

**THE HIGH COURT**

**COMMERCIAL**

**2008 4333 P**

**BETWEEN**

**KOGER INC AND KOGER (DUBLIN) LIMITED**

**PLAINTIFFS**

**AND**

**JAMES O'DONNELL, ROGER WOOLMAN, DAVID GROSS AND H.W.M. FINANCIAL SOLUTIONS LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Kelly delivered on the 31st day of July, 2009**

**Introduction**

This judgment deals with an issue of principle which has arisen in the course of discovery being sought by the plaintiffs against the defendants. The issue is whether an officer or officers of the plaintiffs ought to have access to material to be discovered by the defendants which contains what the defendants consider to be highly confidential information and where disclosure of it will, it is said, be highly damaging to them. The defendants contend that a successful defence of these proceedings will be a Pyrrhic victory if disclosure of the material is furnished to the plaintiffs.

In order to understand how this question arises, it is necessary to look briefly at the proceedings to date.

**The proceedings**

This action arises from an allegation that the first, second and third defendants who are former employees or contractors of the plaintiffs, set up the fourth defendant and launched a software product called ManTra. That is a rival product to the plaintiff's successful NTAS product.

The NTAS is a "*back office*" software solution for fund administrators, developed over a number of years at considerable expense. It embodies the proprietary results of significant programming skill and intellectual creation.

The plaintiffs contend that ManTra was developed by the defendants using improperly and unlawfully obtained confidential and copyrighted information which is the property of the plaintiffs. The plaintiffs allege in particular that confidential and copyrighted information relating to the programme of the NTAS product including proprietary source code and database structure information was utilised by the defendants.

The plaintiffs also allege that the defendants used confidential information relating to the plaintiffs' business in marketing the ManTra product and were in breach of duty and breach of agreement in soliciting a number of employees or contractors of the second plaintiff to the fourth defendant.

This alleged activity on the part of the defendants was, it is said, used as an unfair springboard into the market for their back office software for fund administrators.

The defendants have denied these claims in their totality.

Given this standoff between the parties, discovery will be a key element to the plaintiffs' claim and the defendants' defence. Documents relating to the design, content, source code and development history of the ManTra product will be of great relevance to the determination of the issues in the proceedings. Discovery of them is, it is accepted, appropriate albeit with some reluctance in respect of certain material.

On the motion for discovery with which this application is concerned, there was agreement between the parties that virtually all the documents sought by the plaintiffs are discoverable.

The issue which arises is as to whether the material, once discovered, should be made available to a specified officer or officers of the plaintiffs.

Before turning to that question, it is necessary to look a little closer at certain steps that have been taken in the proceedings to date.

**The experts**

Allegations of breach of confidence and copyright infringement concerning computer programmes are not easy to prove. That is particularly so where, as here, it is alleged that steps may have been taken by the defendants to mask the original source of the code or material from which the infringing product was developed. The plaintiffs in this case have been able to identify a variety of factors which they say point to the defendants' product being the fruit of unlawful copying and misappropriation of proprietary copyrighted information. These factors include what are alleged to be obvious reproductions of the proprietary functionality in the plaintiffs' product and what is alleged to be an extraordinarily short time taken by the defendants from the date of their departure from the plaintiffs to their bringing a fully developed and sophisticated rival product onto the market.

In the course of various case management hearings since the case was transferred into the Commercial List, agreement

was reached that experts would be appointed to review and compare the plaintiffs' NTAS product with the defendants' ManTra product. After much correspondence, terms of reference were agreed so that the experts would have a clear view as to the issues that they were to address and the material to be provided to them.

After the terms of reference for the experts had been agreed, they were provided with original material on foot of a confidentiality agreement entered into between the parties. That agreement included a proviso that the materials being provided to the parties experts were given strictly on the basis that they would not share such materials with their clients. It follows that the plaintiffs have not seen such materials which include a copy of the defendants' ManTra product.

This Court sanctioned a joint review and comparison on agreed terms of the source code of the plaintiffs' product and the defendants' product with a view to discovering if common ground could be reached between the experts as to the issues of infringement. The experts conducted their review and each prepared separate reports.

These experts' reports were exchanged and further directions were given by the court that the experts should hold a joint meeting and produce a memorandum of the meeting. The experts produced that memorandum after a meeting which lasted all day on 12th June, 2009.

