

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**INTELLECTUAL PROPERTY**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/03/2007

**Before :**

**MR JUSTICE WARREN**

**Between :**

	<b>INDICII SALUS LTD. (In Receivership)</b>	<b><u>Claimant</u></b>
	<b>- and -</b>	
	<b>(1) GARU PARAN CHANDRASEKARAN (2) VANESSA CHANDRASEKARAN (3) SSANEVA SECURITY TECHNOLOGIES LTD</b>	<b><u>Defendants</u></b>

**Mr T Penny** (instructed by **Messrs Kerman & Co** ) for the **Claimant**  
**Mr J MacDonald QC** and **Mr Seamus Andrew** (instructed by **Messrs Millbank Tweed** ) for  
the **Defendants**

Hearing dates: 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> October 2006

**Judgment**

**Mr Justice Warren :**

1. This is a further round in the acrimonious litigation between the Claimant, Indicii Salus Ltd (“ISL”) and the Defendants Guru Paran Chandrasekaran, his wife Vanessa and Ssaneva Security Technologies Ltd (“Ssaneva”), a company in which they are interested. This hearing is to deal with the Defendants’ application to discharge the search order mentioned in a moment and, if successful, with the question whether there should be an enquiry on the cross-undertaking as to damages.
2. Etherton J granted a search order against Mr and Mrs Chandrasekaran on 10 August 2005. It was a wide order permitting search of the matrimonial home; it was executed on 12 August 2005, although not completely. The Defendants applied to discharge the order of Etherton J on various grounds. On the first occasion on which the matter was before me, I indicated that I thought that the appropriate time for dealing with the discharge application was at the trial itself. It has, however, always been the Defendants’ case that they were never going to use, in any improper way, the Software in their new business. They said that they were

prepared to give undertakings to that effect and did so, although they had not done so until very shortly before the first hearing in front of me in early 2006. That effectively disposed of the underlying action. The Defendants said, however, that the search order should never have been made. They wished to pursue the application to discharge it, alleging that the grant of the order had caused them significant loss as well as resulting in considerable expenditure in costs.

3. I directed the service of grounds for the discharge of the search order which were duly served. The grounds included an allegation that the application for the search order was an abuse of process. On 27 March 2006, I struck out the application insofar as it was based on allegations of abuse of process. In my judgment on that occasion, as well as in an earlier judgment dated 15 February 2006, I set out a certain amount of the history of this case; I do not propose to repeat it. I should add that I have re-read my previous judgments. I see no reason to change in favour of the Defendants any of my assessment of the facts of the case which I expressed.
4. I also made some fairly stringent case-management directions. Although I was prepared to allow some cross-examination, I directed that it should be restricted to 1 day. I also refused to allow Dr Waters to be called. The matter went to the Court of Appeal on various aspects. In relation to my case management directions, it was accepted by the Claimants that my restriction on the time allowed for cross-examination was too tight and that the Defendants should be allowed to call Dr Waters. My directions were varied to that extent. The challenge based on abuse remained struck out.
5. The Defendants are, of course, entitled to a hearing of their application for discharge of the search order. But in making the directions which I did, it seemed to me that they should not be entitled to a hearing which would, to all intents and purposes, amount to a trial of the action with full cross-examination of many witnesses in order to ascertain the truth one way or the other of the many allegations being made in each direction. The underlying action having been disposed of, dealing with the search order could be dealt with in a manner which I considered more proportionate: not every factual issue between the parties would be relevant to whether the search order should be discharged and those which were relevant were not necessarily ones which the Defendants would any longer be entitled to have resolved.
6. I make those observations because I am invited by both sides to make various findings of fact notwithstanding that there has been only limited cross-examination and only of a small number of witnesses. The fact that a particular witness has not been cross-examined does not mean that I am bound to accept his or her evidence as true especially where one party or the other has expressly stated that the evidence is not accepted. Further, disclosure has not been given so that there may be documents of relevance which I have not seen. The question for me is whether, on the totality of the evidence which I have received, I am satisfied that the search order should not have been made and in deciding that question, I may leave certain factual issues unresolved. As Mr Penny reminds me, the various pre-conditions for the granting of search order (which I examine in a moment) establish an evidential *prima facie* threshold; they do not require the ultimate resolution of issues of fact. I would repeat what I said in my earlier judgment, however, which is that, on the material presented to him, no criticism can be made of Etherton J for making the order which he did.
7. At the adjourned hearing of the Defendants' application last year, I heard oral evidence from Mr Monty Koppel ("**Mr Koppel**"), Mr Kiely, Dr Waters and Mr Chandrasekaran. Following that hearing, I have received long written submissions from Mr Macdonald QC and Mr Andrew for the Defendants and from Mr Penny for ISL. They will, I hope, forgive

me if I do not deal with all of the many points which they make. Some of the submissions seem to me to go rather beyond matters of relevance to the applications and to stray into the territory which would have been appropriate only if a trial of the action had been held. I can assure the parties, however, that I have read with care those written submissions and the many references to other documents which they contain, as well as reviewing the transcripts of the oral evidence.

### **Grounds of application**

8. The grounds on which the Defendants are now pursuing their application to discharge the search order are these:
  - a. The Defendants did not intend to use the Software (as defined in the search order) in the development of their proposed new product.
  - b. The Defendants would not have disposed of or destroyed evidence necessary for ISL to establish its claim if they had been given notice of that claim.
  - c. There was no or insufficient likelihood of serious damage being caused to ISL by the Defendants' activities.
  - d. The undertaking in damages given by ISL and the supporting undertaking given by Anjar International Ltd (“**Anjar**”) were of no or insufficient value to adequately protect the Defendants in the event that they sustained loss as a result of the wrongful imposition of the search order.
  - e. ISL did not make full and fair disclosure in relation to the value of the Software, with the effect that their case in relation to the likelihood of damage (ground c. above) and the value of the undertaking (ground d. above) was materially incomplete and/or misrepresented.

### **Applicable legal principles**

9. Section 7(1) Civil Procedure Act 1997 provides that the court may make an order under the section for the purpose of securing, in the case of any existing or proposed proceedings in the court-
  - a. the preservation of evidence which is or may be relevant, or
  - b. the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings.
10. Mr Macdonald says (and I think that this is uncontroversial) that anyone wishing to apply for a search order must satisfy four layers of requirements which he summarises in this way;
  - a. First, they must demonstrate that the facts and circumstances surrounding the case are appropriate to justify this sort of Order, based on the guidance given in the authorities, of which the leading authority is *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55 (CA).
  - b. Secondly, given that the application is made without notice, they must fulfil the usual requirement of making full and fair disclosure of all material facts: *Brink's MAT Ltd*

*v Elcombe* [1988] 1 WLR 1350, 3 All ER 188 (CA).

- c. Thirdly, since the defendant may be entitled to damages for any loss sustained as a result of the search order, if it turns out to have been wrongly granted, the claimant must give an undertaking in damages, which (depending on the financial status of the claimant) may be required to be supported by some form of security.
  - d. Fourthly, the search order must contain a number of safeguards for the defendant, which have been laid down by the authorities (see particularly *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 and *Universal Thermosensors v Hibben* [1992] 1 WLR 840) and the CPR (eg by 25PD.7-12) and which are now incorporated in the standard form of Search Order (reproduced at 25PD 13).
11. There are four pre-conditions identified by Mr Penny (and I think that this is equally uncontroversial) which are established by the authorities (in particular *Anton Piller* and *Lock International plc v Beswick*) before the Court will ordinarily exercise its power to grant a search order:
- a. There must be an extremely strong *prima facie* case (a requirement which must be viewed with some flexibility).
  - b. The damage, potential or actual, must be very serious for the applicant.
  - c. There must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that the defendants may destroy such material before an on notice application is made.
  - d. The harm likely to be caused by the execution of the search order on the respondent and his business affairs must not be out of proportion to the legitimate object of the order.
12. In the years following the decision in *Anton Pillar*, it became relatively easy to obtain search orders. In particular, the courts seemed to be willing to infer that a defendant who could be shown to be acting improperly would be likely to hide or destroy evidence. Judges became concerned that it had become all too easy to obtain this sort of relief which could often have serious and permanent adverse consequences for a defendant. But the need for, and meaning of, the requirement that there should be a “real possibility” that the defendants may destroy evidence was underlined and explained in *Booker McConnell plc v Plascow* [1985] RPC 425 and in *Lock International plc v Beswick*. In the first of those cases, Dillon LJ said this:

“The phrase “a real possibility” is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery up of documents is in question, the courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with the court’s order, and that defendants will therefore comply with orders to, for example, produce and deliver up documents without it being necessary to empower the plaintiffs’ solicitors to search the defendant’s premises.”

13. And in *Lock International plc v Beswick*, Hoffmann J said this:

“Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response. To borrow a useful concept from the jurisprudence of the European Community, there must be proportionality between the perceived threat to the plaintiff’s rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an *Anton Piller* order. People whose commercial morality allows them to take a list of customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them.”

14. However, Mr Penny says the test this is simply an evidential test which requires evidence of a real possibility that a defendant will disobey a lesser order, for example, for delivery up of computer equipment. It does not, he submits, require a finding of fact that the defendant would or would not have destroyed or hidden evidence. It is clearly correct that all that has to be shown is a “real possibility” of destruction of evidence (and in principle the same applies to hiding rather than destruction). It follows, I consider, that the Court does not have to be satisfied before making a search order that the defendant actually would destroy evidence; and it may be, on the facts of a particular case, that the Court is satisfied that the defendant actually would breach a lesser order such as that which Mr Penny mentions and may, in all the circumstance including that fact, decide that there is a “real possibility” of destruction of evidence. An applicant must, nonetheless, consider whether a lesser form of order would be adequate. If there is no reason to think that a defendant would disobey an order, for instance for delivery up of a claimant’s property, then it would not be appropriate to seek to obtain a search order.

15. Both Mr Macdonald and Mr Penny refer to the decision of the Court of Appeal in *Dunlop Holdings Ltd v Staravia Ltd* [1982] Comm. LR 3. Mr Macdonald refers to it in the context of search order becoming easy to obtain in the 1980s where the courts, he said, would infer that a defendant who could be shown to be engaged in wrongful activity was likely to destroy or hide evidence of his wrongdoing if given notice of the claimant’s application. But the decision in that case remains good law and the observations of Oliver LJ remain pertinent when he said this (see at page 3):

“It has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the Court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the Court.”

This passage was approved by Hoffmann J in *Lock International plc v Beswick* at page 1280G and is as applicable today as it was then.

16. On any application for a search order there is a duty of full and fair disclosure imposed on an applicant. A failure to observe that duty is liable to result in the order being discharged. The relevant principles are found in *Brink's MAT Ltd v Elcombe* [1988] 1 WLR 1350, [1988] 3 All ER 188 (CA) and are set out in the judgment of Ralph Gibson LJ at page 1356ff:
  - a. The claimant must make full and fair disclosure of all facts that are material for the judge to know in dealing with the application.
  - b. Materiality is to be decided by the court, not by the claimant or his legal advisers.
  - c. Proper inquiries must be made by the applicant before making the application to ensure that he is able to present all material facts. The duty therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries.
  - d. The extent of the inquiries which will be held to be necessary depends on all the circumstances of the case including (i) the nature of the case when the applicant makes the application (ii) the order being sought and its probable effect on the defendant and (iii) the degree of legitimate urgency and the time available to make the inquiries.
  - e. If material non-disclosure is established, the court will be "astute to ensure" that a claimant who obtains an order without notice without making full disclosure is deprived of the advantage he may have derived as a result of his breach of duty.
  - f. Whether the non-disclosure is sufficiently material to justify or require the immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues decided by the judge on the application. The answer to the question whether the non-disclosure was innocent is, as Mr Penny says, therefore an important consideration but is not decisive.
  - g. An injunction will not be discharged for every omission.
  - h. The Court has a discretion, despite proof of material non-disclosure which justifies or requires the immediate discharge of the without notice order, nevertheless to continue the order or make a new order on terms.
17. In this context, Mr Penny draws my attention to certain passages from the judgments in *Brinks MAT Ltd* (Balcombe LJ at page 1358 and Slade LJ at page 1359) cited with approval by Woolf LJ in *Behbehani v Salem* [1989] 1 WLR 723 at pages 726-9. in which the Court of Appeal warned against carrying the principle of material non-disclosure to extreme lengths: it is important for the Court to assess the degree and extent of culpability with regard to the non-disclosure and the importance and significance to the outcome of the application of the matters which were not disclosed to the Court: see page 729E.
18. In *Memory Corporation plc v Sidhu* [2000] FSR 921, the Court of Appeal emphasised that the Court, in considering the consequences of a breach of the duty of disclosure, should take account of all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the

defendant, including the question whether the consequences of the breach were remediable and had already been remedied. Above all, the court had to bear in mind the overriding objective and the need for proportionality: see at page 936.

