was that, Mr. Kelly, as a ground for seeking mandatory orders against the defendant to compel him to continue to provide support and maintenance, had set out reasons why, even if the plaintiff had immediate access to the relevant source codes, that would not be sufficient to enable it to support and maintain the relevant software systems. One of the reasons was that it would take "many months" for the plaintiff, either itself or by utilising third party service providers, to become familiar with the code. Nonetheless, before these proceedings were initiated, the plaintiff had set in train the dispute resolution procedures to procure release of the source codes, or had initiated the preliminary steps necessary to do so, in the case of all of the agreements. At the hearing, the plaintiff adopted the pragmatic, if proverbial, position that half a loaf is better than no bread.

The position in relation to the source code escrow agreements is complicated by the fact that there are three separate agreements, two in long form and one short form. The clearest exposition of the implications of the different agreements is set out in Mr. Kelly's affidavit of 30th June, 2009.

The short form agreement was dated 28th May, 2008, and this is the agreement which was made in consideration of the payment by the plaintiff of €60,000, inclusive of VAT, to the defendant. It relates to two categories of software applications: a discrete bundle of approximately six applications and two hundred other applications. The process for the release of the source code in the case of the first category had been initiated prior to the initiation of these proceedings by a letter 29th May, 2009, to the Law Society in which the plaintiff sought the appointment of an independent expert. That expert was appointed by the President of the Law Society in mid-June, 2009. In relation to the second category, the process was initiated on 3rd June, 2009, by the plaintiff giving notice to the defendant that it would invoke the escrow against him within thirty days, if he did not restore support to the applications. The significance of that is obvious when one considers the short form agreement. It provided in clear and unequivocal terms that NCC would be entitled to release the source code to the plaintiff, without further reference to the defendant, upon the occurrence of the release events set out, for example, on the defendant being declared bankrupt. Another release event was the defendant being in material breach of his obligations as to maintenance, support, modification or correction of any of the software and having failed to remedy such default notified by the plaintiff to the defendant within thirty days. The position as of 29th May, 2009 and 3rd June, 2009, as I understand it, was that the plaintiff was not aware that the defendant had made all his staff redundant. Another release event stipulated is the defendant ceasing to carry on business. The position adopted by the plaintiff at the hearing was that it was on that release event - the defendant having ceased to carry on business - that the plaintiff is now relying to procure release of the source codes.

There are provisions included in the short form agreement for the protection of the defendant on the release of the source code. There is also a dispute resolution procedure provided for, in that it is provided that, if there is a dispute between the plaintiff and the defendant about whether any release event has occurred, the defendant agrees that the source code can be released by NCC to the plaintiff on the decision of an independent expert whose appointment will be mutually agreed, or, failing mutual agreement, who will be appointed by the President for the time being of the Law Society. As I have stated, in the case of the first category, an independent expert has been appointed. In the case of the second category, Mr. Kelly averred that the plaintiff proposed applying to the Law Society for the appointment of an independent expert. The procedure governing the dispute resolution dispute, time limits and such like, is set out in the short form agreement. It is expressly provided as follows:

> "The Independent Expert's decision will be final and binding on all parties to this Agreement and shall not be subject to appeal to a court in legal proceedings except in the case of manifest error."

In relation to the material provisions for present purposes, the long form agreements are largely similar to the short form agreement. The two long form agreements, one of which is in existence since 2004, deal with the radiological information system and environmental health applications, both of which are considered important critical applications for the plaintiff. On 29th May, 2009, and on 3rd June, 2009, the plaintiff sought the release of the source codes for both applications from NCC. The defendant is disputing that a valid release event has occurred. Under the long form agreements, it is NCC who appoints the independent expert and the evidence is that NCC is going to appoint an independent third party to adjudicate on the disputes. The long form agreements provide that the defendant ceasing to carry on business constitutes a release event. Each contains a provision that the independent expert's decision shall be final and binding on all the parties to the agreement and shall not be subject to appeal to a court in legal proceedings except in the case of manifest error.