The memorandum identifies limited areas of agreement between the experts. The areas of agreement read as follows:-

*"1A. Referring specifically to the Turner Report, paragraph 5.3 (Appendix I), paragraph 5.4 (Appendix J), paragraph 5.6 (Appendix L) and the matter of literal copying we have agreed that there is common code that exists in both NTAS and ManTra, and also in code distributed by Sybase within the standard Power Builder Foundation Class Libraries (PFC's), and which is also available on the Internet.*

*1B. Referring specifically to the Turner Report, paragraph 5.5 (Appendix K) and the matter of literal copying we have agreed that there is common code that exists in both NTAS and ManTra, and also in code distributed by AmyUni as a third party library, and which is also available on the Internet.*

*1C. The experts are not aware of any other common code that exists within NTAS and ManTra other than the single word matches and code comments as listed in Appendices F, G and H of the Turner Report to the extent that they are not already included in 1 A and 1B above.*

*1D. The experts agreed there is commented out code in the ManTra source code that includes references to the names of some columns and tables from the NTAS database which the experts do not believe were in the public domain.*

*1E. The experts also agree that neither agreement nor disagreement may be inferred where this document is silent on any matter."*

Apart from those areas of agreement, there is not much else that the experts were agreed upon.

The plaintiffs' experts, however, have expressed the view that the defendants must have relied upon the plaintiffs' proprietary source code and database structure information in order to develop the ManTra product. Their reasons for so finding are apparent from their reports and need not be repeated here.

The plaintiffs' experts, having reached their preliminary findings are of opinion that they need access to further documentation relevant to the infringement issues including the system's design documentation and "metadata" documentation. This material is exclusively within the possession of the defendants and can only be obtained upon discovery.

The defendants accept that this material is discoverable but say that it should only be disclosed to the plaintiffs' experts and not to the plaintiffs themselves or to their legal team. This is a problem that has arisen in cases such as this in the past and there is some jurisprudence which assists in a resolution of the difficulty. I will address it later in the judgment.

### **The plaintiffs' needs**

The plaintiffs contend that it is not enough that the material disclosed on discovery should be made available only to their experts. If such is the case, then it will, in their view, create a fundamental inequality of arms between the parties in the conduct of the litigation. They say that because the key claims in the case centre around the development of ManTra and its constituent elements. They say that they cannot be expected to prosecute their claim without having examined the ManTra product and reviewed documents relating to its creation in conjunction with their lawyers and experts. By definition, the defendants and their lawyers have unrestricted access to all documents relating to the development of ManTra. The plaintiffs argue that this inequality cannot be addressed by the provision of those documents only to experts or experts and legal team. For the plaintiffs to introduce evidence of those aspects of the ManTra product which involve a use of the plaintiffs' confidential information, the plaintiffs must examine the product and related documents. Without such, the plaintiffs will, it is alleged, suffer a wholly unfair disadvantage in the conduct of the proceedings.

In addition, having reviewed the materials currently available to the plaintiffs and considering the nature of the documents which are now sought, they believe that there is a much stronger chance of the plaintiffs succeeding in these proceedings if they and their experts obtain access to the material discovered. Such material will enable the plaintiff to obtain documents to advance their further assessment of the extent to which the defendants allegedly used the plaintiffs' confidential information and to meet the defendants' case that there has been no such use. A failure to afford access to the discovery would, it is said, be productive of an unfair result rendering it impossible to dispose fairly of the proceedings. The plaintiffs also point out that as the first, second and third defendants were all former employees or contractors of the plaintiffs, they have the added advantage of being intimately familiar with the plaintiffs' business, its product and the history of the development of that product in a way that cannot be said of the plaintiffs vis-à-vis the defendants' product and the history of its development.

The plaintiffs' personnel have an intimate knowledge of the NTAS product and its development and can give what is

described as “*meaningful input to the experts*”. They say they cannot be expected to prosecute their claim without the ability to examine the ManTra product and reviewing the documents relating to its creation.

### **The defendants’ objections**

The plaintiffs allege that the defendants are seeking “*to invoke the fig leaf of confidentiality*” in order to avoid discovering materials which are “*likely to be highly damaging to their case*”. The defendants take issue with this characterisation.

They contend that the existing confidentiality agreement provides that a party in receipt of confidential information “*shall be entitled to refer to such elements of the confidential information as are strictly required in order to answer the relevant questions*”. The defendants submit that this proviso allows for the experts to disclose individual pieces of source code or other materials which relate to specific identified instances of potential source code copying. The defendants say that the plaintiffs are seeking to depart from the confidentiality protocol that has been agreed. Quite apart from that, disclosure of the type sought is not necessary because it relates to matters that fall exclusively within the experts’ area of competence and has adequate provision for disclosure to the plaintiffs themselves in circumstances where specific findings of unlawful copying have been made.