19. Mr Macdonald puts forward some propositions in relation to the cross-undertaking in damages which, again, I think are uncontroversial:
  - a. An undertaking in damages must be offered by a claimant who seeks a search order. It will be inserted automatically in any court order for an interim injunction unless the judge specifies otherwise (PD 25, para 5.1(1)) and is in the pro forma Search Order.
  - b. The claimant has to deal in his evidence with his ability to honour the undertaking in damages, and the Court can require some sort of security or payment into court to fortify the undertaking. As an alternative, an undertaking from a more financially secure person or entity may be required.
  - c. Where a company in receivership applies for interim relief, it is usual practice for the receiver to give the undertaking in damages, limited to the amount of the assets available to him, or to a sum reflecting a reasonable estimate of the value of those assets: *Re DPR Futures Ltd* [1989] 1 WLR 778. I would comment that the usual practice is no more than that and can be departed from if the Court is satisfied that some alternative arrangements are adequate to protect the defendant.
  - d. If there is a change to the claimant's financial position affecting his ability to honour the undertaking in damages, he is under a duty to disclose it to the defendant: *Staines v Walsh* [2003] EWHC 1486 at paragraph 36.
20. Mr Macdonald also draws attention to the safeguards which are now built into the standard form of search order (see CPR 25PD13 and PD25 paragraphs 7 and 8). He appears, in his written submissions, to be launching a complaint about the manner in which the search order was implemented and executed and about inadequacies in the compliance with the requirements of paragraphs 7.4(1),(6) and 7.5(1), (4), (9). These are not, however, matters raised in the grounds of the application which have, for many months now, identified the parameters of the application.
21. The issue of unlawful use of computer programs arises in the present case. I should say something about the principles.
22. For the purposes of copyright protection, a computer program is treated as a literary work, so that copyright will subsist if the program is an original literary work: see Sections 1 and 3(1) (b) Copyright Designs and Patents Act 1988 ("the CDPA"). The owner of copyright in a computer program has the exclusive right to copy the work (*ie* to reproduce the work in any material form) or to make an adaptation of the work or any substantial part thereof: sections 16 and 17 CDPA. Copying includes storing the work in any medium by electronic means: section 17(2) CDPA and making copies which are transient or incidental to some other use of the work: section 17(6) CDPA. An "adaptation" means an arrangement or altered version of the program or a translation of it, and "translation" includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program: section 21 CDPA.

23. In *Ibcos Computers v Barclays Mercantile Highland* [1994] FSR 275, Jacob J dealt with the proper approach to copyright infringement in computer programs. He held that:

- a. Matters such as program structure and design features may be considered as part of the copyright work in addition to the bits of code and specific program structure within an individual program.
- b. Individual programs as well as the overall program are capable of copyright protection if they were the result of work, skill and judgment.
- c. Copyright can exist in the source code of a computer program, provided it has sufficient originality.
- d. When deciding whether a substantial part of the work has been reproduced, consideration is not restricted to the text of the code, and issues of copying and substantiality can arise at various levels of abstraction, and accordingly the Court may look at program structure and design features.
- e. The unauthorized use of confidential source code may amount to a breach of confidence. In dealing with source code, it is to be noted that it often includes programmer comments and, in the words of Jacob J “is very important to anyone who wants to copy a program with modifications ....”.

24. In *Cantor Fitzgerald v Tradition (UK)* [2000] RPC 95, at paragraphs 76-79, Pumfrey J noted that it is generally accepted that the “architecture” of a computer program is capable of protection if a substantial part of the programmer’s skill, labour and judgment went into it, and the term “architecture” is capable of referring to the overall structure of the system at a very high level of abstraction including what was referred to in *Ibcos* as “program structure”.

25. I agree with Mr Penny when he says that these authorities establish that unlawful “use” of software can take many forms, and, although such unlawful use includes, it is not limited to, the use or copying of all or part of source code. It is, therefore, at least strongly arguable that it would be unlawful for the Defendants to use ISL’s software (including the documentation describing the way in which the software functions) in the design of the architecture of all or part of Ssaneva’s new product or in the development of the high level or low level specifications for all or part of its new product, or in the coding or in any modifications to these various levels of design. I approach the present case on the basis that it is strongly arguable that the rights in respect of which ISL may seek protection are that wide. The case is not concerned simply with the copying and subsequent use of the source code as such.

### **The witnesses**

26. I will in due course need to look at some of the detailed evidence given by the witnesses who gave oral evidence and were cross-examined (Dr Waters, Mr Kiely, Mr Koppel and Mr Chandrasekaran). I should, however, make some general observations about my impressions of each of them.

27. Dr Waters had declined to provide any witness statement for either side at an earlier stage of the proceedings. He did not do so prior to his oral examination either. He was in the past a loyal colleague and possibly friend of Mr Chandrasekaran although I do not know the state of their relationship today. He clearly had not wanted to become involved in this dispute. I consider him to be a truthful witness whose evidence on certain important areas I found very



helpful. It is clear that he did not want to damage Mr Chandrasekaran and, without being in the slightest bit dishonest, painted him as good a light as was consistent with the truth.

28. Mr Kiely had previously given witness statements in support of ISL. He gave oral testimony which was entirely consistent with what he had said before. Mr Macdonald attacks his testimony as coming from a man who cannot be trusted as evidenced in particular by his actions in reading Mr Chandrasekaran's emails which, according to Mr Macdonald, were serious breaches of the data protection legislation, amounting to criminal activity. It is only as a result of that activity that important parts of the evidence now used against the Defendants were obtained. Mr Macdonald submits that I should reject his evidence where it conflicts with that of Mr Chandrasekaran, in particular in relation to conversations which Mr Kiely says took place. Clearly, one or other of Mr Kiely and Mr Chandrasekaran is lying to me; Mr Macdonald invites me to conclude that it is Mr Kiely who is doing so. I take a very different view of Mr Kiely. He strikes me as an essentially honest witness who has shown some strength of character in, eventually, taking his concerns to Mr Koppel and then giving evidence notwithstanding the exposure to possible sanctions in relation to the activities which I have mentioned. I reject any suggestion that his evidence is tainted on the basis that his personal financial interests make it important for him to keep on the right side of Mr Koppel.
29. Mr Koppel has, over the period of this litigation (and before it) come under sustained attack from Mr Chandrasekaran, including what I can only describe as hectoring and abusive correspondence. It is not necessary for me to go into the reasons for the breakdown in the relations between the two of them and, indeed, I do not have the material on which to do so, let alone say who is to blame. What I can say is that there is nothing which leads me to doubt what Mr Koppel has said in evidence about the matters which are relevant to the grounds for this application, in particular in relation to the Comodo deal which I shall come to in due course.
30. Mr Chandrasekaran is a witness on whom I cannot place reliance in relation to the central issues which arise on this application. He clearly lied to Mr Koppel and to the receivers both before and after the commencement of this litigation. He has only changed his line when he has been found out. He was less than full and frank with the supervising solicitor about what he did and did not have at the time of the execution of the search order. It is said that he was "foolish" to have done what he did on these occasions. I do not believe he was simply foolish. I believe that he deliberately chose to hide the truth on each of these occasions because he thought he would not be found out. Further, he has attempted to explain some matters in ways which do not stand up to scrutiny – I have in mind particularly the "mirror image" explanation (which I will deal with in detail later), an explanation which he continued with even in his oral evidence. Accordingly, insofar as it is necessary for me to resolve factual issues in dispute between the parties, I prefer the evidence of Dr Waters, Mr Kiely and Mr Koppel to that of Mr Chandrasekaran whenever resolution of an issue which I need to decide turns on their competing accounts.

### **Summary of Defendants' case**

31. Mr Macdonald says that this is not a case where the search order was appropriate. He makes a number of submissions, most of which are hotly contested:
- a. The case was not one of an emergency. Mr Koppel was not deceived. He knew that Mr Chandrasekaran had retained computers, including a Xenophon server and that Mr Koppel had long maintained Mr Chandrasekaran had copies of all ISL software.

He knew that Mr Chandrasekaran intended to start a new business and he appreciated that Mr Chandrasekaran could do that without breaching ISL's copyright. Mr Macdonald relies on Mr Koppel's letter to Mr Chandrasekaran dated 1 June 2005. But that letter talks simply of Mr Koppel's "well-substantiated fear" that Mr Chandrasekaran retained a server with ISL software on it and sought from Mr Chandrasekaran an explanation of how Mr Chandrasekaran's future activities in the security encryption business would not in fact infringe ISL's intellectual property rights. As I have said more than once before in different language, it hardly lies in the Defendants' mouth to criticise ISL for failing to launch proceedings before it did when they were strenuously denying that they had the items which they now say Mr Koppel well knew they had. It is not, in any case, suggested by the Defendants that ISL knew that the Defendants were intent on starting a new business using ISL's software.

I should say that Mr Macdonald is not to be taken as raising delay in bringing the application as a (new) ground for discharge of the search order. Rather, it is relied on this way: it is said that Mr Koppel's knowledge, coupled with delay, is evidence that there was no threat of serious damage to ISL. As Mr Macdonald puts it:

"If there was a genuine urgent threat to ISL's business Mr Koppel would have acted in January or February when the Ebox Japanese deal was still a possibility."

- b. There was no threat to destroy evidence. Although it is accepted that ISL always had a good claim to return of its property and to protection of its copyright by seeking an injunction, this is not a case where the claimant would have been deprived of that relief if notice of the claim had been given to the defendant. This was not therefore a case where a search order was essential to achieve justice between the parties and order for delivery up and injunction against breaching ISL's copyright would have been adequate. This is, I think, a very bold submission in the light of (a) the constantly repeated denials, coupled with intemperate language, that the Defendants retained any computers or software belonging to ISL (b) the discovery of the mass of material on execution of the search order and (c) the less than frank disclosure afforded to the supervising solicitor and the attempted hiding of the server in the garden during the course of the search.
- c. In relation to the use of the Xenophon server, Mr Macdonald relies on answers given by Dr Waters in cross-examination to the effect that it looked increasingly unlikely by March 2005 that Xenophon might be used in the new product. But even he did not suggest that the possibility had been dismissed nor that possession of the source code might not be very useful in assisting in the development of the new product.
- d. Mr Macdonald also makes this submission:

"It was put to [Mr Chandrasekaran] in cross examination that Dr Waters evidence about his email exchange with Stelios was about working with the Xenophon software, but changing it sufficiently so as to disguise it as a new product. He was asked if he accepted that evidence and said "Mostly I do, yes." He added that what he said to Stelios in January was that he was looking to buy the software from Mr Koppel and that he wanted to raise money for a new business..... "go find me a solution that gives me

something credible in the market to take out and if we can use Xenophon in some way then we should". This is entirely consistent with using the software with ISL's consent, with the "disguise" for reasons of marketing."

[Stelios is Stelios Alexandrakis, one of Mr Chandrasekaran's associates whom I will refer to simply as Stelios.]

It may, indeed, be consistent with that result. But I reject entirely that it was in fact the case that the "disguise" was for this purpose. It is clear, in my judgment, from the evidence of Dr Waters, that the disguise was nothing to do with marketing but everything to do with creating the appearance that a great deal of work had been done in developing Ssaneva's product and thus giving the impression that it was something new, when the reality was that it was going to be based on Xenophon itself.

- e. This is, I consider, the inevitable conclusion to be drawn from Dr Waters' evidence which I accept in relation to an email exchange at the end of February 2005 between himself and Stelios. Dr Waters and Stelios were discussing the way forward, there being two conflicting demands: one to get the product on the market as soon as possible and the second to make it look as different as possible from Xenophon. There can, however, be little doubt that new product was parasitic on Xenophon in concept. Dr Waters accepted that there was a need to justify man-hours in order to make it look as though sufficient time had actually been spent to develop a new product from scratch when in fact it had not been spent. Dr Waters also made it clear, and I accept, that Mr Chandrasekaran knew that this proposal was under discussion.
- f. By March 2005, Mr Chandrasekaran was advised against using Xenophon and he accepted that advice. From March 2005 there is, according to Mr Macdonald "overwhelming evidence..... that Ssaneva's business, while based on a server centric design which was in the public domain, was to be a new product starting from scratch using clean room procedures. ....The Defendants did not intend to use the software (as defined in the search order) in the development of their proposed new product. It was not to be based on ISL's source code". There was no or insufficient likelihood of serious damage being caused to the Claimants by the Defendants' activities.
- g. By January 2005, ISL's software had no significant value. The software was, in any case, useless without the expert technologists involved. By 14 January 2005 (when the business was finally closed), ISL had no staff so that the product was indeed effectively useless. Etherton J was not told about this. On this ground alone it is said that search order should not have been made.
- h. There was a failure to give full and frank disclosure. In particular, Mr Macdonald says that the true reasons for the failure of the Ebox Japanese negotiations (explained further below) were not given. Etherton J should have been told.
- i. Further, the cross-undertaking in damages was given, in effect, by Anjar which undertook to instruct the administrative receivers to hold the proceeds of sale of the software and to apply them in satisfaction of the ISL's cross undertaking in damages. The Judge was not informed that Kroll who had been the administrative receivers up to 10 August 2005 had expressed the strong possibility that Anjar might not have the

resources to pay their fees. As Kroll were the administrative receivers they would have been entitled to their remuneration out of the sale of the software in priority to Anjar.

- j. Mr Appleton, who became receiver after Kroll, is said to be selective in relation to the Indian documents to which he refers in his affidavit in support of the application for the search order. Material of relevance was not mentioned.
- k. If Etherton J had had all of this information he would not, have made the search order.

These heads of Mr Macdonald's submissions reflect the five grounds which I have set out at paragraph 8 above.

32. In his written submissions, Mr Macdonald has distilled, from the considerable amount of documentation and the witness statements made, a history of Anjar's involvement in ISL and the progress of ISL's business through to the receivership and the application for the search order. He has also dealt with Mr Chandrasekaran's relationship with Mr Koppel. The evidence of a Mr Burridge has featured considerably in the history. I am grateful for Mr Macdonald's analysis which I have found useful in reaching my conclusions. I do not, however, find it necessary or even helpful myself to set out this history in detail or to deal with all of the conclusions which Mr Macdonald reaches. Rather than deal with matters exclusively along a time-line, I have found it more satisfactory to approach the matter by reference to each of the grounds relied on for discharge of the search order.