The defendant contends that, given the existence of a dispute between the parties as to whether a release event has occurred, it is not open to the court to make an order directing the temporary release of the source codes because to do so would override the express terms of the short form and the long form agreements for the resolution of that dispute.

The Law
In disputing the defendant's contention that the Court should not intervene at this juncture, counsel for the plaintiff relied

on a decision of the High Court (O'Sullivan J.) in *Telenor Invest AS v. IIU Nominees Limited and Esat Telecom Holdings Limited* [1999] IEHC 188. In that case the plaintiff and the first and second defendants were shareholders in a company. At the time of the proceedings the first defendant held only 1% of the equity share capital, and the plaintiff and the second defendant held the remaining 99% equally between them. In his judgment, O'Sullivan J. described the primary dispute as being between the plaintiff and the first defendant and as relating to the interpretation and implementation of a shareholding agreement. The issue on the plaintiff's interlocutory application arose out of a clause of the shareholding agreement which provided that any party should, so long as it held not less than 10% of the equity share capital, be entitled to nominate one person as a director of the company. On its application the plaintiff was seeking an interlocutory order directing the first defendant to take steps to cause its nominees to resign or, alternatively, to restrain them from acting pending the determination of the dispute.

The shareholding agreement contained an arbitration clause. There was also before the court an application by the first defendant seeking to stay all proceedings under s. 5 of the Arbitration Act 1980 (the Act of 1980) on the basis that the dispute was the subject of an arbitration agreement. In response, the plaintiff invoked s. 22(1)(h) of the Arbitration Act 1954 (the Act of 1954). Section 22 provides that the Court shall have, for the purposes of and in relation to a reference to arbitration, the same power of making orders in respect of various matters, for example, in respect of security for costs, as it has for the purpose of and in relation to an action or matter in the Court. One of the matters which paragraph (h) itemises is "interim injunctions".

O' Sullivan J. acceded to the application for a stay in relation to the substantive proceedings, but not in relation to the application for interlocutory relief. In doing so he stated:-

> "No authority was submitted to me to the effect that in this country and in the context of an arbitration governed by the Acts of 1954 and 1980, the jurisdiction conferred on the court by s. 22(1)(h) does not apply at all or has been curtailed. In these circumstances I consider that while it may well be appropriate to grant the first defendant a stay on part of the plaintiff's proceedings, that this in no way trammels the courts jurisdiction to afford interim relief (which clearly includes what is usually termed interlocutory relief) to the plaintiff pending the determination of the dispute."

O'Sullivan J. also made an order in favour of the plaintiff restraining the defendant from causing or permitting its director nominees on the board of the company from acting in that capacity pending the determination of the dispute relating to the interpretation of the relevant clause of the shareholding agreement.

Counsel for the defendant sought to distinguish this case from the *Telenor* case on the basis of the facts and the nature of the remedy being pursued. I am not convinced that such distinction exists. Leaving aside the question whether the criteria on the basis of which a mandatory interlocutory order is granted differ from the criteria for the grant of a prohibitory interlocutory order, in my view, the effect of the order which the plaintiff seeks against the defendant is not substantially different to the effect of the order granted by O'Sullivan J. What the plaintiff wants the court to do is to order the release of the source code to it pending the determination, in accordance with the escrow agreements, whether it is entitled to such release. In the *Telenor* case, the effect of the order which the plaintiff got was to prevent the nominees of the first defendant from acting as directors until it was determined, in accordance with the shareholding agreement, whether they were entitled to act or not. Essentially, in both circumstances, the parties seeking the injunction were trying to side step the agreed dispute resolution mechanism on a temporary basis. The fundamental question is whether, as a matter of law, that is permissible. Because of the existence of s. 22(1)(h), O'Sullivan J. held that it was in the *Telenor* case. The authorities relied on by the defendant suggest that it is not permissible in this case.