The defendants note that whilst the experts employed by the plaintiffs have concluded that code existed in ManTra which was literally copied from NTAS, the defendants’ expert found no such evidence of copying. Such instances of literal source code copying as were identified by the plaintiffs’ experts were subsequently shown by the defendants’ experts to refer to publicly available source code which originates from third parties and which could not therefore ground an action for copyright infringement or breach of confidence.

The real substance of the objection is the assertion by the defendants that if the technical documentation sought by the plaintiffs is made available to their principals, it will be the subject of a very detailed analysis by them. The defendants say that whilst they understand that the plaintiffs will be subject to an undertaking that they may not use the documents discovered for any purpose other than the proceedings in suit, it is impossible for a person to “*un-know*” what he or she has come to know from an analysis of the defendants’ product. They say that with the best will in the world, it is not feasible for the plaintiffs’ personnel to put from their minds what they will learn from the analysis of the material discovered to them.

This is particularly worrying for the defendants because they believe that their ManTra product is far superior to the NTAS product of the plaintiffs.

The defendants believe that disclosure, even subject to an undertaking of the type I have identified, will seriously undermine the position of the fourth named defendant in particular. Disclosure will involve its primary assets being made known to a competitor for detailed analysis by that competitor’s personnel. If the defendants succeed in this action and the discovered documentation is returned and the plaintiffs comply fully with their undertaking, the defendants say that nonetheless, the competitive position between the plaintiffs and the defendants would not be restored to the position prior to the proceedings.

They point out that the fourth defendant is a start up business operating in a competitive and difficult trading environment. It is heavily reliant on the advantage the ManTra product enjoys with respect to a number of competitor products. These advantages arise from certain functional features and elements of design which are not present in the plaintiffs’ NTAS product. The loss of any of these competitive advantages will undermine the viability of the fourth defendant.

### **The Legal Position**

The general legal position which obtains in respect of disputes of this nature is summarised in Matthews & Malek on *Disclosure* (2007 Ed.) under the heading “*Exposure of the parties’ trade secrets or other confidential information*” as follows:-

*“As with third party confidentiality, the fact that giving disclosure would involve the loss of the parties own trade secrets or confidences is no answer in itself. Indeed, since it is the parties and not even a third parties’ confidence which is threatened, the position is a fortiori. But the court will more closely scrutinise disclosure sought, to ensure that it truly is material and not oppressive. Although disclosure will normally have to be given, protective limitations may be (and often are) introduced at the stage of inspection.”*

There are a number of cases where difficulties of the type presented here have been considered by the courts.

In *Warner Lambert Co. v. Glaxo Laboratories Limited* [1975] R.P.C. 354, the plaintiff sued for infringement of two patents relating to steroid compounds and their manufacture. The defendants claimed that secrets of commercial value were connected with the process for the manufacture of the steroid preparation of which complaint had been made. The defendants had given discovery of their process of manufacture to the plaintiffs’ counsel, solicitor, patent agent and an expert on their undertaking not to divulge this information to any others including the plaintiffs themselves and further not to use such information except for the purposes of the action. The defendants were further willing to include among those persons, another expert appointed by the plaintiffs in the United Kingdom. The plaintiffs required disclosure to be given without restriction, alternatively to be given in addition to (1) their chief executive, (2) their general counsel in the United States of America, (3) their patent counsel in the United States of America and (4) an Italian scientist resident and employed by them in Italy.

On the summons for directions, the Judge ordered conditional disclosure to the chief executive and the United States of America general counsel but not the patent counsel in the United States or the Italian scientist. The defendants appealed and the plaintiffs cross appealed. The defendants contended that no further disclosure should be ordered beyond what had already been given by agreement. The plaintiffs contended that any disclosure made should be without conditions other than those arising from the general law relating to litigation and the disclosure which should be made also to the two persons excluded. The Court of Appeal partly allowed the appeal and dismissed the cross appeal. The leading judgment was given by Buckley L.J. In the course of his judgment, having identified the question which had to be decided as being the extent to which the defendant should be required to disclose its process to representatives of the plaintiff,

he said as follows:-

*"In this respect, the court is, in my opinion, confronted with a balance of conflict of expedients. The plaintiff is entitled to be protected against infringements of its monopolies under the two patents in suit. If the defendant is in fact infringing, it should not be permitted to shelter behind a plea of secrecy. If, however, the defendant is not infringing, it is entitled to have the secrets associated with its process maintained intact. The parties are competitors in a highly competitive market. How can justice be done and at the same time effect be given to the rights of each party to the greatest possible extent?"*