## **Result of search**

33. As a starting point, it is helpful to see what the search actually produced and to compare that against what Mr Chandrasekaran was saying to Mr Koppel and Mr Appleton and the evidence which he has given at different stages of the proceedings.
34. On 12 August 2005, ISL discovered 14 computers and a further computer was delivered up by Mr Chandrasekaran after the search, all of which belonged to ISL. Sometime later in August, and once an electronic "image" had been taken of each hard disk, the relevant software was deleted from the computer hard disks by the Defendants' computer consultant (Octavian) in the presence of the computer consultant retained for the search, Vagon International ("**Vagon**"). Vagon produced a report to Kermans (ISL's solicitors) dated 7 September 2005 ("**the Vagon Report**"). This reported that software was found on all of the computers in Mr and Mrs Chandrasekaran's possession (save for one which was not searched). The computers are specified on a list prepared by the Supervising Solicitor ("**the SS List**"). The Supervising Solicitor also prepared, as is standard practice, a report of the search ("**the SS Report**"). Mr Penny, in his closing submissions, has carried out a detailed analysis of what was found on the various computers. In most respects, I accept his analysis. Accordingly, I have adopted, with modifications, much of his text as my own as follows.
35. Mr Chandrasekaran's computer (**SS List Item 1: Dell Optiplex No. 95BS40J**): From the SS Report it can be seen that Mr Chandrasekaran disclosed the existence of this computer at 11.42am. During the Search, Mr Chandrasekaran claimed that this computer would contain old archived information from 1999 and that, save for the Xenophon Server (a separate machine), he had no other Software. However, the Vagon Report revealed that this computer in fact contained source code, executables and Xenomail on the hard disk.

36. It must be noted that Mr Chandrasekaran sought to take issue with the Vagon Report. However, the Vagon Report contains reliable evidence, in my view, of the contents of the computer. Certainly, for the purposes of this application, I accept it as evidence on which ISL can rely in resisting the application.

37. Shortly before the cross-examination hearing, some documentation was printed off on behalf of ISL showing the detailed contents of this computer, which revealed:

- a. A substantial amount of documentation including manuals relating to the Xenophon and Xenomail software.
- b. A manuscript document in Mr Chandrasekaran's handwriting relating to the new business. Dr Waters, whose evidence I accept on this point, confirmed that it did relate to the new business. It is probable, I consider, that this document was prepared in March or April 2005.

38. Mr Penny was concerned to establish whether the documents within a. above would be helpful to Ssaneva and asked Dr Waters questions about them. Dr Waters agreed that they would be an aid, and would be helpful, to someone wanting to use Xenophon in a new project. Mr Chandrasekaran accepted in evidence that he had wanted to have all Xenophon documentation on his computer before the business closed and that the reason the documents were loaded onto the computer might have been Mr Koppel's threat to close the business. Mr Chandrasekaran's case is that his motive in doing this was that he desperately wanted to keep a copy because he had started the company. It may be that sentimental attachment such as that was one reason for Mr Chandrasekaran wishing to have a copy of the Software, but I also think it more likely than not that he also wanted to have a copy in case it might turn out useful in the future in developing a new product.

39. As the manuscript document mentioned in paragraph 37.b. above, it contains an analysis by Mr Chandrasekaran of the contents of the electronic files on that computer. Mr Chandrasekaran acknowledged that it showed him "getting reacquainted with the program I had designed but long ago forgotten". It refers among other things to the fact that the computer contained "all source code and old documentation". This is consistent with the Vagon Report when it states that source code was present on this computer; and Dr Waters confirmed that this is what the document would suggest.

40. Accordingly, Mr Chandrasekaran must have known that source code was present on his computer. Indeed, he eventually acknowledged that he was "always aware at that point that we would have the source code". He accepted that his assertion to the Supervising Solicitor that this computer did not contain any Software was incorrect. Nonetheless, he claimed that, at the time of the search, he did not remember that the computer contained source code. I find this a very lame explanation. Given my overall impression of Mr Chandrasekaran, it is an explanation which I cannot, on the evidence before me on this application, accept.

**41. Mrs Chandrasekaran's computer (SS List Item 2: a Dell Precision 450 Serial no 54V631J):** This computer was found in the study during the search. According to Vagon it contained Xenomail. Shortly before the cross-examination hearing, some further documentation was printed off on behalf of ISL showing the detailed contents of this computer too, which revealed:

- a. A document entitled "instructions for mapping of directories".

- b. A document entitled “R&D Lifecycle” created on or around 6 March 2005. It contains a number of headings including “Server”, “Product 1” and “Product 2” as well as a schedule for completion of their designs. In relation to all three headings the document states against the entry for 14 February 2005, “Design completed” and in relation to the server envisages “Contract with Indians commences and development continues in India” starting in May and running through to July 2005.
  - c. A written report by Octavia, computer specialists, which was commissioned by Ssaneva. This shows that Octavia undertook a system audit at the Chandrasekarans’ home on 29 June 2005, when they identified the Ssaneva system as including a Poweredge 1300 server at paragraph 4 of the report. At paragraph 31 they wrote this: “A Dell OptiPlex GX100 workstation performs a file serving roles [sic] and a Dell PE 1300 serves the Xenophon Application. A second workstation holds a backup of the Xenophon application but is not in active use (unplugged at time of audit)”.
42. As to paragraph a., Mr Penny says that this appears to evidence the downloading by Mr Chandrasekaran or his wife or others under their direction or control of all documents and data from ISL on 14 January 2005, a matter of two days before the business closed. Dr Waters confirmed, and I accept his evidence on this, that, on or around 14 January 2005, using the computers at Mr Chandrasekaran’s home a backup was taken of the ISL exchange server, the ISL data and the Xenophon database; in effect he says that all data at ISL was copied onto the file server. Mr Chandrasekaran accepted Dr Waters’ evidence about this. He claimed that his motive was a sense of posterity and a sense of nostalgia. Again, I find this explanation very lame and do not accept that Mr Chandrasekaran did not have in mind, at the very least, the possibility of using this material in the future. In any event, I find that documents were downloaded either by or with the consent and knowledge of Mr Chandrasekaran.
43. As to paragraph b., this appears to indicate, as Mr Penny says, that the design of the server and what were referred to as new Products 1 and 2 had been completed by 14 February 2005. Mr Chandrasekaran accepted in cross-examination that in January 2005 (and possibly even to the end of February) the intention was to use the Xenophon server in the new product. When questioned about what was meant by Product 1 and Product 2 on this document, he claimed he did not know but under pressure he then said Stelios was in charge, as if to imply that he, Mr Chandrasekaran, could not be expected to know what was going on. He claimed that, although there was an intention in January 2005 to use Xenophon and Xenomail in the new products, by March that idea had been abandoned. This leaves unexplained why the document itself was created on 6 March 2005.
44. Mr Penny submits that these answers from Mr Chandrasekaran were unsatisfactory and that it is very unlikely that he did not know what was meant by Products 1 and 2. He invites me to find that what was meant was that they would be identical or very similar to Xenophon and Xenomail, and in this sense they were indeed complete. It is, in my view, highly unlikely that Mr Chandrasekaran was not fully aware of all aspects of the development of the new business and the progress being made. I agree with these submissions of Mr Penny. I find that Mr Chandrasekaran knew that Products 1 and 2 were to be identical or similar to Xenophon and Xenomail. I also think that it is more likely than not (I need put it no higher) that Mr Chandrasekaran was still intending at this time to use Xenophon and Xenomail or something very similar in his new business. But even if that is wrong, I have little doubt that he had not dismissed that as a possibility and that ISL, had it known of these facts at the

time, would have had serious cause for concern.

45. As to paragraph c., Mr Chandrasekaran, in cross-examination, initially accepted that the server remained part of his home network system from January to June 2005. Later on he said that the server was not part of his home system explaining simply that he had always intended at some point to get the server up and running, as if to imply that it never had been. Mr Penny suggests that this change of story was because Mr Chandrasekaran realised that he had previously given an explanation that the server had been found in the nursery which would not fit with the server forming part of the home network. I consider the evidence relating to the server in more detail below.
- 46. SS List Item 8: a Dell Precision 760 serial no. 4YDM91J:** ISL has also made printouts from this computer which reveal that this computer contained at least one gigabyte of source code. It is quite possible that this source code was loaded onto this computer as late as 16 April 2005 (the date on which a relevant directory appears to have been created), after Dr Waters had left. This computer also held 15,446 files of Xenophon-related documents. Vagon had noted the existence of code, executables and Xenomail on this computer.
47. Mr Chandrasekaran accepted in cross-examination that someone must have loaded this source code onto this computer on about 16 April 2005, at a time when Dr Waters was no longer working for him, but denied loading the code on himself. But then he claimed that this computer was not operating at all in April 2005 and that Mr Kiely had created the relevant directory for convenience. Mr Penny says that this is “a scandalous allegation against TK, which is not supported by a shred of evidence”. There is, indeed, no evidence before me to support such an allegation. Mr Kiely denies that he did this: I accept his evidence. Mr Penny invites me to hold that Mr Chandrasekaran’s assertion in this regard was “baseless conjecture which gives more support to the impression that (i) PC has embarked on a vendetta against TK, and (ii) PC was prepared to say anything in evidence regardless of its truth or falsity”. I accept that it was baseless conjecture, at least on the evidence which has been presented to me. It is unnecessary to say whether it is part of a vendetta or whether it supports the counter-allegation against Mr Chandrasekaran. I take account, however, of the submission in reaching the overall conclusions which I do.
48. I conclude that the source code was downloaded around 16 April 2005. If Mr Chandrasekaran did not download it himself, it is highly likely that either he instructed someone else to do so or knew perfectly well that it was being done. I do not accept his evidence on this aspect. Incidentally, this evidence shows that Mr Chandrasekaran was wrong when he informed the Supervising Solicitor at the time of the search that there was no other Software at his house.
49. On the state of the evidence before me, the fact that the source code was loaded onto this computer in late April 2005 makes it impossible to conclude that by this stage, there was no plan by Mr Chandrasekaran to use Xenophon software in the development for the new products. Indeed, it seems to me more likely than not that he had not by then rejected the idea that the Software might be used in the development of the new products and that there was a real possibility that it might in fact be used
- 50. The Xenoserver (Dell Poweredge 1300: SS Item 11):** this is the machine that Mr Chandrasekaran asserts was at various times in his study, the nursery and in the garden. There is a mass of evidence relating to this machine and its use.
51. On 14 November 2004, Mr Kiely produced a written report for Mr Chandrasekaran

regarding the implementation at PC's home of a full network so he could operate the software and documentation which Mr Chandrasekaran received and read.

52. Dr Waters said in evidence that, by the end of January 2005 a Xenoserver was up and running from Mr Chandrasekaran's home, which was plugged in and working. I accept that evidence.
53. At paragraph 6 of his 2<sup>nd</sup> affirmation dated 31 January 2006, Mr Chandrasekaran accepts that this machine was created for him in the late stages of the receivership but quite a few months before the business was closed. He claims that this was done so that he could read his emails. He also states that Stelios and Dr Waters may have connected the server after 14 January 2005. However, I think that it is reasonably clear that the files were copied over from ISL house on 14 January 2005 and that the Xenoserver was up and running by that date. It is, as I have already said, highly unlikely that Mr Chandrasekaran was not fully aware of what was going on.
54. Towards the end of January 2005, while he was working at ISL house decommissioning the computers, Mr Kiely saw in operation at Mr Chandrasekaran's home a Xenoserver and several other computers as well as an external hard drive. I accept Mr Kiely's evidence on this, evidence which is supported by his contemporaneous emails to Mr Charles Koppel. Dr Waters was taken through Mr Kiely's evidence about this, and stated that he had no reason to doubt Mr Kiely's explanation.
55. Mr Kiely reported this matter to Mr Charles Koppel, who (with Mr Koppel) telephoned Mr Chandrasekaran to challenge him with the fact that he was using from home a Xenoserver. Mr Chandrasekaran denied having a server at his house and denied running ISL software. He told them that what Mr Kiely had seen was a security feature being a "mirror image" of a computer at ISL house. He now says that the analogy which he used at this stage was a well but it seems to me to be much more likely than not that he used the mirror analogy even at this stage. Mr Chandrasekaran then sought Dr Waters' support for this explanation, which was forthcoming.
56. Mr Penny asked Dr Waters about this incident. His evidence, which I accept, was unequivocal. He said that he was aware that Mr Chandrasekaran gave an explanation about a mirror image security feature but accepted that the explanation was "complete nonsense", that the explanation was untrue and that it was a fabricated explanation. He accepted that he supported that false explanation at the time having been asked to do so by Mr Chandrasekaran.
57. Mr Chandrasekaran's own evidence on includes the following:
  - a. Mr Chandrasekaran's first witness statement dated 23 November 2005 in support of the application to discharge:
    - i. Mr Chandrasekaran claims that he strongly denied to Mr Koppel having a Xenoserver running at home saying that he was unaware that he had a copy of the server software on an old machine. That was plainly untrue as the Xenoserver was operational and running, at least in late January and February 2005. I consider that it is highly unlikely that Mr Chandrasekaran was not aware during the second half of January 2005 that he had a Xenoserver running at home.