Counsel for the defendant relied primarily on the decision of the Supreme Court in *Re Via Networks (Ireland) Limited* [2002] 2 I.R. 47 in support of his contention that the Court should not intervene at this juncture. That case involved a petition under s. 205 of the Companies Act 1963, wherein the petitioners, who were minority shareholders in the company, were alleging that the affairs of the company were being conducted, and the powers of the directors exercised, in a manner oppressive to them or in disregard of their interests. The respondent, the owner of the majority of the shares in the company, sought that the proceedings should be struck out on a number of grounds, one being that the proceedings should be stayed on the basis that the relevant shareholders' agreement contained a provision that any and all disputes should be resolved exclusively and finally by binding arbitration among the parties. At first instance, counsel for the respondent had submitted that the proceedings should be stayed pursuant to s. 5(1) of the Act of 1980, irrespective of the fact that the proceedings were brought under a statutory provision, or alternatively pursuant to the inherent jurisdiction of the court, but a stay had not been granted.

Delivering judgment in the Supreme Court, Keane C.J., with whom the other judges concurred, having found that the disputes which had arisen between the respondent and the petitioners were manifestly encompassed by the terms of the arbitration clause, dealt with a submission of counsel for petitioner to the effect that it would be contrary to public policy to operate the arbitration clause in a manner which would deprive the petitioners of their right to have the allegations of oppression determined by the High Court. He stated (at p. 57):-

> "I am satisfied that this argument is misconceived. When the petitioners entered into the arbitration agreement, they were expressly waiving the right to have issues that arose between them arising out of the shareholders' agreement litigated in any forum other than the arbitral tribunal: that is the essence of an arbitration agreement. It is irrelevant in this context whether the right of action they might otherwise have enjoyed was one which arose at common law or was statutory in origin."

On the question whether the High Court enjoyed an inherent jurisdiction to stay the proceedings, Keane C.J. stated (at p. 58):-

> "I am also satisfied that the High Court enjoyed an inherent jurisdiction to stay the proceedings in this case having regard to the existence of the arbitration clause. I would adopt as a correct statement of the law in this jurisdiction the following passage from the speech of Lord Mustill in *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited* [1993] A.C. 334 at p. 353:-
>
> > 'I believe that it is in accordance, not only with the presumption exemplified in the English cases cited

> above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of the international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the respondents should go.'
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> While, as the passage makes clear, in that case the contract was one which was more characteristic of the high-level world of international commerce than the agreement now under consideration, I have no doubt that the general principle is equally applicable to the agreement in this case."

Counsel for the defendant also relied on the decision of the High Court of England and Wales in *Cable & Wireless Plc v. IBM UK Limited* [2002] C.L.C. 1319. In that case, the agreement under which the dispute arose provided that the parties should attempt in good faith to resolve any dispute promptly through negotiations but, if the matter was not resolved through negotiation, the parties should attempt in good faith to resolve the dispute or claim through an alternative dispute resolution (ADR) procedure as recommended to the parties by a designated institution, but so that the ADR procedure which was being followed should not prevent any party from issuing proceedings. In his judgment, Colman J. stated at p. 1327:-

> "The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a freestanding agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy…However, the availability of the remedy whether of a stay or an adjournment or case management order must be a matter for the discretion of the court."

In that case, in accordance with the practice in the Commercial Court of England and Wales the proceedings were adjourned.

Contrary to what was asserted by counsel for the plaintiff, in my view, the decision of the High Court (Kelly J.) in *Shelbourne Hotel Holdings Limited v. Torriam Hotel Operating Company Limited* [2008] IEHC 376, does not support the plaintiff's contention that, notwithstanding the existence of a binding dispute resolution mechanism in each of the source code escrow agreements, the court should intervene and order the release of the source code. In the *Shelbourne Hotel* case, the plaintiff, the owner of the hotel, brought proceedings to force the defendant, the company managing and operating the hotel, to comply with a provision of the management agreement which regulated their contractual relationship. What the plaintiff sought in its plenary summons was permanent injunctive relief to compel the defendant to grant access to the plaintiff to the books and records and the business and staff of the hotel in accordance with its rights under the management agreement. What the court was concerned with was an application for an interlocutory injunction in similar terms. The management agreement contained an arbitration clause, the relevant parts of which are quoted in the judgment of Kelly J. After the plaintiff's proceedings were initiated, the defendant initiated a referral to arbitration on the question of whether or not the plaintiff might terminate the management agreement and on the question of damages, and also, on the interpretation of the clause in the agreement in relation to the keeping of books of control and account by the defendant and access by the plaintiff to books and records. In the proceedings the defendant had issued a motion seeking to stay the proceedings pursuant to s. 5 of the Act of 1980, pending arbitration. Kelly J. held that on the substantive issue raised in the action there was a valid arbitration agreement which could be performed and could address the dispute between the parties, but there was no arbitration agreement which covered the interlocutory application before him. Accordingly, he stayed the action, but not the motion and granted an interlocutory injunction.