*The burden of proving infringement rests upon the plaintiff. If the value of the defendants' process did not lie, in part at least, in the secrets associated with it, the plaintiff upon showing that there is a substantial and genuine issue of infringement to be tried would normally be granted as an interlocutory step in the action disclosure by the defendant of its process without the imposition of any terms restricting the use of the information so obtained. In the present case, however, if this course were to be adopted and the plaintiff were to fail in the action, the defendant might be seriously prejudiced. If, on the other hand, there were no disclosure, the plaintiff might be unduly hampered in proving his case. An infringer should not be assisted in protecting himself by nondisclosure of matters which in the normal way would be the subject of pre-trial discovery. In such a case a controlled measure of disclosure seems best calculated to serve the interests of justice. The course which has been taken in a number of such cases has been to direct disclosure to selected individuals upon terms aimed at securing that there will be not either use or further disclosure of the information in ways which might prejudice the defendant. The cases which have been brought to our attention are cases in which the court has directed that the plaintiff shall be allowed to inspect the defendants' manufacturing process; but I think that there can be no difference in principle between disclosure of that kind and disclosure made by communicating, for instance, a chemical process."*

Buckley L.J. then went on to consider a series of cases and factual material dealing with the case in suit before him. He then went on to state:-

*"The judge was, as it appears to me, concerned to ensure that the plaintiff company, in the person of some responsible officer, should have an opportunity not only of being advised by technical experts and legal advisors, but of knowing the facts on which that advice was founded, so as to be able to form a personal judgment on how to deal with the actions. There are obviously strong arguments in favour of a party to litigation being enabled so far as possible to chart his own course in the light of professional advice. It is right, however, I think, to say that in the present case there is a particular circumstance which complicates the problem. The processes patented by the plaintiff and the process employed by the defendant are such that it is impossible to discern, by analysis or otherwise, from the product of either how it has been made – that is, which of a number of possible chemical processes has been employed. This would make it, as I conceive, virtually impossible to police any terms imposed in the use of such information as is disclosed; and this would be even more so, having regard to the fact that the plaintiff operates outside this country and that the individuals to whom the plaintiff wants disclosure to be made are all resident outside the jurisdiction. This should, in my opinion, make the court particularly careful not to expose the defendant to any unnecessary risk of their trade secrets leaking to any competitors.*

*If in a particular case it is right that disclosure of any facts should be made by one party to his opponent's advisors before trial, it must normally follow as a matter of course that the opponent should be entitled to know the facts so disclosed. His advisors are his agents in the matter, and strong grounds must be required for excluding the principal from knowledge which his agents properly acquire on his behalf. But this principle must be subject to some modification if trade secrets are to be protected from disclosure to possible competitors...Where a matter in question in an action, being that matter upon which inspection or disclosure will throw light, is of a technical nature, the parties seeking discovery may well require inspection by, or disclosure to, technical and professional advisors. If the matter be of a kind of which the party will be likely to be able with the aid of those advisors to form some kind of view of his own, it seems to me that he should normally be allowed to know as much about the facts as his advisors. If, however, the case were one of so esoterically technical a character that even with the help of his expert advisors the party himself could really form no view of his own upon the matter in question but would be bound to act merely upon advice on the technical aspects, disclosure to him of the facts underlying the advice might serve little or no useful purpose."*

That decision of the Court of Appeal was considered by the Federal Court of Australia (Spender J.) in the case of *Mackay Sugar Cooperative Association Limited & Ors v. C.S.R. Limited* [1996] 137 A.L.R. 183. Spender J. held that disclosure should be made of confidential material which is necessary for the proper preparation of the case of the parties seeking discovery. He said that a party obtaining discovery will generally be entitled to inspect all of the discoverable documents except those in respect of which a proper claim of privilege can be made. He cited with approval, a passage from the speech of Lord Wilberforce in *Science Research Council v. Nasse* [1980] A.C. 1028 where he said:-