- ii. Mr Chandrasekaran gives the mirror image security feature explanation. I find that that explanation was false and was known by Mr Chandrasekaran to be false when he gave originally it and when he repeated it in his evidence.

b. Mr Chandrasekaran's second affirmation dated 31 January 2006:

- i. Mr Chandrasekaran asserts that the server may have been running at the beginning of 2005 but that he had no knowledge of this. I consider that it is highly unlikely that the server would have been running without Mr Chandrasekaran's knowledge and instructions, particularly since he claimed that he needed it to decrypt emails.
- ii. He claims that he was "foolish" to deny that he was using a Xenoserver and three other computers suggesting thereby that he does indeed admit that he was in fact doing so.

c. In cross-examination:

- i. Mr Chandrasekaran asserted that the machine was not functioning in January 2005 and was not in use at his house. I reject that assertion. It is, in any case, inconsistent with his second affirmation where he says that it may have been running at the beginning of 2005.
- ii. Mr Chandrasekaran reiterated the security feature explanation. He claimed that he did not use the words "mirror image" although he did admit to referring to a reflection. He took issue with the evidence of Dr Waters on this subject. However, I have no doubt that Dr Waters was telling the truth so that Mr Chandrasekaran was not.
- iii. Mr Chandrasekaran contended that, on the occasion in late January when Mr Kiely saw what he did, the machine was not connected and was in the spare room. However, he also gave evidence that Dr Waters and Stelios came to his house in late January so that Stelios could see the software which he had not seen for some years. Mr Chandrasekaran says that they (but not he himself or his wife) went up to his study (which I do not understand to be the same room as the spare room) where the server then was and says that they looked at Xenophon probably on that occasion. He says that he does not think that they connected the server to the network. None of this was put to Dr Waters: Mr Chandrasekaran had not previously told this story to the Court or to ISL although what he had told his own advisers I do not, of course, know. It seems to me to be very likely that the server was, in fact, in the study throughout January and that was there when Mr Kiely says he saw it connected.

58. There is some uncertainty as to what happened to the server after Mr Chandrasekaran and his wife returned from holiday in the Maldives on about 21 February 2005. Mr Penny submits that circumstantial evidence suggests that Mr Chandrasekaran's assertion that it was not functioning and was put in the nursery is untrue and unreliable saying this:

- a. In his first affirmation dated, Mr Chandrasekaran claims that sometime after mid-May 2005, he cleared out the proposed nursery and discovered the Xenoserver with software on it, which he had completely forgotten was there. He claims that, after a

hearing before Master Leslie on 29 June 2005, he needed to decrypt some emails so he made a mental note to set it up and so called Mr Kiely to assist in that task. Mr Chandrasekaran repeated his evidence to the effect that he had forgotten about the existence of this computer. He has admitted in his second affirmation and in cross-examination that the assertion that he had forgotten about it was untrue.

- b. In his second affirmation, Mr Chandrasekaran asserts that whilst the server might have been set up without his knowledge before he went on holiday, he does not recall its use after his return from holiday. He relies in support of this assertion upon the fact that it was not working some 6 months later in early August.

59. During the execution of the Search, before the Supervising Solicitor was allowed into his house, Mr Chandrasekaran now asserts that he took the server and hid it behind a bush in the garden, although he did not tell the Supervising Solicitor he had done this.

**60. The “Gateway” computer: Dell GX110 Serial no 5TG910J:** the Vagon report revealed that this computer contained 2 hard drives, including a Maxtor internal hard drive which contained C++ code. This machine suffered a hardware failure during the deletion process. In the Report, Mr Dine (of Vagon) explains that this hard drive was observed to contain Xenocode in a ‘source safe’ directory structure, Xenomail, over 100,000 source code files and over 50,000 executables. Mr Robinson (ISL’s solicitor) states in his witness statement that he was informed by Mr Dine that, before it failed, this hard drive was observed to contain at least 8 gigabytes of source code.

61. The Gateway computer was found in the study according to the SS Report. Mr Chandrasekaran had pleaded with the Supervising Solicitor not to turn off this computer (so one can safely say that it was up and running at the time of the Search). Mr Robinson also gave evidence that Mr Chandrasekaran pleaded with the Supervising Solicitor to be allowed to keep the computer (see paras 29, 38 and 53 of his statement) and Mr Chandrasekaran accepted under cross-examination that he had asked for this computer to be left with him for him to use.

62. Mr Kiely gave evidence (which I accept) to the effect that a substantial 160 gigabyte Maxtor internal hard drive was purchased and delivered at ISL house shortly before the business closed. It seems clear that this was in fact installed on Mr Chandrasekaran’s Gateway computer. Dr Waters accepted that he was aware during the period January to March 2005 that there was a computer at Mr Chandrasekaran’s house loaded with source code. He also stated that Mr Chandrasekaran was similarly aware that at his house there was during that period a computer loaded with the source code on it. He also said that Mr Chandrasekaran would not have looked at it alone because it would not have meant anything to him. He agreed that the source code was not needed for any decryption purposes and accepted that it could have been “an ideal quarry for someone seeking to use Xenophon as the starting point in their new project”, depending, as he said, on what you were producing at the end.

63. Mr Chandrasekaran’s own evidence on this issue in his second affirmation is to the effect that the source code would have been installed by Dr Waters, Mr Goddard or Mr Kiely but that he himself did not install it and did not know what was on this machine. He claims that Mr Kiely is mistaken about the timing of the installation of the disk, that he was not aware that the disk had been installed and nor was he aware that the disk contained Xenophon source code.

64. In cross-examination, Mr Chandrasekaran asserted that the reason he was so keen for the

computer not to be turned off and to keep it was that it was his gateway to the outside world and that it had a very old disk which he did not want to come to any harm. He maintained the assertion that he did not know that a new hard disk had been installed on the computer or that the source code was there on the hard disk.

65. I accept Mr Kiely's evidence about the timing of the installation of the disk. Further, I consider that it is highly unlikely that Mr Chandrasekaran was unaware that it was fitted and that he did not know that it was loaded with at least 8 gigabytes of source code.

**66. The external Maxtor one touch hard portable hard drive:** the way this issue arose was as follows. During the deletion process undertaken by Octavian (and overseen by Vagon), Mr Dine (of Vagon) found evidence that a Maxtor one touch external drive had been connected to the Gateway, and told Mr Robinson about this. In turn, Mr Robinson spoke to Mr Kiely, who confirmed that he had seen an external Maxtor drive in use while decommissioning ISL's computers. Mr Robinson immediately raised the issue with the Defendants' solicitors. No satisfactory response or explanation was given, Mr Chandrasekaran reiterating a denial of any knowledge that such a device had been connected and saying that he would await the Vagon report. The report was produced by Vagon on 15 September 2005 but the matter was not further addressed at the time.

67. It was not until his evidence in reply (in his second affirmation) that Mr Chandrasekaran did eventually address the issue. He claims that he does not remember when it was bought and that he did not remember anything about it when Reed Smith (the Defendants then solicitors) asked him. He says that he had his memory jogged by a recent conversation with Dr Hailes who recalls Mr Chandrasekaran mentioning it during a conversation around Easter 2005.

68. Dr Waters was cross-examined about this issue. He recalled there being an external hard drive in existence and said that it was attached to a computer otherwise it would not have been any use at all. He says he took it when Mr Chandrasekaran and his wife went on holiday (7-21 February 2005) and that he gave it back to Mr Chandrasekaran shortly after they returned from that holiday (*ie* in late February 2005); he could not be certain of the date but it was before he stopped working for Mr Chandrasekaran.

69. Mr Chandrasekaran accepted in cross-examination that it was in his possession in January 2005 but says he would not have used it as he did not do even the most trivial system backup. He said that he did not recall Dr Waters giving it back to him. He maintained, what he had said before, namely that when he asked Dr Waters about the external hard disk Dr Waters said he had no recollection of it. However, when Dr Waters gave evidence to me, he clearly did remember it. It is unlikely, I think, that he would have remembered it when giving evidence but would not have remembered it when Mr Chandrasekaran asked him (if indeed he did ask him). The inference I draw is that Mr Chandrasekaran was not told by Dr Waters that he, Dr Waters, had no recollection of the matter.

**70. The CD ROMs containing source code:** the evidence starts with Mr Kiely's assertion in his affidavit that he gave CD ROMs to Credo around October 2003. The Defendants failed to deliver up any CD ROMs containing source code at or following the search. Mr Chandrasekaran informed the Court on oath that all items which fell within the scope of the search order had been delivered up. In late January 2006, just before the first hearing of the discharge hearing, he claimed to have discovered some CD ROMs containing source code in a cupboard at home and delivered them up. He says that these were the CD ROMs given to him in October 2003.

71. Dr Waters stated in evidence that Mr Chandrasekaran was aware that he had backups on CD which contained source code. In contrast, Mr Chandrasekaran maintained in his cross-examination that at the time of the search order he was not aware that he had such CD's. It is clear, I consider, that the CD ROMs must, at the time of the search, have been in the cupboard where Mr Chandrasekaran says he later found them. I find it hard to believe that he did not in fact know that they were there.
72. There is more to say about the CD ROMs. In his third witness statement, Mr Kiely gave evidence that what Mr Chandrasekaran had been given was a complete build set of Xenophon and Xenomail, that the discs were marked with his, Mr Kiely's, handwriting and that the CDs delivered up in January 2006 did not bear his handwriting. Further, he said that their structure was different from the discs handed over in October 2003. It follows that the CD ROMs which were delivered up are not the ones which were originally in Mr Chandrasekaran's possession. It is not surprising, therefore, that ISL and Mr Koppel consider that Mr Chandrasekaran has not delivered up all the CD Roms in his possession, including in particular those given to him in October 2003, and that he is therefore probably in breach of the Search Order in this regard.
73. It is part of Mr Chandrasekaran's case that until his return from holiday in the Maldives, he was pursuing a project in which Mr Koppel would be interested and involved. He gave this evidence initially in his first witness statement and it was repeated in his cross-examination. He says, in effect, that it was only after return from the Maldives in mid-February 2005, that he and his wife had decided to have nothing further to do with Mr Koppel and that it was decided that the new product would be developed entirely "without any reference to the ISL software". This seems to be at least a tacit recognition – something which has not always been accepted by Mr Chandrasekaran – that up until then there was indeed an intention to use Xenophon as the basis of the new product, or at least of that possibility remaining real, albeit in a project which involved Mr Koppel in some way. It is very difficult to view the actual evidence as being consistent with the suggestion that, until the return from the Maldives, Mr Chandrasekaran was considering a project which involved Mr Koppel. If the facts are not consistent with that suggestion, it follows that Mr Chandrasekaran is not being honest and the inevitable conclusion must be that, at that time, he was intending to use the Xenophon software in a new product without ISL's consent or knowledge. As will be seen in a moment, the facts are indeed inconsistent with that suggestion.
74. In that same witness statement, Mr Chandrasekaran refers to "a new product developed by a brand new technology team, without any reference to the ISL Software which I had basically known for some time was defunct". I do not consider that the evidence is consistent with the suggestion that Mr Chandrasekaran had for some time known that the software was defunct. That it needed updating and further development may well be true. But even if "some time" is to be read as meaning a small number of weeks, it is simply not possible to believe that Mr Chandrasekaran had genuinely considered the software to be defunct some weeks before his return from the Maldives.
75. What cannot be denied by the Defendants is that there is a total absence of documentary evidence from mid-January 2005 onwards which supports their case on this. From closure of their business on 14 January, Mr Chandrasekaran was looking for new investors and in that context sent emails to several of them in which he ran down Mr Koppel, describing how badly he had been treated and saying that the closure of the business would enable him to break from Mr Koppel; he also said that he intended to start up a new business rebranding and reselling Xenophon. The evidence of other witnesses in their statements is to the effect

that Mr Chandrasekaran wanted to have nothing to do with Mr Koppel.

76. Notwithstanding these emails and the other evidence, Mr Chandrasekaran's evidence in cross-examination was that the opportunities which the emails mention were ones which would involve Mr Koppel, a proposition which Mr Koppel himself rejects, nothing along those lines having been suggested to him by Mr Chandrasekaran. There is nothing at all to support what Mr Chandrasekaran said and, given the obvious breakdown of the relationship, it is inherently unlikely. When one then reads the correspondence between Mr Chandrasekaran and Mr Koppel after 14 January 2005 and in particular the emails which Mr Chandrasekaran wrote whilst in the Maldives, it is clear, in my judgment, that his evidence is not true. The email dated 7 February sent by Mr Chandrasekaran to Mr Koppel from the Maldives is long and immoderate in its terms. But its message is succinctly conveyed by the final paragraph:

"On our return to the UK, I now ask you and your son to leave us in peace. When in the past I have suggested that I want to inform the police of the threats you have made against us, you considered it a threat in itself to you and became quite cross (to put it mildly). I have now got to the stage where my family tells me that I have no choice but to inform the police should you continue. We are quite ill and I fear that my wife will never recover from this horrendous ordeal. Please leave us alone on our return."

I make no comment on the truth of the suggestion that threats were even made by Mr Koppel: he denies that any threats were even made and views Mr Chandrasekaran's involvement of the police as a dishonest tactic on his part. But what the email does show to my mind is that it is impossible to think that Mr Chandrasekaran would continue any further business involvement with Mr Koppel.