The basis on which Kelly J. determined that the interlocutory application before him was not covered by an arbitration agreement is clearly set out in the judgment. The management agreement contained a provision to the effect that "either party may seek injunctive or equitable relief (including, without limitation, restraining orders and preliminary injunctions) in any court of competent jurisdiction". It further provided that referral to arbitration in accordance with the arbitration clause would be without prejudice "to preliminary or interim injunctions or enjoining orders granted by such court". As a matter of construction of that clause, which he equated with s. 22(1)(h) of the Act of 1954, albeit that it was in less clear language, coupled with the arbitration clause, Kelly J. concluded that interlocutory applications were not captured by the arbitration clause. By contrast, what the plaintiff seeks on this application is the very matter which is reserved exclusively to the determination of the independent expert in the escrow agreements – release of the source codes.

Application of the law to the facts

Applying the principles recognised in the *Via Networks* case, I have come to the conclusion that there is no good reason for the parties departing from the dispute resolution mechanisms provided for in the short form and long form escrow agreements. While, in her submissions, counsel for the plaintiff made the case that there would be undue delay in obtaining a decision from an independent expert, the evidence does not support the submission. On the contrary, an examination of the short form escrow agreement clearly demonstrates that its terms are designed to facilitate speedy resolution of a dispute. It provides that within five working days of the appointment of the independent expert, both parties shall provide full written submissions to the independent expert, together with all relevant documentary evidence in their possession in support of their claim. The independent expert is required to give his or her decision on the matter within ten working days of the referral, or as soon as practicable thereafter, and is required to send that decision to the parties and to NCC. If the independent expert's decision is in favour of the plaintiff, NCC is authorised to release and deliver the relevant material to the plaintiff within five working days of the decision being declared by the independent expert to the parties. In all probability, bringing that process to conclusion is more expeditious than procuring a determination on a contested interlocutory application in this Court.

Accordingly, I consider that the proper manner in which to exercise the jurisdiction of the court is to refuse make an order directing the temporary release of the source codes. If the defendant were pursuing the interlocutory reliefs claimed by him, on the same basis that it would not be appropriate to override the terms of the source code escrow agreements by granting a mandatory injunction directing the temporary release of the source codes, it would be inappropriate to make an order suspending the process of expert determination, as he sought in his notice of motion. Under the Court's inherent jurisdiction, I consider it proper to stay the issues arising on the plaintiff's amendment to the plenary summons.

I have made those decisions on the basis of the principles enunciated by Keane C.J. in the *Via Networks* case. However, there is an additional consideration to which neither party alluded. That is that NCC is the party which has custody of the source codes and is the party which is obliged to release the source codes in accordance with the terms of the various short form and long form escrow agreements. To be effective, an order directing the release of the source codes would have to be directed to NCC. However, NCC is not before the court. Moreover, although counsel for the plaintiff conceded that the Court could impose conditions in any interlocutory order made and limit the order to the release of some only of the source codes, I am of the view that NCC, acting on the determination of an expert, would be much better equipped to ensure that any release of the source codes is in accordance with the terms and conditions of the short and long form agreements and, in particular, the safeguards of the defendant's interests embodied therein, than the court.

Orders

There will be orders dismissing the respective applications for interlocutory relief of the plaintiff and the defendant. There will also be an order staying the issues arising on the plaintiff's amendment to the plenary summons pending the completion of the dispute resolution procedures in accordance with the escrow agreements.