*"There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence."*

He pointed out that the respondents particularly relied on an unreported judgment of the Victoria Court of Appeal in the case of *Mobil Oil Australia Limited & McDonnells P.T.Y. Limited v. Guina Development P.T.Y Limited* (Unreported, 3rd November, 1995). There Hayne J.A. said:-

*"Once the documents are inspected by the principals of the trade rival the information which is revealed is known to the trade rival and cannot be forgotten. Confidentiality is destroyed once and for all (at least so far as the particular trade rival is concerned). To say that trade rival is bound not to use the documents except for the purpose of the action concerned is, in a case such as this, to impose upon that trade rival an obligation that is impossible of performance by him and impossible of enforcement by the party whose secrets have been revealed."*

Spender J. said that that concern, while a very real one, was somewhat overstated. He said:-

*"In many circumstances people, including judges, are given information which for some reason or another should not be used for a particular purpose. It goes without saying that judges are expected to decide cases on the material properly admissible before them and to put to one side anything which is inadmissible or irrelevant to the determination of the issues before them. It seems to me that while there are difficulties raised by the need to adopt that course, it is a course which, in fact, is both necessary and frequent. Similarly here it seems to me that it overstates the matter to say that confidentiality is destroyed on disclosure, or that a particular person is unable not to use information, imparted to him on a strict undertaking of confidentiality for improper purposes."*

The matter was considered by the Court of Appeal in England again in *Format Communications M.F.G. Limited v. I.T.T. (United Kingdom) Limited* [1983] FSR 473. That case involved an action for breach of confidence and copyright infringement in respect of a computer programme. The Court of Appeal ordered that inspection of a computer source code be permitted by an employee of the defendants subject to certain undertakings.

In the course of his judgment, Slade L.J. identified the task of the court as this:-

*"As I see the position the court, in this class of case, has to try to keep a fair balance between the natural wish of the respondent to have any trade secrets of his adequately protected and the natural wish of the applicant to see any document which may support his case."*

Waller L.J. expressed himself in the following way:-

*"I have come to the conclusion that the nature of the changes which could be identified as defendants work is such that it almost certainly would require somebody with familiarity to identify those parts of the computer programme which could be traced to the defendants' work."*

In *British Markitex Limited v. Johnston* [1987] 2 PRNZ 535, Wylie J. held that confidentiality is a factor to be considered but not an absolute bar to discovery. Discovery could be provided on conditions which would ensure proper safeguards to limit the dissemination of the information thus revealed.

Thus far, all of the cases allowed disclosure albeit in a conditional form. There are cases on the other side of the line where it has been refused. One such case is *Sport Universal v. ProZone Holdings Limited* [2003] EWHC 204. That was a decision of Mr. A. Mann, Q.C., sitting as a Deputy Judge of the Chancery Division in England. In that case it is alleged that the defendants, former employees of the plaintiff, had left the plaintiffs' employment and created their own rival software product which analysed players' performances at rugby. The plaintiffs alleged that they thereby infringed copyright in the plaintiffs' software product. It was said that the defendants "Clint" product was superior to the plaintiffs' product. At the commencement of the proceedings the plaintiffs' representatives secured a delivery up of the defendants' source code on the undertaking that it would be shown only to the lawyers and the plaintiffs' expert. The code was analysed and particulars of similarity prepared. Permission was then sought to vary the undertaking so as to allow the technical director of the plaintiff to see the defendants' source code. The Judge declined to permit the plaintiffs' technical director access to the source code. He said:-

*"I start from the premise that although any bar on disclosure to a party is exceptional, this is a case in which there should be such a bar. The restrictions on disclosure were offered in an undertaking given by the claimant at the outset and it is only relatively recently that it is sought to be released from it. The claimant obviously accepts that the defendants source code is not material which should be freely available and disclosed to all the claimants' officers and to that extent the burden on the defendants of showing that there should be some restrictions and disclosure has in effect been automatically fulfilled. The claimant was prepared to continue with that nondisclosure regime for a significant number of months during which the action was conducted at the outset. In particular, for a period of, I think, over a year, it did not seek any release from the undertaking and was apparently content for the work of comparison of the two programmes to be carried out by its expert unassisted by Mr. Giorgi or any other employee or officer of the claimant seeing the source code himself or herself. It might have preferred a different regime, and I can quite see it might have been more convenient, but it did not press for one. I am, therefore, prepared to conclude that the source code is very sensitive information, and that there would be potential damage to the interest of the defendants if it is revealed to officers of the claimant, and that it is not absolutely necessary at this stage that the blanket restrictions on disclosure should be released, as least in terms of the proper analysis of the software."*