77. That conclusion is made even clearer when it is noted that this email was sent on the same day as Mr Chandrasekaran sent a business plan for Newco to a Mr Cardona. I have no doubt that the Newco was Ssaneva. The plan was clearly based on ISL's own business plan. I reject Mr Chandrasekaran's evidence that this business plan related to a proposal in which Mr Koppel would have some involvement which is what he said in cross-examination.
78. What all this evidence thus far establishes, in my judgment, is that at least up until the time when Mr Chandrasekaran and his wife returned from the Maldives, it is clear that Mr Chandrasekaran had not abandoned the possibility of using the Xenophon as the basis of the new products which Ssaneva was to develop. It is also clear, I think, that whether used in a fundamental way or not, the software would be very useful in such development, a valuable quarry as it was put to Dr Waters and which he accepted. It may even be that this is, by now, common ground, but it was not always so.
79. I should not leave this aspect of Mr Chandrasekaran's evidence without setting out one passage from his cross-examination. In response to Mr Penny's question about the absence of documents referring to an ongoing business relationship with Mr Koppel, he said this:

"Mr Koppel is.....My communications with Mr Koppel are very rarely by email, you know at that time. These were conversations. I want to be very clear about this because this is important. When he was saying to me that I could no longer work in this industry again [something, I interpose to note, that

Mr Koppel denies ever saying] it was vexing me a lot, including the fact that he qualified that I could not even go back into research. He put a deal to me, that is that I have a £1 million debt, that I raise money and carry on with what I want to do. I had said to him at several times up until that, “People will not co-invest if they know you are involved”. He said “Fine, we can hide my identity.””

I do not believe that such a conversation or anything like it ever took place and reject Mr Chandrasekaran’s evidence about it.

80. In my earlier judgment in relation to the strike-out of the abuse ground, I referred to what has become known as the “caught-out” conversation. It is part of Mr Kiely’s evidence that he had a conversation with Mr Chandrasekaran at the end of January or beginning of February 2005 when Mr Chandrasekaran asked him whether he would be “caught out” if the software was written in a different computer language (C++). Mr Kiely also says that Mr Chandrasekaran told him during this conversation that he would first have to launch and sell encryption services using the software under another name in order to generate sales. It is, I think, clear – although this was at one stage not accepted by the Defendants – that Mr Kiely did report to Mr Koppel such a conversation whether or not it in fact took place.
81. Mr Chandrasekaran denies that any such conversation took place. He asks rhetorically why he would have had such a conversation: Mr Kiely was not a systems engineer and would not be the right person to ask even if one were to assume that Mr Chandrasekaran was intending to do something improper and wondered if he would be able to get away without detection. Having formed the views of Mr Chandrasekaran and Mr Kiely which I have (as to which see paragraph 30 above) I prefer the evidence of Mr Kiely to that of Mr Chandrasekaran on this issue. Quite apart from that, Mr Kiely’s version makes more sense. Mr Kiely himself has no reason to lie about this (unless one takes the conspiratorial approach, in my view an unjustified approach, of Mr Chandrasekaran that Mr Kiely is for some reason assisting Mr Koppel in a vendetta against him). Further, there are several factors, identified by Mr Penny, which suggest that he might well have asked Mr Kiely for his view:
- a. At the end of January 2005, Mr Chandrasekaran was intending to use the Xenophon software in the new business, so his question is consistent with his intention.
  - b. Mr Chandrasekaran knew such conduct would be unlawful.
  - c. Mr Kiely’s reference to Mr Chandrasekaran wishing to “disguise” the ISL software as something else is consistent with the email exchange already referred to.
  - d. If Mr Chandrasekaran was going to ask anyone about this, he would not ask a member of his technical board who, according to Mr Penny and as I consider to be correct, did not know Mr Chandrasekaran had the software, but would ask someone unconnected with Ssaneva.
82. Moving on in time to March 2005, Mr Kiely alleges that he had a conversation with Dr Waters in which Dr Waters told him that if Mr Chandrasekaran went ahead with what he was planning he would be “in very deep trouble”. Mr Chandrasekaran’s evidence, given at an early stage of these proceedings, was that he had spoken to Dr Waters about the alleged conversation and that he, Dr Waters, had emphatically denied having had such a conversation. Dr Waters’ own evidence was that he could not recall such a conversation

with Mr Kiely but could not deny that it had taken place. It does, however, seem unlikely that he had emphatically denied to Mr Chandrasekaran that the conversation had taken place. What all this shows is that, had ISL known then what it knew now, it would have been justifiably concerned that Mr Chandrasekaran was intending to use the software in his new business. I would add that Mr Chandrasekaran says that he asked Dr Waters whether he would attest to his conversation with Mr Chandrasekaran in a witness statement but that Dr Waters replied that he was unwilling to do saying, according to Mr Chandrasekaran, that “he was afraid of the repercussions from Mr Koppel”. If that exchange with Mr Chandrasekaran had taken place, it is odd to my mind that Dr Waters was not able, later, to state categorically in the witness box that his conversation with Mr Kiely did not take place. This suggests that that exchange did not take place.

83. There is not a great deal of other material dating from March to May 2005 to which I need to refer. Running through March and April there is extremely acrimonious correspondence between Mr Chandrasekaran and Mr Koppel. It contains a letter dated 8 April from Mr Chandrasekaran. In relation to that letter, Mr Penny describes it as arrogant and dismissive in its terms. He submits that its contents were deliberately dishonest in a number of ways, identifying the following:

- a. Mr Chandrasekaran repeats the “mirror image” explanation
- b. He expressly denies having “any company property whatsoever” other than a laptop. He expressly denies having, in particular, “servers running Xenophon software” adding that “there are no such servers at my house”.
- c. He categorically asserts that he has no wish “to develop the software further” and has no intention of encroaching on ISL’s IP rights.

84. I agree with his description of the letter and there can be no dispute that paragraphs a. and b. were untrue and known to Mr Chandrasekaran to be untrue.

85. On 9 May 2005, Mr Pepper, one of the administrative receivers from Kroll, wrote to Mr Chandrasekaran to chase up on their request (of January) for return of ISL property. He expressly identified certain items of hardware including the Poweredge server. He also asked for confirmation that Mr Chandrasekaran was not utilising Xenomail or aspects of the Xenophon software “either in its current version or by way of the next generation of this software”. Mr Chandrasekaran responded as follows:

“Neither of us [Mr Chandrasekaran and his wife] have anything to add to what I have stated to Mr Monty Koppel in my letter of 8<sup>th</sup> April. I insist that this correspondence from Kroll, which is clearly part of the intimidation process together with the Koppel’s, seize [sic] forthwith...”

86. Mr Chandrasekaran thus repeated the assertions set out in paragraph 82 above. He was clearly and deliberately lying.

87. Mr Chandrasekaran claims that on 17 May 2005, he discovered two abusive messages on his voicemail. Some time and energy has been spent in the evidence and in written submissions about these messages which Mr Chandrasekaran now accuses Mr Kiely of having left. The messages are irrelevant to the issues before me. The only evidence that they might have

been left by Kiely comes from Mr Chandrasekaran himself who, prior to the search order and learning of Mr Kiely's involvement in obtaining access to Mr Chandrasekaran's email accounts, had not suggested that this was so. I am certainly not, on that evidence, going to make a finding that Mr Kiely did leave the messages especially given my assessment of Mr Chandrasekaran's evidence overall. I do not propose to say any more than that about these messages.

88. Following Mr Chandrasekaran's letter dated 8 April 2005, matters were not progressed further by Mr Koppel until the beginning of June 2005. He had undergone major surgery in the meantime. In the letter dated 1 June 2005 which I have already mentioned, he took issue with virtually everything which Mr Chandrasekaran had said, saying this: "If you want to move on with your life it is now the time to be open and truthful". Mr Koppel repeated his earlier requests for return of "the ISL software and hardware in your possession" and for Mr Chandrasekaran to sign the confirmation which the receivers had sought. Although the letter from Mr Koppel was hard-hitting, it was in no sense improper or intimidatory. Mr Chandrasekaran did not take the opportunity to tell the truth. Instead, he refused to get into "protracted correspondence....in countering your completely false and untrue allegations.....I have said all I have to say in my letter to you of 8<sup>th</sup> April. For the final time I repeat that I have no intention of breaching any intellectual property rights....".

89. By the end of June 2005, the Ssaneva business plan was reaching finalisation. It is a significantly different document from the Newco business plan to which I have already referred. I note certain passages:

- a. "Ssaneva's initial product research, design and aspects of its development are already underway. However, in order to minimise the cost of its R&D and also to capitalise on geographical market trends in channel marketing, it intends to enter into a co-development programme with a leading public Indian outsourcing company. The estimated time of completion of version 1.0 of the product for release is set to be 17 months from the date of initiation of the development pack."
- b. "Ssaneva.....will have a subsidiary in India. The intellectual property will vest entirely in the UK.....Sales, marketing, creation of IP and business strategy will all be run from the UK".
- c. "The design and specification of Ssaneva's NP is being carried out in the UK by [Mr Chandrasekaran] and members of the TAB [Technical Advisory Board], in conjunction with a select team from the chosen Indian development business".
- d. "Ssaneva will focus the first 13 months on the creation of NP using technical resources in the UK together with a development program in India...."

90. Mr Chandrasekaran said to Mr Penny in cross-examination that "if you are suggesting that by co-development what I meant is you, the Indians, develop and I am going into this quarry, nothing could be further from the truth". It would, nonetheless, be difficult, I think, for Mr Chandrasekaran to suggest other than that he personally was to have a close involvement in the design and specification of the new product. It would be important, therefore, for there to be procedures implemented as a result of which it could be ensured that there would be, whether deliberately or by accident, no infringement of ISL's IP rights. Mr Chandrasekaran asserts that this was to be done by the use of "clean room procedures". These are dealt with by Professor Anderson in his expert report commissioned on behalf of ISL: he describes the clean room procedure and "the benefit which someone developing a new sever-centric



crypto solution might get from having access to the existing software, and to the skill and labour therein embedded”. He states:

“The essence of a clean-room development is that someone who is fully conversant with the software with which a compatible implementation is to be produced briefs the developer’s system analysts and they in turn produce a specification to which the new code is written.....The question might therefore be quite reasonably asked as to whether [Chandrasekaran] was sufficiently au fait with information security to be capable of specifying a product range for Ssaneva. Regular access and reference to the Indicii Salus software and reading the source code, manuals, etc. may have been important revision for a man who had been embroiled in management duties and away from the front line of his original trade for many years. The existing ISL code could be an important reference point not only at the initial stage of development of the specification of the new product, but also later. Once the Indians have developed a detailed specification, the existing source code could be referred to in order to improve upon or vary what the Indians produced.

A further benefit might come from re-using the (perhaps confidential) cryptographic protocols utilised by Xenomail....This aspect of Xenomail design might be memorised and provide a head start to a clean-room developer...”

91. Even assuming that clean room procedures were capable, if properly implemented and observed, of protecting against infringement of ISL’s IP rights, the secret possession by Mr Chandrasekaran of the software does not inspire one with confidence that he would not in fact have made use of the software in his work with the Indian developers. Indeed, Mr Penny, who submits that Mr Chandrasekaran is a proven inveterate liar, goes further and says that there is no reason to trust that Mr Chandrasekaran would have implemented clean room procedures at all rather simply tell his Technical Advisory Board that he had done so, pointing out, correctly, that there is nothing to suggest that Mr Chandrasekaran had in fact told anyone that he retained the software.
92. At the beginning of August 2005, there was a phone call between Mr Kiely and Mr Chandrasekaran. Mr Kiely was asked to transfer everything from the original ISL server (at Mr Chandrasekaran’s home) to a different server. Mr Kiely was told that Mr Chandrasekaran had all the passwords and a copy of the software on another machine and that he had a copy of the original Xenophon (installation) software. When he made his first witness statement, Mr Kiely had only a note which he had made of the call which he had recorded. When he came to make a full transcript, he found the file corrupted but it has, since then, been possible to effect a full transcript with which I have been provided.
93. Mr Chandrasekaran says that he was trying to achieve two things in instructing Mr Kiely: first to get the Xenophon server software going so that he could decrypt material for another piece of litigation he was in the middle of; secondly, to transfer the software across to a different computer because he was being chased by the receivers for the computer which it had been stored on. It is, nonetheless, clear from the transcript that he did not want to Mr Kiely to tell anyone about this and it is fairly obvious that he would not have told the

receivers that he had copied across the software to another computer. Mr Penny invites me to say that the encryption story is simply an excuse by Mr Chandrasekaran to disguise his real intentions. He points out that Mr Chandrasekaran has not made a single attempt, notwithstanding his insistence in various court orders to preserve access to computers for decryption purposes, to gain access to the computers to decrypt any encrypted material. As he puts it: "Had encryption been his motive, he would have asked [Mr Koppel] for permission to do so and would not have engaged in the web of lies and deceit that has now been exposed". I agree. It seems to me that that reading emails was only one reason (if it was a reason at all and not just an excuse) why Mr Chandrasekaran wanted possession of a Xenoserver, another reason being that he wanted to be able to use it in connection with the planning of his new business.

94. It is at this stage that I should say something about the Technical Advisory Board and its members, and the other witnesses who gave evidence about the new business. Mr Macdonald relies on their involvement and their evidence in his submissions designed to establish that the Defendants had no intention to use the software, not least because it was out of date and valueless. It is not disputed by ISL that the relevant Technical Advisory Board members are eminent in their field; nor is their honesty and integrity sought to be impugned in any way (although that is not to say that Professor Anderson agrees, at a professional level, with everything they say - this is an area where experts may differ.). Mr Penny makes two broad submissions: first, that all of the Board members (and other witnesses) were reliant in reaching the conclusions which they do on information supplied to them by Mr Chandrasekaran and were not involved in the day-to-day development process; secondly, Mr Chandrasekaran did not tell them that he had in his possession all the source code, documentation, manuals and software relating to Xenophon and Xenomail loaded onto computers which were in use by him. As to the first of those submissions, it is clearly correct. As to the second, I turn to consider the positions of each of the witnesses. They are Dr Hailes, Professor Piper, Mr Burridge, David Svendsen, Jeffrey Rodwell, David Rapaport and David Perkins.