*However, that does not conclude the matter...the claimant has managed for a considerable time without the technical assistance of Mr. Giorgi and it is in the nature of this case that the claimant's case at trial will turn on the evidence of the expert and not Mr. Giorgi himself. I accept that it might be more convenient for Mr. Giorgi to assist the expert but I do not think it is necessary, even bearing in mind the proximity of the trial. As to the giving of instructions, I do not think that it is necessary at this stage for Mr. Giorgi, as opposed to perhaps a non-technical officer, to have access to the code. I do not see at present that that access is necessary."*

This case is perhaps the strongest from the defendants' point of view. The defendants did, however, call my attention to other decisions such as *Reynolds Leasing Corporation v. Carreras Rothmans Limited* (19th July, 1983) in which Falconer J., in dealing with a case concerning a patented invention for processing tobacco, restricted disclosure beyond the independent experts to the chief in-house patent counsel of the plaintiff and a member of a firm of United States patent attorneys representing the plaintiffs.

Aldous J. in *International Video Disk Corporation v. Nimbus Records Limited (No. 1)* (11th April, 1991), ordered disclosure which was confined to independent expert witnesses and two of the plaintiffs' patent counsel. The court noted that neither of them was involved in design or manufacture. Their sole task was in exploiting the plaintiffs' patent portfolio.

In *Communications Patent v. Cable Time*, the same judge on 22nd February, 1989, refused disclosure to a specialist patent agent working as a consultant for the plaintiff, noting that disclosure had already been made to lawyers, patent agents and experts. The court ordered disclosure to an employee of an associated company of the plaintiff who had responsibility for the conduct of the case but had limited technical knowledge and was not associated with the plaintiffs' research and development.

### Conclusions

The above case law all seems to demonstrate that the restriction which the defendants seek to place on disclosure of the material namely, only to be seen by the experts or alternatively only by the experts and the legal advisors but to deny it to even a limited number of persons in the plaintiffs' organisation is exceptional. Such restriction can be ordered but it is unusual. If such a restriction is to apply, there must be exceptional circumstances which would justify it.

In the present case, the defendants contend that disclosure of the material, the subject of the motion, should be confined in the same manner as it has been during the review of the plaintiffs NTAS software and the defendants ManTra software conducted by the experts appointed by both sides.

The confidentiality agreement provides that the parties experts alone shall receive and review the parties source code, object code, user documentation together with other confidential information for the purpose of the preparation of their reports. The experts are entitled under the terms of that agreement to refer those elements of the confidential information as necessary to legal advisors so as to enable them to answer the relevant questions in their reports. Those legal advisors may in turn disclose the report to their client. That, they say, is sufficient and ought to be adhered to given the consequences for them which I have already addressed.

On the other hand, the plaintiffs assert that a refusal to allow a limited number of personnel of the plaintiffs under strict conditions to have access to the material in question will unfairly result in the plaintiffs having to conduct the trial in blinkers. The core materials relating to the defendants programme which is said to have been developed improperly through infringement of the plaintiffs confidential information has to be discovered and disclosed to the plaintiffs' key personnel if there is to be a fair trial. They particularly point to the fact that their experts have 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.

The case is a finely balanced one but I have come to the conclusion that the interests of justice require limited disclosure of the material in question. The very limited disclosure contemplated in the confidentiality agreement is not sufficient to permit of a fair trial. I propose, subject to hearing counsel, to make an order permitting disclosure to the plaintiffs' legal advisors (counsel and solicitor) and to a nominated officer of the plaintiffs under strict conditions.

These conditions will include:-

- (i) An undertaking on oath from the nominated officer of the plaintiffs that the material disclosed will not be used for any purpose other than the conduct of this litigation.
- (ii) That the documentation will at all times remain within the custody of the plaintiffs' solicitors who must give an undertaking to the court that they will not part company with such material or allow it to be copied in any way without the defendants consent or leave of the court. They must also undertake on oath that the material will not be used for any purpose other than the conduct of this litigation.
- (iii) The access to be had by the named officer of the plaintiff to the material will have to be in the presence of the plaintiffs' solicitors.
- (iv) That a record be kept of the material examined by that officer and the dates, times and duration of such examination.
- (v) At the conclusion of the litigation, the material will be returned in its entirety to the defendants' solicitors.