95. Dr Hailes says that Mr Chandrasekaran "first approached me with respect of Ssaneva in January 2005". I suspect that what he means was with respect to a proposed new business because, as I understand it, Ssaneva was not yet the Newco which Mr Chandrasekaran envisaged. He explains his involvement through to June 2005, including videoconferences with the Indian companies on 21 June. The purpose was, he says, to select Indian partners for technical development, then stating that it "succeeded in achieving this, but further development has halted as a consequence of this action". He does not explain how he is able to make this last statement. He states that he explicitly questioned the legal position with respect to the software at his first meeting (*ie* in January). He was told by Mr Chandrasekaran that ISL software would not be used and that clean room procedures would be implemented. This, however, was at a time when Mr Chandrasekaran was, contrary to what he told Dr Hailes, still intending to use, or at least to make use of, the ISL software as is shown by the discussion of the evidence which I have already undertaken. He expresses his conclusion in this way:

"Overall it would make no sense for a new company, with fresh resources, and a new approach to systems building, to make use of ISL code from a technical point of view.

From a business point of view it would be absolutely suicidal for Ssaneva to develop and attempt to market a product based on ISL code."

96. Mr Macdonald also relies on Dr Hailes' explanation of how a piece of software is developed in order to demonstrate the limited role which Mr Chandrasekaran would have in the development of the new software. But he does not suggest that Mr Chandrasekaran would have had no role, not that his input would not have been significant. I do ask myself why, if his role was other than important, he has always been regarded as such a key player in the enterprise.
97. It is clear, I think, that Dr Hailes did not in fact know that Mr Chandrasekaran had the source code in his possession, otherwise it would be odd for him to say, as he does in his second witness statement, that it "would not particularly surprise me" to discover that Mr Chandrasekaran did have old versions of ISL source code on old computers at home. Mr Chandrasekaran nonetheless said in cross-examination that he had in fact told Dr Hailes that he had source code in his possession; he could not remember when, but thought it could have been in January. Without the benefit of Dr Hailes' own evidence to say that he was told, I cannot conclude that Mr Chandrasekaran did in fact tell him that he possessed all the software. I appreciate Dr Hailes' own view that the replication of ISL's system design would not have been his favoured approach even if the ISL software had been legally and freely available for use. I also appreciate that there are differences between him and Professor Anderson about the use which Mr Chandrasekaran could make of the software without many other people becoming aware of it. However, their respective evidence raises a number of difficult factual and technical questions which I cannot do on this application.
98. So far as concerns Professor Piper, Mr Macdonald relies particularly on the following passages from his evidence:

"It is my view, absolutely preposterous to suggest that Paran will attempt to "copy" Indicii Salus's software (that is a few years old). To contemplate this Paran would need to be both dishonest and stupid. He is neither."

[As to whether Mr Chandrasekaran is dishonest or stupid, that is a matter for me, although the Professor is entitled to his own view.]

"I am told...that Mr Chandrasekaran is being accused of retaining source code which properly belongs to Indicii Salus and of telling the administrative receivers that he did not have the code. I am not entirely surprised that Mr Chandrasekaran still had source code in his possession, given that he founded the company in the first place. Equally I am not shocked that he refused to cooperate with the administrative receivers, given the high tension between Mr Chandrasekaran and Mr Koppel in the run up to and after the closure of Indicii Salus. I agree with Dr Hailes' explanation as to why the source code would have been useless to Mr Chandrasekaran in relation to Ssaneva's new business."

99. Professor Piper considers that Xenophon would not form a sound basis for a new product. His reasons are, however, rather different – and to some extent in contradiction of those of Dr Hailes, particularly in relation to the modular approach to use of a modular approach to the creation of security software. But what is clear, again, is that he was unaware that Mr Chandrasekaran had the software and other material. And, as with Dr Hailes, his own views of what would have been feasible or not, Mr Chandrasekaran himself was intending to use the software in January and February at a time when Professor Piper would say this would

be dishonest and stupid.

100. So far as concerns Mr Burrridge, Mr Macdonald relies particularly on the following passages from his evidence:

“To conclude, throughout the development of the Ssaneva business plan, which I helped Paran with, and the lead up to and follow-up of the 21 June meeting, there was not even the scintilla of suspicion in my mind that the product which was to be at the heart of Ssaneva was anything other than a completely new product. If it is suggested by anyone that Paran was secretly holding out the possibility of somehow feeding Xenophon software to the Indian companies to work on in the new business, I would respond that this is inconceivable. These are multi-million pound listed companies whose business and whose customers are highly regulated. There is no way they would ever even contemplate touching another company’s product, and nor would they ever accept the say-so of an individual – however highly regarded – to the effect that it was his to hand over to them. Such an idea seems to me to be completely fanciful.”

“I do not believe that there was a genuine risk that Paran would have used the ISL software in the new business because of all the safeguards put in place, such as the Technical Advisory Board, the involvement of the Indians, and the fact that the ultimate product would have been subjected to scrutiny by GCHQ and by sophisticated corporate end users, as well as the fact that the ISL software was sufficiently out-of date to be virtually unsalvageable.”

101. Mr Burrridge appears to be saying that at no time, at least after his own involvement, would Mr Chandrasekaran have contemplated use of the ISL software. However, as well as the passages just quoted, he also says in his first witness statement that when Mr Koppel closed the business in mid-January 2005, Mr Chandrasekaran then “determined to go ahead with an idea that he had already discussed with me of starting afresh and developing a new product and a new business in the field of server-centric cryptography”. If this is correct, Mr Chandrasekaran cannot have told Mr Burrridge that, at that time, he still envisaged Xenoserver being used in the new product. Indeed, Mr Burrridge says that he was keen to understand, and be assured, that there was no borrowing or theft of any IP rights. At all stages, Mr Burrridge was assured by Mr Chandrasekaran that there was to be a new product developed from scratch. For instance, he says that he was told this at a meeting on 20 January 2005 when Mr Chandrasekaran presented to staff proposals for a new business from scratch. Yet, at this time, Mr Chandrasekaran was still intending to use Xenophon in order to be able to launch a new product on the market as quickly as possible. Mr Burrridge was not told that. If he had been told that he could not have given the evidence which he has.

102. In July 2005, there was an email exchange between Dr Hailes and Mr Burrridge. On 13 July, Mr Burrridge gave some reassurance to Dr Hailes who had clearly been concerned about the legal position. It includes the following:

“....the current business which we are all working on, whilst still

in the cryptographic space, will create a NEW server-centric cryptic engine with components and standards, which, I am told, are considerably different in some areas to anything that has gone before, In other words, not only will some of the components look different, but some of the design will also differ as a consequence of that.

.....my lack of knowledge in this area means that I have to take [Mr Chandrasekaran's] word about the extent of the changes to the components and the design. You will understand that much better...";

and he goes on to take comfort, even if that is wrong, from what he had been told by Mr Chandrasekaran to the effect that he, Mr Chandrasekaran, would be allowed to "use his brain and intellect to operate within a field in the public domain". That is probably a reference to legal advice which Mr Chandrasekaran had obtained but it is not known, of course, what he told his solicitor when obtaining advice.

103. As to that, Mr Macdonald does rely on the evidence of Mr Rodwell (the solicitor at Reed Smith who was introduced to Mr Chandrasekaran in April 2005) where he says this:

"I advised Paran in relation to these concerns [Paran's relations with Mr Koppel]. I told him that it was very important that he should not copy the Indicii Salus software, and I explained that it was not just direct copying that should be avoided, but that indirect copying could also infringe copyright (*ie* "copying" could occur even if he was not looking at the code as he wrote down a new version or translation of it). I explained that the usual way of avoiding infringement in these circumstances was to use clean room procedures whereby the person who was familiar with the code would provide to an experienced analyst a detailed oral description (using only their memory and their own expressions) of the functionality of each module. The analyst would never have sight of or have recited to him any of the original specifications, code, screen dumps or reports but would provide a functional description of the modules based on that description. The detailed specification and code would then be developed by other persons. Paran appeared to me to understand completely the advice that I gave him, and always made it clear to me that his intention was to develop a new product (and he has never indicated otherwise, even before the conversations I have described) using clean room procedures."

He also notes that upgrading the code was simply not in contemplation at a beauty parade for the Indian companies and that the relevant draft Master Service Agreements contained warranties that material supplied by Ssaneva would not infringe third party IP rights.

104. I do not doubt Mr Rodwell's evidence. But the question for me is what Mr Chandrasekaran actually intended to do; or, more strictly, the question is what, for the purposes of this application, it is right to consider that there was a real risk that he might do.

105. I do not consider that the evidence of Mr Svendsen and Mr Rapaport takes matters any

further. I should, however, mention a part of Mr Perkin's evidence which Mr Macdonald refers to. [Mr Perkins is the partner at Millbanks who instructed Mr Macdonald and Mr Andrews at the hearing.] He gives evidence about a conversation he had with Mr Vishwakiran of the proposed Indian development company. He says this:

"Mr Vishwakiran has also explained to me that he asked Mr Chandrasekaran during the course of their discussions whether his technical team could be provided with some documentation on the old Xenophon product. They wanted background material so that they would have a deeper understanding of a server-centric system by the time of the meeting in London. However, Mr Vishwakiran says that Mr Chandrasekaran refused to provide them with the material, explaining that, because the intention was to create entirely new, up to date and independent software, he did not want to risk tainting the exercise in any way by making the old material available to HCL."

It seems to me that that evidence is something of two edged sword for the Defendants. It is, of course, consistent with an intention to use clean room procedures. But it also shows reasonably clearly that he retained background material, documentation on the old product; and it shows clearly that the developers would indeed have found such material valuable. If it had been material in the public domain, there would have been no problem about providing it; but, so it seems to me, it was really material confidential to ISL which had not been returned and of which possession was denied.

106. In the light of the observations which I have made on the evidence of these witnesses, I do not consider that it is the compelling evidence which Mr Macdonald suggests it is to the effect that Mr Chandrasekaran had no intention to use the source code and other confidential material. I turn now to the grounds on which the application to discharge the search order is made.

107. The first ground is that the Defendants did not intend to use ISL's software in the development of the proposed new product. It is particularly important in relation to this ground to appreciate that my function, on this application, is to decide whether, on all the evidence now before me, whether the search order should be discharged effectively *ab initio*. I have more information and evidence than was available to Etherton J when he made the order; but I do not have all the information and evidence which would have been available had there been a full trial. Mr Penny submits that not only have the Defendants failed to rebut the *prima facie* case which was accepted by Etherton J, but that I should reach a finding of fact that the Defendants did, indeed, have an intention to use ISL's software in the development of their new product.

108. In this context, the time at which matters are to be judged is of some importance. The important question in relation to ground 1 is whether or not the intention existed at the time of the search order. From my review of the evidence, it will have become clear that in January and early February 2005, there was such an intention. The Defendants' case has to be that by August 2005 that intention had been abandoned.

109. I decline Mr Penny's invitation to make findings of fact on this issue in the sense that such findings would be made at a trial. It seems to me that it is enough (from ISL's point of view in relation to the first ground) for me to hold that, on the totality of the evidence now available to me, the *prima facie* case on intended use which justified the grant of the search order, has

not been rebutted. In deciding that issue, I must, of course, take into account the evidence which the Defendants adduce and the further evidence which ISL adduces in relation to events before the search order. I am, however, also entitled to take into account evidence of matters after that date, including in particular the result of the search order itself and matters which go to credit of the witnesses from whom I have heard. I do not think there is much, if any, difference in that approach from asking myself whether Etherton J would have been justified in making the search order if he had had before him all the evidence which I have received, allowing for the fact that some of that evidence relates to events after the search order was executed.

110. Taking the first ground in isolation, I have reached the clear conclusion that the search order should not be discharged on that ground. Even if it were found, after a full trial, that the Defendants did not intend to use the software, the evidence establishes, in my judgment, that there is a strong case to the contrary. Were it not for the evidence of the witnesses who were not called and cross-examined, the case against discharging the order on the first ground would be very strong indeed. There is a clear case for saying that Mr Chandrasekaran's intention as late as February 2005 was to use the software, including the source code, and to make use of the extensive documentation in the design of the new product. There is insufficient to indicate any change of mind; on the contrary, there is material which is more consistent with a continuing intention to use the software than with a change of mind. In particular:

- a. The Defendants had, until execution of the search order, the source code, executables and electronic documentation, manuals and data relating to Xenophon and Xenomail. It is more likely than not, I conclude, that these were to be found on one or more computers which were up and running at the family home. The explanation that these were required for decrypting and for sentimental reasons is wholly unconvincing.
- b. Mr Chandrasekaran repeatedly lied to Mr Koppel and the receivers about his possession of this material. The "mirror image" explanation, repeatedly given before the search order and reiterated in evidence was fabricated.
- c. Mr Chandrasekaran suggests that his position about the use of the software changed on his return from the Maldives on the basis that, before then, he had been intending to use the new software in his new business with the consent of Mr Koppel who would be involved in it, at least as an investor. He says that, on his return, he abandoned this idea and decided on an entirely new business. It is unlikely in the extreme that Mr Chandrasekaran would have contemplated, at any time after closure of the business on 14 January 2005, embarking on any new business in which Mr Koppel had any part; I do not believe that Mr Chandrasekaran ever genuinely contemplated that and am quite certain that he did not communicate any such possibility to Mr Koppel. The suggestion that Mr Koppel would make available a further \$1 million with his name being kept secret from other investors is, I consider, another fabrication. Even in late February, it appears that the ISL software was still to be based on Xenophon: that is the natural reading of the email correspondence between Dr Waters and Stelios around 25 February, even if copying of the source code was not contemplated.
- d. In any case, it is clear, I consider, that in January 2005, Mr Chandrasekaran was telling third parties that the new product would have nothing to do with ISL's software or IP rights when, in fact, he was intending at that time to use it. It is not at

all clear to me what the evidence of Dr Hailes, Professor Piper, Mr Burridge and others would have been if they had known of Mr Chandrasekaran's intentions in January. It might, I accept, be that after a full trial the evidence would have established that, whatever Mr Chandrasekaran's initial intentions, he had indeed changed his mind by August on the footing that, by August, there would have been no realistic prospect, both from a technical and commercial point of view, of using ISL's software and other IP rights in any way, whatever Mr Chandrasekaran might have liked to do. It would, even then, not necessarily follow that the search order should be discharged *ab initio* or that the cross-undertaking in damages should be given effect. I will return to that scenario later.

- e. There is no doubt at all, as the search revealed, that Mr Chandrasekaran repeatedly lied to Mr Koppel and the receivers about his possession of the software, documentation and other property of ISL. Whatever suspicions Mr Koppel had prior to Mr Kiely's disclosures to him, the Defendants can hardly complain that Mr Koppel concluded, on the basis of Mr Kiely's information, that his fears were not only justified but that he then had enough evidence for ISL to act. For completeness I should add that I reject Mr Macdonald's submission that Mr Kiely had in fact told Mr Koppel of everything he knew and handed over the emails much earlier than 1 August 2005. I accept the evidence of Mr Koppel and Mr Kiely on that.
- f. There is insufficient evidence to establish any change of intention on the part of Mr Chandrasekaran after February 2005. In particular, the business plan for Ssaneva, whilst demonstrating the involvement of the Indian developers, shows that Mr Chandrasekaran was to continue to have a close involvement himself so that the mere involvement of the Indians gets the Defendants nowhere. The critical question is what use Mr Chandrasekaran was to make of the material he possessed in furthering the development of the new product. Indeed, accepting, as I do, that Dr Waters expressed his concerns in a conversation with Mr Kiely in March 2005, there is some evidence that Mr Chandrasekaran had not in fact changed his approach.

111. Accordingly, had Etherton J known in August 2005 of all these matters, I doubt very much that his decision whether or not to grant the search order would have been any different. Accordingly, the first ground fails.

112. The second ground for discharging the search order is that the Defendants would not have disposed of or destroyed evidence necessary for the ISL to establish its claim if they had been given notice of that claim. I reject that ground. On the basis of the totality of the evidence before me I consider that there was a real risk that the Defendants, and Mr Chandrasekaran in particular, would have hidden, or possibly even destroyed, the copies of ISL's software and electronic documentation which they held. Quite possibly they would have retained the computers themselves and returned them, but not before removing ISL's material from them. The Defendants should not be surprised by this conclusion in the light of the following factors:

- a. The fact of the retention of this material after closure of the business
- b. Mr Chandrasekaran's repeated lies to Mr Koppel and to the receivers about retention of computers and software *etc.*
- c. The fabricated story about the security feature, or mirror image, designed to deceive ISL about Mr Chandrasekaran's possession of Xenophon, a story repeated in Mr



Chandrasekaran's evidence in this case. Mr Macdonald, in his submissions on the second ground, submits that Mr Chandrasekaran, like most citizens of this country, would obey a court order for delivery up without the need for an intrusive search order. Mr Penny, justifiably I think, retorts that most citizens of this country comply with the oath given when providing evidence.

- d. Mr Chandrasekaran's allegations against Mr Kiely made without any supporting evidence at all.
- e. The fact that Mr Chandrasekaran attempted to hide the server in the garden when the search order had been served on him and the giving of false information to the supervising solicitor about the presence of software on other computers.
- f. The failure to deliver up CD ROMs until January 2006. Mr Macdonald submits that Mr Chandrasekaran should actually be given credit for that, the CDs having been discovered in a cupboard and then disclosed. The fact is that Mr Chandrasekaran should have searched for such material long before being asked, according to his case, by his advisers in January 2006. It is not easy to understand why what should have been a thorough search in August 2005 failed to reveal what was found in January 2006. In any event, by January 2006, Mr Chandrasekaran was hardly in a position to deny that he had received CD ROMs which ought therefore to have remained in his possession. I should add here that ISL has some evidence to suggest that these CD ROMs are not, in fact, the ones with which Mr Chandrasekaran was provided and that he must therefore still be in possession of offending material. I am not in a position to form any concluded view on that and it forms no part of my decision.

113. The third, fourth and fifth grounds are closely connected. To recap, they are to the following effect: there was no or insufficient likelihood of serious damage being caused to ISL by the Defendants' activities; the undertaking in damages given by ISL and the supporting undertaking given by Anjar were of no or insufficient value adequately to protect the Defendants in the event that they sustained loss as a result of the wrongful imposition of the search order; and ISL did not make full and fair disclosure in relation to the value of the software, with the effect that their case in relation to the likelihood of damage and the value of the undertaking was materially incomplete and/or misrepresented. All of these grounds relate, in one way or another, to the value of ISL's IP rights.

114. I am primarily concerned with the value of these IP rights in August 2005 when the search order was granted. It is necessary, however, to consider the value of these rights both in the months before then and in the months after, since the value at different times in those periods may throw some light on the value in August 2005. ISL did not pretend to Etherton J that the value of the IP rights was large and certain. He was told that the value was substantial but uncertain, a description which Mr Penny says has proved to be accurate. I agree.

115. It is important to appreciate that the value of the IP rights is different from the value of the business. The business included not only the IP rights themselves, but, until some time before closure, a team which kept the software up to date and senior staff such as Dr Waters. The business also had the benefit of Mr Chandrasekaran's own involvement. Even Mr Koppel has to accept that Mr Chandrasekaran was an important part of the overall concern, Mr Koppel's criticism (whether or not justified) of Mr Chandrasekaran not being that he was not a creative product designer and developer but that he was hopeless at bringing the business on. But it also needs to be remembered that a huge investment had been made over

the years.

116. Mr Macdonald submits that by January 2005 ISL's software had no significant value. There is a considerable amount of evidence to which I need to refer. First, there are two negotiations for the sale of the software which need to be mentioned: the first is known as the Ebox offer; the second is known as the Comodo deal. Second, there is evidence from Professor Anderson which is referred to by both sides. Third, there are other less significant pieces of evidence to fit into the picture.

117. In the period leading up to the closure of the business, ISL had been looking for new investors or persons to buy the business (or the company itself). I do not propose to go into the accusations which have been made by Mr Koppel that Mr Chandrasekaran was in fact obstructive in his attitude to some of the opportunities which might have been taken further than they were. It is enough to focus on the Ebox offer. Mr Appleton, in his witness statement in support of the search order, puts the position in this way:

“...in early 2005 there was a proposed transaction with a Japanese consortium where negotiations were in an advanced stage with draft agreements in circulation for a transaction at a consideration of approximately £9,000,000. The draft agreement is exhibited to an affidavit made by Nigel Spence, who was a representative of the Japanese consortium. The Japanese consortium did not enter into this agreement because of an internal division in the consortium.”

118. Mr Spence described the negotiations in his affidavit. He says this:

“...I led the negotiating team of a Hong Kong and Japanese consortium in negotiations with the receivers of ISL for the purchase of the Xenophon software. During the course of these negotiations we carried out due diligence on the software and a price was finally agreed for the sale and purchase of the software with the receivers and the debenture holder of ISL in the sum of £9million.....The reason that the transaction did not proceed was because of a personal disagreement between Hong Kong and Japanese partners which was not related to either the software or the terms of the transaction referred to above.”

119. Following suggestions from Mr Chandrasekaran that the Ebox offer was in some way a sham or presented in a misleading way, ISL filed, in January 2006, further evidence from Mr Spence and two other individuals closely involved, Mr Caldwell and Mr Hitchman. Mr Caldwell carried out some consultancy work on ISL for Mr Spence and produced a report for him on 16 August 2004, a report prepared after a visit to ISL's premises and a meeting with Mr Chandrasekaran (together with Mr Spence and Mr Koppel) earlier that day. In that report he said this in relation to Xenophon:

“This seems to be a mature and stable product and I have no doubt that if the product can be acquired for the right price it would be a sound acquisition for a company with an immediate route to a mass business market. I have no doubt that the technologists within the company are probably first class and absolutely vital to a rapid preparation of the product for new

market places. I would see it as imperative to retain at least a nucleus of the technologists in the company in order to preserve the IP in a useable state.”

120. Mr Macdonald points out that from 14 January 2005, when the business closed, there were no staff. The product he says was, therefore, effectively useless. Indeed, he points out that this is what Mr Koppel himself had said in a conversation in July 2004.

121. However, unless the Ebox offer was a sham, the fact is that a substantial offer of £9 million was on the cards at the beginning of February 2005. Even in August 2005, we find Mr Spence saying in his affidavit that he regarded the software as very important and having considerable commercial value. He gave further evidence in his first witness statement dated 5 January 2006. In that he says that, at the meeting on 16 August 2004, he was asking himself which members of staff he might need to retain. He left the meeting with the view that he would not need to retain Mr Chandrasekaran or his wife. Likewise, he regarded the salesman would not be retained. Then he says this:

“I was aware, from Mr Soukup, that Baltimore was making several of its encryption software engineers redundant. I thought that I would be able to hire these to work on the ISL product, if I was successful in acquiring ISL. I prefer to hire new staff, who would be loyal to me, rather than inherit existing staff, whom I thought would be disgruntled and possibly disloyal.”

122. Mr Spence can be seen to be taking a different view from that which Mr Caldwell was expressing in his report in relation to the need to retain staff. I do not propose to spend time on debating which of them is correct. The fact is that the Ebox offer was progressed and up to the beginning of February 2005 was progressing without any requirement for retention of staff. It is clear, in my judgment, from the totality of the evidence on this topic, that the negotiations and the offer were real and *bona fide* notwithstanding Mr Chandrasekaran’s unsubstantiated suggestions that Mr Koppel himself had misled the receivers.

123. Before leaving the Ebox offer, I should deal with Mr Macdonald’s submission where he repeats the Defendants’ complaints that there was material non-disclosure in relation to the Ebox offer. He refers to Mr Spence’s first affidavit, including the last sentence from it which I have just set out. He then refers to Mr Hitchman’s evidence where he says this:

“The transaction did not go ahead because the funding, which was expected, did not materialise”.

124. Mr Macdonald also relies on Mr Spence’s further evidence in his first witness statement where he says that he was phoned by Mr Hitchman shortly after 2 February 2005. He was told that Kawakami, one of the Japanese investors, no longer wanted to proceed. One of the reasons given was that Mr Kawakami was “having difficulty closing the US\$200 million funding round”, another reason being that there was disagreement about where development of ISL’s product would take place (Cambridge or Tokyo).

125. Mr Macdonald says that Etherton J should have been told about all of this. However, Mr Hitchman does not say, and his statement cannot be read as suggesting, that the funding, which was expected, did not materialise because the partners considered the price was too high. Nor does Mr Spence’s further evidence support such a conclusion. It is therefore difficult to see what difference it would have made to Etherton J even if he had been told

expressly that the funding had not materialised. If one were looking at the position in January, this negotiation establishes clearly, in my judgment, that what Etherton J was told – the software has a substantial but uncertain value – was accurate. This is, in my view, nowhere near a failure to disclose a material fact.

126. The second negotiation is the Comodo deal. In early 2006, ISL's software was sold to a BVI company called Comodo Holdings Ltd. I shall come to the nature of the deal in a moment, but I should mention one point about the identity of the purchaser. Mr Koppel and the receivers thought that they were dealing with a company called Comodo Holdings Ltd. The sale and purchase agreement was made with a company of that name, and certain shares, which were issued as part of the deal, were shares in a company of that name. Shortly before or during the hearing in front of me, the Defendants produced material from the Companies Registrar in the BVI that there was no BVI company bearing that name. Mr Penny was unable to meet this last-minute revelation by evidence, but he told me on instructions that there was simply an error in the name and that the company did indeed exist. Since the hearing, evidence has been produced by a Mr Whittam, who is a director of various companies within the Comodo Group.

127. From his evidence it appears that there was a BVI company named Comodo Limited. On 20 October 2000, a board resolution was passed changing the name of Comodo Limited to Comodo Holdings Limited, and authorising the Registered Agent of the company to file a notice of change of name with the Companies Registry. The present company secretary of the company is Thorntons Accounting Ltd. Mr Whittam says that he is the person in Thorntons Accounting Ltd who undertakes the duties of company secretary, having taken over responsibility in 2002. When he took over, he says that the company was always Comodo Holdings Limited. Mr Whittam has checked the position with the registered agent in the BVI and it appears that they had never received a request to file the name change. He therefore put in hand the required formalities for the name change

128. The name change has now been effected as from 1 December 2006 and a new share certificate has been issued dated 2 December 2006, to Anjar. No objection is taken to that evidence now being put before me.

129. In relation to the Comodo deal itself, evidence was given in witness statements produced in February 2006 from Mr Appleton (the receiver of ISL), Mr Robinson (of Kermans), Mr Abdulhayoglu (the president and CEO of Comodo Holdings Ltd), Mr Smullen and Mr Koppel. Mr Koppel was also cross-examined about the Comodo deal. This evidence, if it is accepted, establishes, in the words of Mr Penny's closing submission, the following:

“In early January 2006 Comodo made an offer of \$4m for the acquisition of ISL's IP rights. Mr Koppel carried out due diligence into Comodo. Both he and Anjar preferred to take a share equivalent at a value of \$4m which they calculated on the same basis as a recent fundraising issue by Comodo, namely, at \$2 per share. Following the Defendants' offer of permanent undertakings to the Court, ISL and Anjar completed the transaction at what they considered to be a share equivalent of \$4m. The deal documentation and pre-contract documentation was submitted to the Court.”

[I add that the acquirer was Anjar, and not ISL, since Anjar's security over ISL's assets meant that it was the only person interested in the assets of ISL at that value.]

130. For reasons unknown to me, the Defendants were reluctant to accept the genuineness of this transaction. As part of my directions for the conduct of this application, I gave permission to cross-examine Mr Koppel about it, declining to strike out the third to fifth grounds of the application as unarguable. I allowed cross-examination on the basis of an email dated 31 March 2006 to me from Mrs Carboni (who was then junior Counsel for the Defendants). That email raised the following points:

- There is no evidence to support the share valuation of US\$2 per share and therefore the total 'deal' value of US\$4 million.
- There is no evidence to support the suggestion that Comodo is likely to float in the near future.
- There is no evidence that ISL or Anjar or Mr Koppel did any due diligence into the value of the shareholding that was to be received in exchange for the IP rights in the software.
- There is no evidence that Comodo did any due diligence on the value of the software, and in particular it appears unlikely that Comodo was made aware of the many previous failed attempts to sell the software and the evidence of Professor Anderson in relation to the value of the Software.
- Without further information from Comodo, it is impossible to obtain information about the value of the shareholding, since it is in a BVI company, the BVI being a jurisdiction where financial information can be hidden.
- Such evidence as has been found by the Defendants' solicitors about the Comodo Group raises serious questions as to the US\$4million valuation.
- There is no explanation as to why Comodo was willing to go ahead with the deal before the Defendants had submitted to final injunctions in the main litigation. (The deal recited that this had already happened, but it was signed on 24 February, and the hearing about the final Order was not until 1 March.)
- There is no explanation as to how the shares would be converted into cash if this were needed to pay out on the undertaking in damages.

131. The email does not refer to the point made subsequently that Comodo Holdings Ltd did not exist. That is not surprising because those advising the Defendants did not learn of the true position until later. I have explained how that position came about. I do not doubt that the explanation given on behalf of ISL is true and that it was simply a mistake that the name change had not taken place and that the parties intended to deal with the entity which is not called Comodo Holdings Ltd but which was called Comodo Ltd at the time. There is, in my judgment, nothing in the points, if they are still be asserted, that the contracting party did not exist and that the contract was for that reason a sham. Nor, I think, is there anything in the point that, since the name change only takes effect from 1 December 2006, it can be seen that the software was worthless because it was effectively sold for no consideration *ie* shares in a non-existent company. The position today is that the software has in fact been disposed of and is now represented by shares in Comodo Holdings Ltd which shares either do or do not have a substantial value. If they do have a substantial value, then it follows that the software too must have had a substantial value at the time of the transaction (unless the transaction is some sort of sham or scam under which ISL has obtained valuable shares in Comodo holdings for no consideration). If they do not have a substantial value, then it is reasonable to infer that the software did not have a substantial value either.

132. The evidence contains not a hint that the transaction was a sham or scam. It goes nowhere

near establishing fraud or dishonesty on the part of Mr Koppel (nor of Mr Appleton who, as receiver, has made no objection to the deal).

133. As to the points made in Mrs Carboni's email:

- a. It appears that shortly before the agreement was made, Comodo had raised funds by issuing shares at a value of \$2 each. Mr Koppel states that he was satisfied with this valuation. There is nothing which makes me doubt his good faith on this issue.
- b. It is correct that the shares in Comodo Holdings Ltd are likely to remain shares in a private company for the foreseeable future. This does not indicate that the software had no value. At most, it would give the Defendants cause for complaint if ISL were liable on its cross-undertaking and it was not possible to realise cash from the shares to meet the liability.
- c. Questions about due diligence into Comodo were raised in cross-examination of Mr Koppel. Let me once again use Mr Penny's words to describe what was done:

It included research by Mr Smullen.....and by Mr Koppel and Zack Shone. Mr Koppel described Comodo as "a household name, everyone knows Comodo". Mr Shone said that Comodo has one of the best security products on the market and he showed Mr Koppel who they were and what they were. Mr Shone said it was a good company. Mr Koppel checked with the IT chief at ActivCard (of which he was a director for many years), who also said it was a good company and should grow into a very substantial company. Mr Koppel checked with Roy Abrams [whose credentials appear in the evidence and who has given a statement] who also came back with a positive report. Mr Koppel considered a number of announcements by Comodo and the fact that they had won awards for product of the year. He also considered the business plan for Comodo. He had a number of conversations with the Chief Executive and Chairman of Comodo. Mr Koppel explained that he considered Comodo to be a company which would be worth billions of pounds in the future on the basis of the business plan which he considered in detail. He agreed with the suggestion that he has a good nose for a deal and said that this was a good deal. He said that he has experience in assessing the value of IT companies and they are assessed on a different basis from conventional companies. It is for this reason that he would not have been assisted by figures in the accounts, and why the business plan was a better indication as to the future value of the company.

- d. It is fair to point out that Mr Koppel's due diligence did not throw up the error in relation to the company name/identity. Perhaps he can be criticised for not carrying out further due diligence. But what can be said is that he formed the view which he did on the basis of the enquiries which he as an experienced businessman considered were appropriate and sufficient.
- e. Contrary to the fourth bullet point in Mrs Carboni's email, there was some evidence that Comodo had carried out some due diligence on the value of the software. Mr

Abdulhayoglu's statement dated 28 February 2006 states in terms that Comodo carried out sufficient due diligence into the product to satisfy them that it was a product which they could use and incorporate into their existing applications. It may be true that Comodo had not been made aware of previous attempts to sell the software or the evidence of Professor Anderson about value. It has not been explained to me why Mr Koppel should have done so.

- f. It is true that it is not possible to be certain about the precise value of Anjar's shareholding in Comodo. But the evidence shows that Mr Koppel was satisfied that he was getting a proper value for the software. Its precise value, which on any view of the Comodo deal, was put at a substantial figure by Comodo, is not to the point in supporting the argument put by the Defendants that what Etherton J was told (*ie* the software was of substantial but uncertain value) was not simply inaccurate but materially misleading.
- g. Permanent undertakings were offered to me by the Defendants at the hearing on 7 February 2006 and were accepted by me and by ISL. The Comodo deal was signed up on 24 February 2004. I do not therefore understand why it is said by the Defendants that Comodo was willing to go ahead with the deal before the Defendants had submitted to final injunctions. The short period of time before a formal order was drawn up and entered cannot affect the position.
- h. Again, I would repeat what I have said under paragraph f.

134. Mr Macdonald refers to Professor Anderson's valuation evidence, and in particular to his suggestion that the value of the software was a few hundreds of thousands of pounds except in the case of buyer with some particular reason to want to acquire it. However, Professor Anderson actually identifies four possible bases on which one might value the software:

- a. What a company might have to pay to licence software of equivalent functionality. He puts a price on this of £20,000 to £200,000,
- b. What a company might have to pay to have similar software written. He puts a price on this of somewhere between \$200,000 and \$2m at the very upper end, with time-scales for development of 2 years at the cheaper end and of 9 months at the upper end.
- c. The net present value of the software as an addition to an established security consulting business. He puts a (very rough-and-ready) price on this of \$300,000.
- d. What another business is prepared to pay for the software. In order to short-cut the development process, a price in the millions of dollars might be achieved.

135. I should perhaps quote Professor Anderson's own summary:

"In short, I am not convinced that [ISL] ever had a viable business, or that Ssaneva has now. The promoters of these companies have shown skill at selling equity but no skill at selling software – and little understanding of the markets in which they proposed to operate.

There is some value in the software that [ISL] developed, but it

does not relate to the defendants' vision of "server-centric cryptography". In the absence of a special situation (such as a company wanting cryptography software in a hurry) we can assess its value either as a toolkit for developers who want cryptography (and cryptic support) routines for use in other applications, or in terms of its replacement cost. In either case, I would assess its value as in the hundreds of thousands of pounds, unless it was required as an urgent solution in which I can understand why someone might pay a figure running into the millions."

136. There is evidence from other persons providing witness statements of their views of the value of the software. Some of that evidence is to the effect that the software was valueless. None of that has been tested. The witnesses have not commented on the Ebox offer, the Comodo deal or Professor Anderson's evidence. It would be wrong of me to conclude, for the purposes of this application, that such evidence establishes that the software was in fact valueless. At most, it raises a doubt that the software had any of the values which the Ebox offer, the Comodo deals and Professor Anderson suggest it might have had.
137. In relation to the insufficiency of the undertakings, Mr Macdonald not only relies on the allegation that the software was valueless, but points out that the cross-undertaking in damages was in effect given by Anjar which undertook to instruct the Administrative Receivers to hold the proceeds of sale of the software and to apply them in satisfaction of the cross-undertaking. He says that Etherton J was not informed that Kroll, who had been the administrative receivers up to 10 August 2005, had expressed the view that there was a strong possibility that Anjar might not have the resources to pay their fees. He relies on an internal memorandum from a Mr Dolan dated 8 July 2004. As Kroll were the administrator receivers they would have been entitled to their remuneration out of the sale of the software in priority to Anjar. Mr Macdonald submits that it is simply not credible that Kroll were simply concerned that Mr Koppel would argue about the amount (which is what Mr Koppel suggests is the position). Kroll was concerned, Mr Macdonald submits, that Anjar's sole asset within the jurisdiction, the software, was not of sufficient realisable value to cover their costs which were in the region of £210,000.
138. Having read and re-read Mr Dolan's memorandum, I can see that it is indeed the case that he expressed concern about Kroll being paid. But this concern is based on a combination of two factors: first, that he had always regarded Anjar as the only realistic purchaser of the business and secondly, his fear that Mr Koppel/Anjar would seek to effect a set off against what they (rather than ISL) would pay, that set-off arising out of an unconnected transaction where Mr Koppel was asserting that Kroll owed him/Anjar money. His concern was therefore that Anjar would not pay their fees rather than that it could not.
139. But all this is, I am afraid, beside the point. By the time that the application for the search order was made in August 2005, nothing was owing to Kroll. That, at least, is what Mr Koppel stated quite clearly in his cross-examination and there is no material before me to suggest that that is wrong. If that is correct, then the previous history is not material and there is no material non-disclosure.
140. On any realistic footing, the software and other material belonging to ISL had a value of some hundreds of thousands of pounds. The Comodo deal (in early 2006) would suggest that its value was much higher than that in 2006 and by inference in August 2005. The value was, as Etherton J was told, uncertain. It is obvious, I would suggest, that whatever its



value, the use by a competitor (eg Ssaneva) of the software would be likely to have a serious adverse effect on that value unless immediate steps were taken to prevent that use. Accordingly, if the software was of significant value and if the Defendants were intending to use it, ISL would suffer substantial damage. In this context, I see no reason to think that a value of some hundreds of thousands of pounds would not be significant and to give rise to the risk of sufficiently serious damage for the purpose of the test laid down in *Lock International plc v Beswick*. In any event, on the evidence, I think that the value is likely to have been far greater than that and quite possibly in the region of the \$4 million price tax established by the Comodo deal. But even if the value was not that high, the fact is that there was, in August 2005, a reasonable hope of achieving a realisation price substantially in excess of a few hundred thousand pounds. What ISL was entitled to protect was the value of the software whatever it may have been, including the hope of selling for a substantial price. The fact that minds may differ about the value of the software and about what hopes and expectations are within reasonable bounds indicate that Etherton J was correctly told that the value of the software was substantial but uncertain. Given that that was so, it seems to me that there was a risk of serious damage to ISL if the Defendants had not been prevented from using the software since it would lose the opportunity to realise the best possible price in circumstances where there was a real prospect of obtaining a substantial price. The test in *Lock International plc v Beswick* can be seen to be satisfied on this basis also.

141. Accordingly, none of the third to fifth alleged grounds for discharging the search order is, in my judgment, established.
142. I would add this. Even if, after a full trial had there been one, it were established that the Defendants did not, in fact, intend to use the software or other confidential material belonging to ISL, for instance because technical or commercial considerations lead practically to that result, it does not follow that an enquiry on the cross-undertaking should be ordered. It might then follow that the search order was wrongly granted although it would not have been improperly obtained: for this distinction see *Yukong v Rendsberg* [2001] Lloyds Rep 113, at paragraphs 32 to 34. I consider that the court retains a discretion, in special circumstance, to refuse to order an enquiry on the cross-undertaking even where the injunction was wrongly granted. In considering whether special circumstances exist, the court can take account of conduct on the part of the defendant both before and after the granting of the injunction and, in the particular circumstances of a search order, the defendant's conduct in relation to the search itself.
143. Further, I am not attracted by Mr Macdonald's argument that the value of the concern lay not in the software and other material but in the team which Mr Chandrasekaran had put together to develop it. This seems tantamount to saying that ISL should not be allowed to protect its position through the means of a search order because it is only the wrong doing defendant who would be able successfully to develop it. So the software would have to be left with the Defendants, leaving ISL with an enormously difficult task in enforcing its rights given the reasonable fear that Mr Chandrasekaran would be less than forthcoming with the truth at a later stage.
144. On the facts of the present case, even if I had been persuaded, on balance that the software was of negligible value, I would decline to order an enquiry. I have already listed the factors which have persuaded me that there was a real risk of dissipation of assets sufficient to justify a search order. Those same factors, in my judgment, would be sufficient in this case to lead me to conclude that an enquiry should not be ordered.
145. In conclusion, the Defendants' applications to discharge the search order and for an

enquiry on ISL's cross-undertaking are dismissed.